IN THE FAMILY COURT

Case Number SO16D11878

SITTING AT SWINDON

Date: 24th February 2020

Before

His Honour Judge Edward Hess

B E T W E E N:

W Applicant

- and -

H Respondent

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

Anonymised version of the written Judgment of
His Honour Judge Edward Hess dated 24th February 2020

INTRODUCTION

1. This case concerns the financial remedies proceedings arising out of the divorce between W (to whom I shall refer as "the wife") and H (to whom I shall refer as "the husband").

2. The case proceeded to a final hearing before me at Swindon Family Court between 17th and 19th February 2020.

3. The wife appeared before me by Ms Rachael Goodall (Counsel) instructed by Trethowans (Solicitors). The husband appeared as a litigant-in-person, although he had instructed a legal team in earlier parts of the proceedings. I am grateful to Ms Goodall for her first class and professional presentation. I am grateful also to the husband for his courteous and intelligent presentation. It is never easy to act as a

litigant-in-person, especially against an experienced legal team; but he has tackled the task with sensitivity and skill and been well able to address all the pertinent issues.

4. The court was presented with a bundle consisting of one lever arch file, and various documents were added in the course of the hearing. I have considered both parties' Forms E and narrative statements, their respective answers to questionnaires, as well as the PODE report, its addendum, and a selection of property particulars. I have also heard both parties giving oral evidence. Ms Goodall provided a helpful opening note and asset schedule at the beginning of the hearing and I heard full closing submissions from both sides at the conclusion of the evidence.

5. At the conclusion of submissions I indicated that I would produce a written judgment at the earliest opportunity, which I now do. As I indicated, I am sending this judgment to the parties by email on the basis that I invite Ms Goodall to produce a draft order, liaising with the husband as appropriate, which follows the details of this judgment.

6. My hope is that I will be able to approve an order without the need for a further court attendance by anyone, but I will fix a mention hearing in case there is a dispute over the drafting or something else unexpectedly arises for determination.

BACKGROUND

7. The history of the marriage is as follows:-

    (i) The wife is aged 50. She had not been married before meeting the husband and had no children.

    (ii) The husband is aged 48. The husband had been married and divorced before his relationship with the wife. There were two children from his first marriage, now in their mid-twenties, and the husband has a good relationship with these children.

    (iii) The parties met in 1998 and started a relationship of cohabitation in 1999. They met through their mutual employment in X financial services company. The wife left her employment in 2001 when she became pregnant with her first child.

    (iv) The parties married in 2005.

    (v) From 2011 onwards the parties lived together at the family home in Wiltshire, an agreeable and spacious period country home with nearly an acre of land in its ownership and surrounded by farmland, just four miles outside a city, albeit near a main road.

(vi) The marriage broke down in 2016. The parties separated in February 2016 when the husband told the wife that he had commenced a relationship with R, a business associate of his aged in her early thirties. The husband moved out of the family home in February 2016 and has subsequently lived in rented accommodation with R. The wife has remained with the children in the family home. It has been very clear during the hearing that the wife has been, and remains, deeply emotionally hurt by the husband's decision in this respect, but it is of course not part of my task to apportion blame for the breakdown of the marriage.

(vii) The wife commenced divorce proceedings in August 2016.

(viii) Decree Nisi was ordered in November 2016.

(ix) Decree Absolute awaits the outcome of the financial remedies proceedings and is not, in itself, controversial. The requisite conditions having been met, I propose to include in my order that permission is given to apply for a Decree Absolute, notwithstanding that more than a year has passed since Decree Nisi was ordered.

8. The parties have three children from the marriage:-

(i) A is aged 18. She is in her final year at school and will leave after taking her A levels in Summer 2020. She hopes to have a gap year before going on to university in Autumn 2021. She plans to study in a medical field, which involves lengthy education and training, and has had offers on suitable courses from four universities for the first part of the training.

(ii) B is aged 16. Up to his GCSEs he attended a fee-paying school. He is now in the first year of his A level course at a state school and will leave school in Summer 2021. He is also likely to go to university and his current thoughts are to follow a similar path as A, with its lengthy period of education and training.

(iii) C is aged 10. He is currently at a state primary school and is expected to proceed to a state secondary in September 2020. Assuming expected progress, he will attend that school until Summer 2027 and there is no reason to suppose that he will not also go on to university.

(iv) All the children have remained living in the family home with the wife and it is clear that she devotes a good deal of her time caring for the children. A sad feature of this case is that there is currently little or no contact between the husband and the children. I note that this is the situation, although it is no part of my task within these financial proceedings to seek to analyse this or to apportion blame for what has gone wrong. As in all such situations, it must be hoped that the passing of time will begin to heal the rifts that have developed. I consider it very unfortunate that the wife has chosen to bring into the case (by annexing it to her narrative statement) a letter from A in which some deeply unpleasant things are said about her father. I hope a more mature A will think better of some of these things.

9. The financial remedies proceedings chronology, spread over two years, is as follows:-

   (i) The wife issued Form A on 26th February 2018.

   (ii) Forms E were exchanged in June 2018.

   (iii) A First Appointment took place before District Judge Bloom-Davis on 15th October 2018.

   (iv) An FDR took place before District Judge Bloom-Davis on 14th October 2019.

   (v) Narrative statements were exchanged in January 2020 for the final hearing in February 2020.

LEGAL STRUCTURE OF THIS APPLICATION

10. In dealing with the claim I must, of course, consider the legal structure imposed by Matrimonial Causes Act 1973, sections 25 and 25A.

11. Matrimonial Causes Act 1973, section 25 reads as follows:-

> (1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
>
> (2) As regards the exercise of the powers of the court under section 23(1)(*a*), (*b*) or (*c*), 24, 24A or 24B above in relation to a party to the marriage, the court shall in particular have regard to the following matters:-
>
> (a) the 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, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the

breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

12. Matrimonial Causes Act 1973, section 25A reads as follows:-

(1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(*a*), (*b*) or (*c*), 24 or 24A or 24B above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

(2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

THE CHILDREN'S NEEDS

13. Accordingly, I bear in mind that I must give first consideration to the welfare while a minor of any child of the family who has not attained the age of eighteen. In this case, B (16) and C (10) remain under 18, and their current needs must be my 'first consideration'.

14. All the children's needs, post-18, also form part of the circumstances of the case which require my overall consideration.

15. It is therefore necessary for me to consider how their respective needs and interests will affect this case. Most obviously, the children require suitable housing, education and nurture whilst minors, which is overwhelmingly likely to be in the wife's primary care.

16. Such needs will, of course, continue after they are respectively 18, but over a period of time will in the ordinary course of events lessen as they spend more time away from home, initially at university and ultimately in work and independence. I shall have to consider the extent to which these needs can be met within the resources available to this family and also the extent and level at which it is reasonable for these needs to be met in the context of other calls on the parties' resources.

PROPERTY AND OTHER FINANCIAL RESOURCES

17. In relation to the "**property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future**" I have been assisted by having a schedule of assets prepared by the wife's legal team. It was possible at the outset of the case to go through this schedule line by line and, in the end, there were no significant disputes.

18. There is only one real property asset, which is the family home. The value was agreed at £730,000. This property is held in joint names and is subject to a Virgin Money mortgage, also in joint names, with an outstanding balance of £466,318, producing a net equity figure of £241,782. In November 2019 the parties agreed to convert the mortgage to (substantially) an interest only mortgage for a fixed period of five years. This had the attractive consequence of reducing the monthly mortgage payment from £1,312 to £787, but the less attractive consequence of having to face a significantly higher monthly repayment figure from November 2024 onwards. In the meantime there is a significant early payment penalty, but both parties have agreed that, since neither party is seeking a sale before November 2024, I should ignore the penalty for the purposes of my analysis.

19. The wife has, legal costs apart, lived within her means since separation. Her legal costs of £70,834 have, however, largely been funded by external means. First, by her mother lending her £40,000 – I was told that her mother is not pressing her to repay this sum now, but it is an enforceable debt and her mother is not of great means and currently expects to have repayment when the family home is sold. I think it is fair to include this debt in the schedule, but treat it as a real debt with a significant element of softness. Secondly, her solicitors have allowed her to run up her account to the extent that they are owed £26,041, with no obvious method of recoupment. Whilst

there were hints that Trewothans might accept payment over a period of time, there was no definite evidence on this, nor on what interest charges might arise from such an arrangement. I shall return below to the issue of how this should be dealt with.

20. The husband has a very significant level of indebtedness. I heard evidence on this and these debts seem to me to have been incurred for a number of reasons. He has had to fund his own legal costs (until he decided, post-FDR, to proceed as a litigant-in-person), he has paid maintenance to the wife throughout the period of separation to meet her living expenses, he paid school fees for B up to his GCSE level and he has lived at quite a high level in his post-separation life (quite a number of foreign holidays, a reasonably high cost 'quasi-wedding' party, regular eating out etc). It has (I think correctly) not been suggested that this spending amounts to 'wanton' spending pointing to a *Norris* addback. The debts exist and the husband has told me that he will now need to pay off these debts over the next few years from income.

21. The most valuable asset by far is the husband's defined benefit pension and I shall return below to the issue of how this should be dealt with.

22. Although Ms Goodall has made observations on the absence of full disclosure from the husband of his up to date bank statements. While her criticism is factually justified, I have not been persuaded that this is of any particular significance in terms of a plan to hide assets or spending details and I am not inclined to draw any adverse inferences from it. The overall situation can be summarised as follows:-

REALISABLE ASSETS/DEBTS

Joint

The family home in Wiltshire[1]	241,782
TOTAL	**241,782**

Wife

Bank accounts in sole name	1,840
Monies owed to wife's mother	-40,000
Outstanding Legal Costs [2]	-26,041
TOTAL	**-64,201**

Husband

Bank accounts in sole name	150
50% x joint TSB account (with R)	-1,292
Credit card and loan debts in sole name	-49,813
Outstanding Legal Costs [3]	-1,905

[1] This is based on an agreed valuation of £730,000 less an outstanding Virgin Money mortgage of £466,318 and costs of sale estimated at 3% of the sale price = £241,782

[2] This figure is based on a total of incurred fees of £70,834 less a total of fees paid of £44,793 = £26,041

[3] This figure is based on a total of incurred fees of £42,905 less a total of fees paid of £41,000 = £1,905

TOTAL	**-52,860**

PENSION ASSETS

Wife

X Defined Benefit Pension Scheme (Z plan) CE	138,939
X Adaptable Defined Contribution Pension Plan CE	13,798
TOTAL	**152,737**

Husband

X Defined Benefit Pension Scheme (Z plan) CE	2,155,475
X Retirement Account Defined Contribution Plan CE	58,653
TOTAL	**2,214,128**

INCOME AND EARNING CAPACITY

23. In relation to "**the income, earning capacity…which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire**" the following picture emerged.

24. When the parties met in 1998 the wife and the husband were both working for X Financial Services and earned similar amounts (on the wife's case she was earning slightly more, but nothing turns on this distinction). When the wife became pregnant with A it was decided (my impression is that this was a mutual decision at the time) that she would give up work and become a homemaker and primary carer. This she remained until the parties' separation, some 15 years of excellent homemaking and three children later. It has not been suggested that this a compensation case (I think correctly on the basis of the principles set out in, for example, in *VB v JP* [2008] EWHC 112 and *SA v PA* [2014] EWHC 392), but it is undoubtedly the case that the division of the responsibilities in the marriage has had the effect of limiting the wife's earning capacity now and for the remainder of her working life.

25. After the separation the wife obtained part-time work (16 hours per week at £8.50 per hour or c. £589 pcm net) as a receptionist in an orthodontics clinic and worked in this capacity for a year between December 2017 and December 2018. She was made redundant from this post in December 2018 and, after failing to find similar work in a school, she decided to start a dog-related business from the family home. The business, commenced in March 2019, has an impressive website and has quickly picked up custom. The wife told me that she currently earns about £535 pcm net from this business, but she hopes and expects it to develop over time. The figures produced by her (which, of course, involved elements of reasonable speculation and guesswork) suggested that she could be earning about £14,200 pag (or £1,100 pcm net) by 2022. It seems unlikely that the figure would ever rise much above this because the business

activities are limited by the attention and care needed to be given to the individual dogs by the wife.

26. The husband's case before me was that this effort by the wife, though commendable on one level, fell short of a maximisation of her earning capacity and (particularly bearing in mind what she used to do up to 2001) she could do better by taking a job in marketing or in financial services and earn perhaps £25,000 or £30,000 pag (or c. £1,650 or £1,950 pcm net). He did not produce any job advertisements evidencing his figures. The wife responded by saying that, with the passage of time since 2001, any relevant skills she then had were really no longer of any use and, if she did go back to full-time office work this would be more likely at the level of about £18,000 pag (c. £1,300 pcm net) and that this would be impractical at the moment anyway because of her need to care for the children. She did produce some job advertisements supporting a figure of £17,500 to £20,000 pag.

27. Having considered the competing arguments I have reached the conclusion that the wife's dog business is a reasonable maximisation of her income at the moment, and for as long as she remains in the family home it is reasonable to assess her on this basis. There will, however, come a time when this position is no longer tenable (this may be a combination of the children growing older and it not being reasonable for her to expect to remain in the family home) and so, unless the wife can find a way of increasing her earnings from the dog business and/or enabling the business to transfer to different premises, there is some force in the husband's suggestion that she might reasonably in due course be expected to be assessed on the basis that she can earn more in a PAYE job, perhaps in administration, perhaps at £18,000 pag or perhaps at a little more than this in time. On present evidence I think it would be too speculative to suggest that she was likely to do much better than this, but she is plainly a person of some ability and perhaps her sights could be set a little higher than they are currently. She is currently aged 50, with a state pension age of 67, so there is time for her to achieve something within the parameters discussed above. I recognise that the separation and divorce has caused her stress and depression, but it is to be hoped that the adverse effects of these, which are undoubtedly present at the moment, will diminish as the litigation finishes and time passes.

28. In addition to her earned income the wife can reasonably expect to have income from various other sources of, at least, the following:-

    (i) On both parties' cases there will be payments of spousal periodical payments from the husband to the wife.

    (ii) There is a CMS assessment (which is a maximum income assessment), currently at £2,087 pcm. Ms Goodall has calculated (and I accept her figures) that this will reduce to £1,697 pcm in Summer 2020 (when A leaves school) and to £1,273 pcm in Summer 2021 (when B leaves school). This will carry on until Summer 2027 when C leaves school.

    (iii) Following the logic of Mostyn J's judgment in *CB v KB* [2019] EWFC 78

(paragraphs 48 and 49), which both parties have agreed, there should now be a child periodical payments top up order at the rate of £525 pcm now, reducing to £420 pcm from Summer 2020 and to £315 pcm from Summer 2021. Again, this will carry on until Summer 2027 when C leaves school.

(iv) There will be child benefit now at the rate of £192 pcm, reducing to £149 pcm from Summer 2020 and to £90 pcm from Summer 2021. Again, this will carry on until Summer 2027 when C leaves school.

(v) The wife currently receives Tax Credits of £946 pcm. The receipt of these state benefits is likely to be short-lived, because it is likely that the reassessment of the benefits prompted by A's leaving school in July 2020 will cause a move on to Universal Credit and the existence of a spousal periodical payments order is likely to eliminate (or at very least substantially diminish) the entitlement to this state benefit.

29. The husband has worked for X Financial Services for all his working life, from 1987 to the present day. He has moved up the ladder over the years and currently holds a senior position. This is plainly a highly responsible position requiring hard work and dedication. He works long hours and earns well. He receives a basic salary (£144,000 pag) and a quarterly performance bonus. The bonus element of his pay, of course, varies (£35,842 in y/e 5th April 2017, £42,714 in y/e 5th April 2018, £27,734 in y/e 5th April 2019 and £28,165 in y/e 5th April 2020), but is sufficiently constant for me in doing my calculations to include it as part of his overall salary. There are also taxable benefits such as a car allowance and pension contributions. The husband accepted that, averaging the bonus over three years, it was reasonable to assess him as receiving c. £9,499 pcm net. In addition he makes a modest charitable contribution through his employer, which I do not add back because this is something he has always done and I do not want to penalise him for it. In addition he pays an additional voluntary contribution of £132 to having a better car than is permitted under the basic car allowance scheme. This is something which the husband conceded he could and probably should cease so I think it is reasonable to add this back in and assess him as having a current earning capacity of £9,631 pcm.

30. Although there is always uncertainty in such matters, there seems to be no reason why he should not continue earning at this level for the foreseeable future, probably up to his aged 60 and possibly beyond that up to his state pension age of 67. He has told me (and I accept) that he is currently under stress and has required the assistance of a counsellor; but, as I suggested in relation to the wife, it is to be hoped that the adverse effects of this stress will diminish as the litigation finishes and time passes.

31. The husband's cohabiting partner, R, earns c. £77,000 pag (c. £4,100 pcm net). She is accordingly able to make a contribution to their mutual expenses (rent, council tax etc) and the husband has not suggested otherwise. The husband has expressed some concerns that the relationship might not survive the pressures currently existing, but my overall impression is that, whilst there are no guarantees, on a balance of probabilities, it will survive for the foreseeable future.

NEEDS

32. In relation to the "**financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future**" I have the following observations.

33. Both parties have the need for a suitable home.

34. In the wife's case there is a need for her to house the children which must be the absolute priority, albeit that the children's dependency on her will diminish over time as they respectively, and perhaps slowly and gradually, make their homes elsewhere. Her case is that she accordingly needs 100% of the equity in the family home.

35. The husband's case is that he has recognised the wife's need by agreeing that the wife can remain in the family home subject to the existing mortgage until November 2024. After that, he says, then it is reasonable for him to receive a share of the equity in the home and to be released from the large mortgage so that he can, at last, contemplate purchasing a home for himself. He has suggested that, at that date (which represents the wife's 55th birthday) she should be able to draw down a large lump sum from the pension created by the pension sharing order and, together with her own share of the equity of the family home, and probably a modest mortgage, purchase a home for c. £350,000 to £400,000, which should provide suitable housing for her and any child still dependent upon her for housing. He produced some property particulars which, on the face of it, supported this proposition.

36. The wife's response is that, whilst she would really like to remain in the family home indefinitely, and whilst she certainly needs 100% of the equity in the family home, she recognises that it will not be possible for her to stay there if she is unable to release the husband from the joint mortgage in November 2024. She vehemently asserts that no property under £450,000 would be suitable for her and that she would probably need £500,000. When some of the husband's lower band properties were put to her in cross-examination she demonstrated a response which was more emotional and less balanced and reliable. For example, she expressed her horror at one of them in these terms: "*This is not a suitable property for a 55 year old lady on her own. It is a new build with cardboard walls where you can see your neighbours brushing their teeth*". When it was put to her by her husband that it was reasonable for him also to have a capital deposit to enable him to purchase a house she responded with great hostility: "*The family home was supposed to be our forever* home…*You instigated all of this*". I shall look at some of the figures when I address pension issues below, but in this part of the evidence I preferred the husband's case. I observed no proper appreciation for the husband's offer to allow the wife to retain the family home for a period of nearly nine years post-separation (February 2016 to November 2024) – I think there are many husbands who would not have offered that. I observed in the

wife a high degree of bitterness, wishing to punish the husband for what he has done, rather than reliably and seriously considering the husband's suggestions on housing and the question of overall fairness in the distribution of assets.

37. I remind myself in this context of authorities such as *M v B* [1998] 1 FLR 53 where Thorpe LJ said: "*Obviously, the primary carer needs whatever is available to make the main home for the children… But in any case where there is, by stretch and a degree of risk-taking, the possibility of a division to enable both to rehouse themselves, that is an exceptionally important consideration and one which will almost invariably have a decisive impact on outcome".*

38. The husband's housing needs will, it seems to me, and on his case, almost certainly have to be met by rented accommodation until November 2024. Thereafter it seems to me to be not unreasonable for him to have a share of the equity in the family home to provide a purchase deposit and also to be released from the substantial joint mortgage.

39. Both parties also have an income need. In a very comprehensive schedule, the wife has asserted a spending need for herself of £3,928 pcm (including monthly mortgage payments of £787) and £1,676 for the children, i.e. a total of £5,604 pcm. The husband, in a very fair way, declined to challenge many of the constituent parts of these figures. In the end, the wife accepted that she could cut a limited portion of this of this spending if she needed to and the husband's position on this point wasn't really very different.

40. To meet her spending needs the wife suggested that I should make a global periodical payments order of £3,750 pcm, and, together with her child benefit (currently £192 pcm) and dog business earnings (currently £535 pcm), she would thus receive £4,477 per month and manage to meet her needs of £5,604 pcm, albeit with a shortfall met by tightening her belt and/or by doing her best to increase her dog business earnings. At the beginning of the case the husband was offering to pay a total figure of £3,000 pcm all in (as opposed to the demanded £3,750). By the end of the case he had extended this to £2,087 pcm (CMS) plus £525 pcm (top-up) plus £1,000 pcm (spousal maintenance), making a total of £3,612 pcm. Thus, subject to the matter discussed in the paragraph below, at the end of the case the difference between the parties was only £138 pcm (i.e. £3,750 versus £3,612).

41. In closing submissions an additional £1,000 pcm (for 26 weeks) was added to this schedule to allow the wife to pay off her outstanding solicitors' bill over the period of 26 weeks (it having been acknowledged that a demand for a lump sum of £26,000 was unlikely to succeed in view of the absence of capital to meet it). I was invited to make an instalment lump sum order of £1,000 pcm for 26 months. In essence this seems to me to be a back door way of applying for a costs order and, as such, I need to bear in mind that the general 'no order for costs' rule under FPR 28.3(5) should be respected in this context and that none of the 'conduct' issues which would permit the circumvention of the general rule apply here. I am, of course, not allowed to be told

what the respective without prejudice positions were at the FDR, and am therefore unable to identify whose fault it was that the case proceeded beyond the FDR, so I cannot make any assumptions about whose fault it is that this bill was incurred. Given that the wife took the decision to employ a legal team for the final hearing and the husband did not, because he didn't think he could afford it, it does occur to me that it might be thought to be a particularly unfair breach of the 'no order for costs' rule if I made an order, either through the front door or the back door, for the husband to pay £26,000 to the wife to enable her to meet her own outstanding costs bill. On the other hand, the debt exists and (absent peculiar generosity by Trethowans) is not likely to disappear and is accordingly a problem for the wife and I cannot ignore it. I do not think it would be fair to make an order which caused the husband to have to pay this bill directly. Two matters occur to me. First, if I otherwise ignore the wife's receipt of tax credits, then she is likely to receive that windfall for a period of time, although I recognise that this may well be only for about six months. Secondly,in dealing with pensions I will bear in mind that the wife may need to meet some of these debts from her pension tax free lump sum and here I note that she will have this significantly earlier than will the husband. I propose to follow this course, rather than making any specific order in relation to the £26,000 debt.

42. The husband has asserted a rather more concise expenditure schedule, which consists of the following monthly spending needs:-

CMS payments to W	2,087
Top-up child periodical payments to W	525
Spousal Periodical Payments to W	1,000
50% of monthly rent payments	925
Debt repayments pcm	1,835
50% of general household outgoings	346
Food, including eating out	450
Clothing/Hairdressing	200
Transport and Petrol	100
Gym	32
Entertainment and Holidays	250
Dental Plan	20
Pets	40
Personal Critical Illness insurance cover	77
TOTAL	**7,887**

43. Although Ms Goodall did seek to try and cross-examine this figure down, I was not persuaded that there was anything very remarkable or unreasonable about these figures. I do not agree with her that the husband's choice of rental property was excessive. I do not agree with her that the husband's figures for food spending, given his circumstances, were unreasonably large.

44. I note, however, that given my assessment of his income at £9,631 pcm net, it seems to me that it must follow that the wife's income demand (for a global amount of

£3,750) is certainly affordable to the husband and the quantum of maintenance sought by the wife is not unreasonable in all the circumstances, though I shall differ with her on the structure of the order (see below).

45. In discussing these needs figures, I have taken into account the **standard of living** the parties and the children jointly enjoyed during the marriage and the **duration of the marriage**.

CONTRIBUTIONS AND THE PRINCIPLE OF EQUAL DIVISION OF CAPITAL

46. As a starting point in the division of capital after a long marriage it is useful to observe that fairness and equality usually ride hand in hand and that (save when an asset can properly be regarded as non-matrimonial property) the court should be slow to go down the road of identifying and analysing and weighing different contributions made to the marriage.

47. In the words of Lord Nicholls in White v White [2000] UKHL 54:-

"…a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination".

and in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24:-

"This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals…The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule."

48. In the words of Mostyn J in JL v SL [2015] EWHC 360:-

"Matrimonial property is the property which the parties have built up by their joint (but inevitably different) efforts during the span of their partnership. It should be divided equally. This principle is reflected in statutory systems in other jurisdictions. It resonates with moral and philosophical values. It promotes equality and banishes discrimination."

49. The evidence I have heard in this case satisfies me that both parties have made full **contributions** to this long marriage, albeit in their different ways.

50. The wife sought to persuade me that her greater cash contribution to the parties' first family home provided extra justification for her having 100% of the net equity in the family home, the only realisable asset remaining; but this argument is not persuasive in my view since it ignores the obvious facts that the husband contributed a great deal more than the wife in his substantial earnings over many years of marriage (as well as some early cash contributions as well) and also that the wife's initial contributions were very much mingled over time into the jointly owned family home – which is undoubtedly a matrimonial asset: see, for example, *S v S* [2006] EWHC 2793.

51. The husband sought to persuade me that his pre-cohabitation pension accrual should be excluded in the division of pensions. I analyse this argument in the pensions section below, but record here that I did not find that argument persuasive either.

52. Accordingly I have decided that if there is any reason for departing from equality of capital in this case it is not to be based on contributions.

53. Accordingly, I have not been persuaded that it is necessary or appropriate for me to get involved in the detailed assessment and quantification of contributions here. For me, the needs issues here far outweigh any significance arising from the different contributions respectively made.

CONDUCT

54. This is not a case in which the issue of **conduct** plays any part in the determination of the financial remedies applications.

DISABILITY

55. This is not a case in which the issue of **disability** plays any part in the determination of the financial remedies applications.

PENSIONS

56. I now turn to the issue of **pensions**, in section 25 terms **the value to each of the parties to the marriage of any benefit which, by reason of the dissolution of the marriage, that party will lose the chance of acquiring,** considered of course in the context of the **ages of the parties** and the **duration of the marriage**.

57. A useful starting point here is to remind myself of the principle set out above, i.e. the proposition that fairness and equality usually ride hand in hand and that this applies to the division of pensions as much as it applies to other assets.

58. Beyond this basic principle, there seem to me to be three relevant issues arising here for consideration:-

    (i) The first issue is whether it is right for the court, in dividing pensions with a view to promoting equality, to target capital equality (i.e. equal CE or other definitions of capital value) or to target the promotion of equal incomes.

    (ii) The second issue is whether it is right for the court, in dividing pensions with a view to promoting equality, to exclude a portion of the member spouse's pension if it was earned prior to the marriage (or seamless pre-marital cohabitation).

    (iii) The third issue is the extent to which the court should disaggregate the pensions in the case and promote a discrete and equal division of the pensions as opposed to attempting to execute an offset against other assets.

59. I propose to deal with these separately. In doing so I shall give consideration to the opinions on these issues set out in some detail in "*A Guide to the Treatment of Pensions on Divorce: The Pension Advisory Group Report*" (July 2019)[4] (to be found online at *www.nuffieldfoundation.org/pensions-divorce-interdisciplinary-working-group*). The Pension Advisory Group (PAG) report, although produced by an independent interdisciplinary working group of lawyers, judges, academics and Pensions on Divorce Experts (PODEs), has the support of the Family Justice Council and the President of the Family Division and should, in my view, be treated as being prima facie persuasive in the areas it has analysed, although of course susceptible to judicial oversight and criticism.

60. In dealing with the question: **is it right for the court, in dividing pensions with a view to promoting equality, to target capital equality (i.e. equal CE or other definitions of capital value) or to target the promotion of equal incomes**, I have the following observations:-

    (i) There is no 'one size fits all' answer to this question. There are undoubtedly scenarios where the fair solution is probably to divide pensions by CE value. For example, where the CEs are relatively small in themselves or as a portion of the assets overall. For example, where the

[4] I declared an interest in this report to the parties in the course of argument and I again declare it in this judgment since I have been Co-Chair of the Pensions Advisory Group alongside Francis J since its inception and played a part in the production of the report.

parties are relatively young and any projections about the future income-producing qualities of the pensions are likely to be speculative or unreliable. For example, where all the pensions are simple defined contribution funds so that the CE values can be regarded as reasonably reliable and simple predictor of future income streams. For example, where the sole pension involved is a non-uniformed public sector defined benefit scheme offering internal transfers only.

(ii) There are, however, scenarios where a simple division of CEs may well not represent a fair solution. For example, where the pensions are medium or large, both in themselves and as a portion of the assets overall, but needs issues still arise. This is particularly the case where one or more of the pensions involved is a defined benefit scheme (and income from within the scheme per £ of CE is likely to be higher than annuity income outside the scheme per £ of CE on an external transfer). This is particularly the case where the parties are no longer young and retirement issues are on the horizon.

(iii) The PAG report expresses its view on this as follows:-

"In a needs-based case, in particular where there is a significant Defined Benefit pension involved, for the parties or court seeking to identify a fair outcome the appropriate analysis will often be to divide the pensions separately from the other assets, based on an equalisation of incomes approach, such approach often requiring expert evidence from a PODE." (page 11)

"Dividing pensions according to their potential income value.
Equality: Given that the object of the pension fund is usually to provide income in retirement, it will often be fair (where the pension asset is accrued during the marriage) to implement a pension share that provides equal incomes from that pension asset. This is particularly the case where the parties are closer to retirement. Where they are further from retirement, it is arguable that the number of assumptions made in an 'equal income' calculation will render a calculation less reliable
Equality of income will often be a fair result
Needs: In many cases the parties will be dividing modest pension funds. It follows that, in order to determine whether the parties' needs are met in retirement, they will need to know what their respective incomes are likely to be following any pension sharing order. A division that pays little or no attention to income-yield may have the effect of reducing the standard of living of the less well-off party significantly." (page 31).

(iv) The PAG report also endorses similar sentiments expressed in the Family Justice Council's report "*Guidance on Financial Needs on Divorce*" (2018 edition) where it is stated:-

"In bigger money cases, where needs are comfortably met, the courts are now likely to be less interested in drawing a distinction between pension and non-pension assets than hitherto. This is partly because other assets

will also be deployed for income production so the distinction is less obvious, but more because the "pension freedoms" introduced by Taxation of Pensions Act 2014… as a result of which those aged 55 or above have the option of cashing in some categories of pension scheme, have blurred the dividing line between cash and pensions and in such cases the trend is now to treat pensions as disposable cash assets, thus disregarding their income producing qualities: see SJ v RA [2014] EWHC 4054 (Fam) and JL v SL [2015] EWHC 555. In small to medium money cases, however, where needs are very much an issue, a more careful examination of the income producing qualities of a pension may well be required in the context of assessing how a particular order can meet need. The need to avoid the possibly punitive tax consequences of cashing in a pension may be more important in these cases and the mathematical consequences of making a Pension Sharing Order (for example because of an external transfer from a defined benefit scheme to a Defined Contribution scheme or the loss of a guaranteed annuity rate) can be unexpected and often justify expert actuarial assistance: see B v B [2012] 2 FLR 22" (page 23).

(v) In my view the facts of the present case (the ages of the parties, the size and largely defined benefit nature of the pension funds, the relative paucity of non-pension assets) place it firmly in that category of case where the fair and equal outcome is to identify, as a starting point anyway, the pension sharing orders which would bring about equal incomes at a specified time in the future. The mathematics in the PODE report indeed illustrate on the facts of this case the general proposition that income from within the scheme per £ of CE is likely to be higher than annuity income outside the scheme per £ of CE on an external transfer.

61. In dealing with the question: **is it right for the court, in dividing pensions with a view to promoting equality, to exclude a portion of the member spouse's pension if it was earned prior to the marriage (or seamless pre-marital cohabitation),** I have the following observations:-

(i) There has undoubtedly been an established practice in some courts considering the divisions of pension, regardless of needs issues, to make a straight line deduction from the CE of a relevant pension fund by reference to a fraction where the numerator is the number of years of the marriage (including seamless pre-marital cohabitation) and the denominator is the number of years over which the pension fund in question was accrued, and to include in its calculations and deliberations only the reduced amount of the CE. It is this approach which the husband in the present case urges on me, arguing that in making a calculation of equality I should reduce the pensions involved in the calculations by reference to the above fraction – in the present case the numerator is 16.584 and the denominator 28.469 (see the PODE report of Mr Galbraith at D25) so that on this basis only 16.584/28.469, i.e. 58.3%, of the husband's large pension fund should be included in the calculations. In my view this approach carries with it significant risks of unfairness as the mathematics of the present case

undoubtedly illustrate.

(ii) In considering the merits of this approach it is worth noting that the inspiration for this approach is sometimes said to be the judgment of Thorpe J (as he then was) in *H v H* [1993] 2 FLR 335, notwithstanding that a close analysis of what Thorpe J said in that case does not in fact provide clear support for this approach. This was a pre-pension sharing case, there was no reference to CEs in the judgment and his emphasis was on the comparison between pension rights earned during the cohabitation and future pension rights: "*I think that in deciding what weight to attach to pension rights it is more important in this case to look to the value of what has been earned during cohabitation than to look to the prospective value of what may be earned over the course of the 25 or 30 years between separation and retirement age*". This seems to me a very different point of reference. Further, in a later case (*Harris v Harris* [2001] 1 FCR 68) Thorpe LJ (as he had become) appeared to eschew this approach when he said, albeit in a slightly different context: "*I do not myself find the argument on proportionality to the pension earned during the marriage to be an attractive one*". It is perhaps also surprising that the judgment in *H v H (supra)* is thought now, nearly thirty years later, to be authoritative on this issue, especially if one reflects on the fact that at the time it was delivered pension sharing did not exist, *White v White (supra)* had not been decided and the use of CEs in these cases was not widespread.

(iii) In one sense the exclusion of the pre-marital portion of the pension is no more than, in modern parlance, the identification of non-matrimonial property. In other words the pre-marital portion of the pension is non-matrimonial property whilst the remainder is matrimonial property. Where the pension was wholly accrued prior to the marriage then it is easy to identify it as non-matrimonial property: see, for example, King J (as she then was) in *GS v L* [2013] 1 FLR 300 and Mostyn J in *WM v HM* [2017] EWFC 25. The apportionment exercise seems a logical extension of this and pension funds are rarely subject to the 'mingling' which often occurs in relation to cash assets.

(iv) In a sharing case the exclusion of the pre-marital portion of a pension might well be a legitimate exercise in principle, although, as identified in *M v M* [2015] EWFC B63, the court might retain an element of discretion as to the level of sharing. In a needs case, the approach needs to be treated with more caution. Where the pensions concerned represent the sole or main mechanism for meeting the post-retirement income needs of both parties, and where the income produced by the pension funds after division falls short of producing a surplus over needs, then it is difficult to see that excluding any portion of the pension has justification. In the words of Lord Nicholls in *White v White* [2000] UKHL 54: "*in the ordinary course, this factor"..*i.e. the factor that the property concerned is non-matrimonial*..."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".*

(v) The PAG report view, which accords with what I have said above, is as follows:-

"an important initial question is whether pensions should be handled any differently according to whether the case is governed by the needs principle (where, broadly speaking, the assets do not exceed the parties' needs), or the sharing principle (where, broadly speaking, the assets do exceed needs). The vast majority of cases – including cases involving low £millions - will be needs-based. Given the Lifetime Allowance, even a 'big' pension case will usually be a needs-case – it is non-pension assets that will generally take a case out of the needs bracket…One central issue is when regard may be had to the timing and source of pension savings. It is important to appreciate that in needs-based cases, just as is the case with non-pension assets, the timing and source of the pension saving is not necessarily relevant – that is to say, a pension-holder cannot necessarily ring-fence pension assets if, and to the extent that, those assets were accrued prior to the marriage or following the parties' separation. It is clear from authority that in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met" (page 22).

(vi) The reference to Lifetime Allowance issues is apposite to the present case. Introduced as a matter of government policy to restrict the use of the tax advantages of pension funds, the Lifetime Allowance was significantly reduced in April 2016 (from £1,800,000 to £1,000,000) and currently stands at £1,055,000. The effect of this change is that there are tax disadvantages for individuals using pension funds once their value reaches this figure. There are a number of historic fixed protection regimes which have, for some, have ameliorated the effect of these changes (indeed the husband in the present case opted into the 2014 fixed protection scheme), but the overall effect in most of these cases is to limit the attractiveness of pensions above the Lifetime Allowance levels such that, as PAG has noted, it is quite unlikely that pension funds will themselves will take the case outside the category of a needs case. It may be that other assets will perform that task, but where (as in the present case) the pension funds are the major asset, the case is more likely to fit within the 'needs case' category.

(vii) Further, in many cases, and the present case is a good example, the straight-line methodology of calculation, though simpler and easier to apply in practice, conceals an unfairness in that the value of a defined benefit pension scheme based on final salary does not accrue on a straight line basis, especially if the member spouse concerned starts work as a lowly paid junior employee and rises to a highly paid director level many years later. The pension will accrue much more value in its later years when the member spouse has reached the high salary level and this is likely to be, as it is in the present case, firmly during the marriage. Thus, where an apportionment is to be made, the straight line methodology of apportionment may well not be fair and some caution needs to be exercised before using it if other fairer methodologies are available. Other

methodologies include inviting the PODE to make a notional calculation of the current CE on the basis that the member spouse's earnings rose only with inflation in the post-marriage period – I note the PODE was not invited to make these calculations in the present case.

62. In dealing with the question **when should the court disaggregate the pensions in the case and promote a discrete and equal division of the pensions as opposed to attempting to execute an offset against other assets** I have the following observations:-

    (i) The orthodox view, encouraged by Thorpe LJ in *Martin-Dye v Martin-Dye* [2006] 2 FLR 901, is that pensions should be dealt with separately and discretely from other capital assets and with a view to their post-retirement income producing qualities. The PAG report offers a similar view: *"try, if possible, to deal with each asset class in isolation and avoid offsetting…a discrete solution which equalises pensions by pension sharing orders and which equalises non-pension assets by lump sum or property adjustment orders*" (page 35).

    (ii) It is undoubtedly the case, however, that many litigants choose to blur the difference between the categories and engage, to a greater or lesser extent, in an offsetting exercise. It needs to be borne in mind, however, that mixing categories of assets runs the risk of unfairness in that valuation issues become very difficult and, absent agreement, it may be unfair anyway to burden one party with non-realisable assets while the other party has access to realisable assets.

63. Applying these principles to the fact of the present case I have reached the following conclusions about the pensions:-

    (i) I have decided that I should divide the pensions in this case with a view to making pension sharing orders which have the effect of providing for the parties equal incomes at a specified time in the future.

    (ii) It has been suggested by Mr Galbraith from Mathieson Consulting Limited, the PODE instructed in this case, in his report of 3rd July 2019 (D16), that (for reasons convincingly explained in detail by him which have been accepted by both parties, and which include a proper consideration of the Lifetime Allowance and Fixed Protection issues arising here) the appropriate equalisation age on the facts of this case is 60 (rather than the normal 65 or 67). I propose to adopt this recommendation.

    (iii) The mathematical conclusions of Mr Galbraith are that to equalise incomes at age 60:-

        (a) if all pensions are included then the appropriate pension sharing orders are 100% of the husband's smaller defined contribution pension scheme and 51.7% of his larger defined benefit

pension scheme (D29); and

(b) if a pre-marital pensions deduction is made on a straight line discounting basis then the appropriate pension sharing orders are 100% of the husband's smaller defined contribution pension scheme and 27.3% of his larger defined benefit pension scheme (D33).

(iv) This would produce the following divisions of the pension funds:-

(a) on the first scenario:-

Wife

X Defined Benefit Pension Scheme (X plan) CE	138,939
X Adaptable Defined Contribution Pension Plan CE	13,798
100% x H's X Retirement Account Defined Contribution Plan CE	58,653
51.7% x H's X Defined Benefit Pension Scheme (X plan) CE	1,114,381
TOTAL	**1,325,771**

Husband

48.3% x X Defined Benefit Pension Scheme (X plan) CE	1,041,094
TOTAL	**1,041,094**

(b) on the second scenario:-

Wife

X Defined Benefit Pension Scheme (X plan) CE	138,939
X Adaptable Defined Contribution Pension Plan CE	13,798
100% x H's X Retirement Account Defined Contribution Plan CE	58,653
27.3% x H's X Defined Benefit Pension Scheme (X plan) CE	588,445
TOTAL	**799,835**

Husband

72.7% x X Defined Benefit Pension Scheme (X plan) CE	1,567,030
TOTAL	**1,567,030**

(v) The mathematical conclusions of Mr Galbraith are that these pension

sharing orders would (assuming no tax-free lump sum was taken) respectively provide the following income for the parties in retirement :-

(a) on the first scenario £36,119 per annum gross for both parties (D29); and

(b) on the second scenario incomes of £54,365 per annum gross for the husband and £22,036 per annum gross for the wife (D33).

(vi) Both parties are, however, working on the assumption that the wife will be able to draw a tax-free lump sum at her age 55 in November 2024. If she does this, then the income figures will reduce by 25% in lieu of which the wife should receive a tax-free lump sum, (on current figures, assuming this sum will be 25% of CE) something in the region of:-

(a) on the first scenario 25% x £1,325,771 = £331,443 plus an income at age 60 of £27,089 pag; and

(b) on the second scenario 25% x £799,835 = £199,959 plus an income at age 60 of £16,527 pag.

(vii) It can readily be seen that, on my assessment of ongoing income need, the second scenario will not provide enough income to enable the wife to meet her ongoing income needs into retirement and, even the first scenario falls a little short, absent a tightening of her belt into retirement. In my view the proper conclusion is that we are firmly in a 'needs case' category here, in which case, for all the reasons discussed above, it would be wrong for me to follow the logic of the straight line discount advocated by the husband. I have reached the conclusion that the proper and fair approach is for me to seek to equalise incomes on an equal basis taking into account all the pensions.

(viii) I have also considered whether I should go on to allow an element of offsetting, as is requested by the wife. Ms Goodall's contention is that I should allow the wife to retain 100% of the net equity in the family home (i.e. she would receive his existing half share of 50% x £241,782 = £120,891) in return for which she proposed that the pension sharing order against the husband's defined benefit scheme should be reduced from 51.7% to 49.5%. This proposition is supported mathematically by the supplemental report from Mr Goodwin of Mathieson Consulting Limited dated 10th October 2019. Although I find it prima facie quite surprising that £120,891 of cash should be regarded as having an equivalent value of 2.2% of the husband's pension, i.e. on a CE basis 2.2% x £2,155,475 = £47,420, as Ms Goodall pointed out nobody has challenged Mr Goodwin on this figure and I must accept its correctness for the purposes of this argument. The husband is, however, firmly opposed to the offsetting proposal on the grounds that he requires a cash sum to put down a deposit to purchase a property for himself after the sale of the family home after November 2024. His rights under his pension do not arise (absent substantial tax disadvantages) until his age 60, by which time it may be too

late to contemplate buying a house and he urges me to follow the orthodox approach of dividing pension assets and non-pension assets separately and discretely. He points out that with her 50% share of the family home plus her pension tax-free lump sums which can be taken in November 2024, the wife should have enough capital to purchase a house meeting her needs as I have assessed them to be, possibly mortgage-free or possibly with a modest mortgage if all of her debts have to be met. On these points I accept the husband's arguments and adopt them. I think it would be unfair to the husband for me to follow the wife's offsetting approach.

(ix) It follows from all the above that my order on pensions will to make pension sharing orders of 100% of the husband's smaller defined contribution pension scheme and 51.7% of his larger defined benefit pension scheme. The pension sharing charges will be met equally between the parties.

CAPITAL ORDERS

64. It follows from all the above that I have not been persuaded that there should be an adjustment of the respective interests in the family home. The parties will each retain their respective 50% share.

65. The husband has volunteered not to enforce his 50% interest until November 2024 and in my view this is a reasonably pitched offer. Plainly an order needs to be drawn up which reflects this and commits the wife in appropriate terms to looking after the property and paying the mortgage in the meantime. I suggest a starting point for the drafting should be the Mesher order drafts in the Standard Family Orders.

66. Plainly it follows from this that the husband is entitled to force a sale of the family home from November 2024. If the wife is by then able to buy out his half share at market value and simultaneously release him from the mortgage then in my view the order should give her the opportunity to do so, but it seems likely that this will only be possible if the wife's personal circumstances change significantly in the meantime.

67. I am conscious that nothing was said in the course of the hearing on the subject of chattels. This may have been deliberate, but if it was an oversight then I suggest it is dealt with forthwith by the husband producing a list of items he would like to have and the wife responding.

INCOME ORDERS

68. The position in relation to income orders is complicated by a moving picture in relation to a good deal of matters, including the wife's earnings, the incidence of state

benefits, the gradually reducing dependency of the respective children and the future arrival of pension income.

69. I need to take into account the present and likely future needs of the wife and the children and the husband's ability to pay maintenance, all as discussed above.

70. I need to deal with a number of areas in which legal principle is involved:-

    (i) First, Ms Goodall invites me to make a global order and places reliance on *AB v CD* [2017] EWHC 3164 in this respect. Whilst this authority provides strong support for the proposition that a court has the power to make a long term global maintenance order, it falls short of stating that a court definitely should make such an order in a scenario, such as the present one, where there exists a CMS assessment and proper mathematical knowledge of how the child maintenance aspects of the case are likely to progress. The existence of a global order carries with it the complication of knowing how to proceed in the future if, for example, circumstances change such as the spousal element is to be deleted because, for example of a remarriage. It seems to me that if a disaggregated order can be made fairly then that it is often the better approach and in my view that applies here.

    (ii) Secondly, there are issues here in relation to how the child maintenance picture should fit together as the children move from secondary to tertiary education, sometimes complicated by gap years. I quote from the Dictionary of Financial Remedies (2020 edition at p.12):-

    "The standard cessation date for a child periodical payments order is the date when the relevant child attains the age of 18 or ceases full time education. Education is ordinarily defined as tertiary education up to a first degree course… The calculation of this date can be complicated by a child's decision to take a gap year between school and university or, perhaps more controversially, between university and starting work or a decision to take a Master's degree after his first degree (see Re N [2009] 1 FLR 1442) and it is not uncommon to extend child periodical payments orders for such periods, but 'a parent is entitled to be protected against the child's prolonged or indefinite deferral of attendance at university' (see Re N (supra). When a child moves from secondary to tertiary education it is not uncommon to redirect all or some of the child periodical payments to the child himself, for example to meet accommodation or living or tuition costs (see McFarlane v McFarlane [2009] 2 FLR 1322). The parent with care may retain an amount as a 'roofing allowance', reflecting the fact that children attending university sometimes spend a good deal of time at home. Which solution is appropriate is likely to depend on the amount of money being paid and the amount of time spent at home as opposed to university, but a roofing allowance of one third of the total is not uncommon".

(iii) Thirdly, the assessment of spousal maintenance needs to be undertaken against the background of Matrimonial Causes Act 1973, section 25A which requires *"periodical payments to be made…only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party"*. The meaning of this section has attracted attention in recent case law, including by Mostyn J in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 where he said:-

"Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:

i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.

ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.

iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.

v) If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.

vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.

vii) The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.

…

xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

(iv) Fourthly, the termination of the spousal maintenance order needs to take into account the pension distribution. If that has been executed to achieve equality then allowing an ongoing spousal order beyond the retirement date runs the risk of upsetting the fairness of the scheme of capital distribution: see *D v D* [2004] 1 FLR 988.

(v) Fifthly, I note some some dicta in *Murphy v Murphy* [2014] EWHC 2263 and *Aburn v Aburn* [2016] EWCA Civ 72, which establishes that I have the power to step up or down the spousal order at various stages providing the prediction of future circumstances based on evidence justifies this.

71. Taking into account all these matters I propose to make the following income orders:-

(i) There will be a spousal periodical payments order as follows:-

(a) The order will commence on 1st March 2020 and continue to be paid in advance on the first day of each calendar month thereafter.

(b) The initial sum will be £1,138 pcm.

(c) From 1st September 2021 this will rise by way of automatic variation to £1,300 pcm.

(d) From 1st September 2027 this will rise by way of automatic variation to £1,500 pcm.

(e) This will carry on until the death of either party, the wife's remarriage or further order of the court or until the wife's 60th birthday, i.e. until and including the payment due on 1st November 2029, when it will stand dismissed with a section 28(1A) bar excluding any extension.

(ii) I note that the CMS maximum assessment will continue to be binding on the husband and that, on the current figures, this is £2,087 pcm, but will reduce to £1,697 pcm in Summer 2020 and to £1,273 pcm in Summer 2021 and will carry on at this rate until Summer 2027, when it will disappear altogether.

(iii) There will be top-up orders as follows:-

(a) for the benefit of the three children from 1st March 2020 at the rate of £525 pcm;

(b) for the benefit of the two younger children from 1st September

2020 at the rate of £420 pcm; and

(c) for the benefit of C from 1st September 2021 at the rate of £315 pcm.

(iv) There will be child periodical payments orders in favour of each child respectively from the 1st September immediately after they respectively leave secondary education until they respectively complete their tertiary education to a first university degree, including one gap year, at the rate of £450 pcm, with £150 being paid to the wife as a roofing allowance and £300 being paid directly to the child concerned.

(v) All the figures in paragraphs (i), (iii) and (iv) above will be subject to CPI uprating on 1st March 2021 and each anniversary thereafter.

72. These figures have been selected with a view to matching all the principles discussed above. I have taken the view that these orders appropriately factor in the wife's income needs in the context of the duration of the marriage and the gradually diminishing significance of the marital standard of living over time as well as the 'transition to independence', whilst recognising that this will not fully happen until she is able to rely upon pension income at age 60 in accordance with Mr Galbraith's calculations. At that stage I have taken the view that there should be a clean break. I conclude that the wife can adjust to this without undue hardship at that stage. The husband's assertion that the adjustment could be done in 2024 is not, in my view, made out. I have preferred this solution to the wife's suggested formulation – that the maintenance should be reduced in 2028 but with no section 28(1A) bar – on the basis that this might very well be a recipe for more litigation in 2028 and it is better for everybody to have certainty at this stage. I have concluded that this solution is affordable to the husband, assuming of course that he retains his current employment (or something similar) over the next ten years, which should be achievable.

73. I recognise that it may be that the above child periodical payments order suggested above may not cover the entirety of the medical based course, but my solution is intended to recognise the limitations on a parent's obligations discussed in *Re N* [2009] 1 FLR 1442. This does not prevent further arrangements being made on a voluntary basis and I would like to express the hope that by that stage relationships may have improved between the husband and the children to facilitate this.

74. Of course things may not turn out exactly as expected, but assuming things proceed more or less as projected, the following represents a tabular summary of the wife's income from all sources for the next few years, at current prices:-

	From 1st March 2020	From 1st September 2020	From 1st September 2021	From 1st September 2027
Spousal Periodical	1,138	1,138	1,300	1,500

Payments pcm				
CMS pcm	2,087	1,697	1,273	0
Top-up child maintenance pcm	525	420	315	0
Roofing Allowance of child maintenance for A pcm	0	150	150	0
Roofing allowance of child maintenance for B pcm	0	0	150	0
Roofing allowance of child maintenance for C	0	0	0	150
Earned income net pcm	535	817	1,100	1,371
Child Benefit pcm	192	149	90	0
TOTAL pcm	4,477	4,371	4,378	3,021
Payments direct to adult children	0	300	600	300
Husband's payments to Wife and children combined pcm	3,750	3,705	3,788	1,950

75. At the outset of the case there was an issue about life insurance to secure these payments, but I believe the solution offered in the course of the hearing by the husband was acceptable to the wife – i.e. that he would nominate an appropriate portion of his existing life insurance to cover a reasonable projection for payments remaining outstanding at any particular time. This will need to be carefully drafted to include in my order. For the reasons discussed in the course of the hearing I did not feel inclined to impose any arrangement about a critical illness insurance cover.

76. In view of the fact that the outcome I have decided upon came between the two open positions – i.e. neither party was entirely successful or entirely unsuccessful – I consider the correct order on costs is that there should be no order. In reaching this conclusion I am of course cognisant of the provisions of FPR Part 28.

77. I shall now ask Ms Goodall to take the lead in drafting an order which reflects all the

provisions of this judgment. I will be happy to consider, and hopefully approve, an order in an agreed form.

78. In case the drafting process throws up unexpected arguments, or anything else arises for my consideration, I shall list the matter for a mention at 10.00 am on 25th March 2020 (t/e: 30 minutes). I express the hope that this hearing can be avoided.

His Honour Judge Edward Hess
Swindon Family Court
24th February 2020