

Neutral Citation Number: [2023] EWFC 160 (B)

Case No: BV18D04882

**IN THE FAMILY COURT AT BRENTFORD**

Alexandra Road,  
Brentford, TW8 0JJ

Date: 28 September 2023

**Before :**

**HIS HONOUR JUDGE WILLANS**

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**Between :**

**KG**

**Applicant**

**- and -**

**NB**

**Respondent**

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**Thomas Haggie** (instructed by **Weightmans LLP**) for the **Applicant**  
**Matt Warmoth** (instructed by **Carter Lemon Camerons LLP**) for the **Respondent**

Hearing dates: 15 September 2023

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**JUDGMENT**

## His Honour Judge Willans:

### Introduction

*All references [ ] are to the final hearing bundle pagination*

1. The applicant applies to the Court to vary a periodical payments term found in a consent order dated 26 March 2019 (“the 2019 order”) [22] under which he is liable to pay to the respondent maintenance each month at the rate of £1,500 per month until 28 March 2027 when it will reduce to £1,250 per month and then to 28 March 2036 when the obligation will terminate with a clean break and a section 28 bar preventing any extension to the term. The logic for such change is argued to relate to (a) the respondent’s relationship with a cohabitee and (b) to a purported earning capacity on the part of the respondent beyond that accepted by her. The applicant argues the maintenance should be reduced immediately to £625 per month (backdated to the date of the application with a repayment of sums overpaid to date) and then should end in 3 years’ time. He originally argued for a reduction to £500 per month but has recalculated the same in the light of a separate reduction in child support (see below). He originally argued that the clean break should be brought forward from 2036 to 2026 but now accepts a clean break should not be brought forward. The respondent disagrees with the applicant and argues for the continuation of the existing order save that she will give credit for any benefits received after the date of the hearing. I have considered the papers contained within the hearing bundle; the live evidence of the parties and the respondent’s fiancée (“the cohabitee”) and the submissions made by counsel for each party. Within this judgment I will not deal with every piece of evidence or reference every argument made but I have kept it all in mind when reaching this judgment.

### Background

2. It is not possible or necessary to provide a full summary of the circumstances leading to the 2019 order. It is more helpful to summarise its key components which I note as follows: -
  - It left the respondent in occupation of the former matrimonial home (“the property”) with the two children of the marriage (now aged 17 and 15) until June 2020 when the property would be sold and from the sale proceeds some liabilities would be settled and a replacement property purchased with a sale price up to £500,000 supported by a joint mortgage between the parties of up to £250,000. Until the new property was purchased the applicant was to be responsible for the mortgage costs. The respondent was to be responsible for the mortgage costs on the replacement property.
  - The replacement property was to be held on trust for sale until the first of a series of triggering events with the most likely earliest event being the youngest child leaving secondary education (likely in summer 2026). On the triggering event the property would be sold and after normal costs of the balance 70% would go to the respondent and 30% to the applicant.

- The applicant would pay maintenance as set out in §1 above. The applicant whilst responsible for the mortgage would be entitled to deduct such payments from his maintenance (and CMS payments if required) obligation.
  - The applicant would pay child maintenance to the respondent at the rate of £975 per month (in line with CMS provisions).
3. In December 2021, the parties returned to Court and reached consent terms varying the previous terms (“the 2021 order”) [30]. Once again, I do not need to detail the background surrounding this development but observe the key terms of the 2021 were as follows: -
- The respondent was to remain in the the property and it would not be sold as previously agreed. To achieve this the cohabitee provided a lump sum of £271,618 which both reduced the mortgage to £250,000 and met identified liabilities which had been expected to be paid on sale.
  - The trust for sale was modified with the same triggering events (therefore likely sale by summer 2026) but with the proceeds being distributed after costs as to repayment of the £271,618 to the cohabitee before a distribution of the balance 70/30 to the parties as previously agreed.
  - The maintenance terms (and all other terms other than those specifically varied) would remain in force.
4. It seems agreed the applicant had since about April 2021 been corresponding on the issue of varying the maintenance levels. It seems agreed the respondent was not open to this suggestion. Plainly the maintenance was not varied as part of the 2021 order. In April 2022, the applicant made this application [35]. Remarkably this is the first time on which the parties have been before the Court. As such it has taken the best part of 18 months for their application to come to final hearing. This is a particular shame given the issues are relatively narrow and the facts far from complex. Previously the Court approved directions agreed by the parties on paper and a listed hearing had to be vacated due to judicial availability. The applicant has applied for the appointment of an expert (occupational health physician) to provide an opinion on the employability of the respondent. This was refused by the Court on a paper consideration requested by the parties [65].

### **The key issues**

5. The parties identify the following matters which have been developed in live evidence / submissions: -
- When considering a change of circumstances is the Court required to view this from the perspective of the 2019 or 2021 order?
  - Does the respondent have an improved earning capacity when compared to the date of the consent order and if so, can the Court quantify this and how, if at all, should this affect the maintenance award?

- To what extent should the maintenance award be recalculated in the light of the role of the cohabitee and having regard to his resources? Can he or should he contribute more to the family economy? What impact, if any, should this have on the maintenance award?
- Taking a longer-term view can the Court assess a future time when the maintenance needs will further change? In particular to what extent can the Court predict the likely circumstances when the property comes to be sold in the summer of 2026?
- The ability of the applicant to meet the existing maintenance award?

### The Legal Principles

6. The power to vary an existing order is found in section 31(1) and (2) MCA 1973.
7. In exercising the powers provided under the section the Court shall under section 31(7)

*...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, and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates, and -*

*(a) in the case of a periodical payments or secured periodical payments order made on or after the grant of a decree of divorce or nullity of marriage [making of a divorce or nullity of marriage order], the court shall consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made or secured only for such further period as will in the opinion of the court be sufficient (in the light of any proposed exercise by the court, where the marriage has been dissolved, of its powers under subsection (7B) below) to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments.*

8. In summary therefore the Court should have regard to all the circumstances of the case and this will include any change in circumstances to which the Court would originally have had regard since the making of the Order. The Court should in all cases consider whether a clean break can be affected without causing undue hardship to the receiving party. There is separate provision which permits the Court to order a capitalised lump sum or other appropriate transfer to enable such a clean break (section 31(7B)). The discretion exercised in such cases has been described as almost 'unfettered,' however the principles which governed an original consent order should not be interfered with. In assessing the variation, the Court should have regard to the original award which may provide 'an appropriate cross check if not a starting point.'
9. I have been taken to three authorities considering cohabitation as a change in circumstances: -
  - In Atkinson v Atkinson [1988] Fam 93: At first instance the Court had determined that cohabitation was only relevant as far as it reduced the wife's needs. On the facts the maintenance was reduced to reflect the ability of a

cohabitee to obtain better paid employment. On appeal Waterhouse J. considered 'settled cohabitation' did not equate to marriage but did amount to a change in circumstance. He also concluded that a decision not to marry for the purposes of maintaining maintenance would be conduct as found within section 25(2)(g) of the MCA. However, he made clear there was no statutory requirement for cohabitation to be given decisive weight and noted that this would impose an 'unjustified fetter on the freedom of the [party] to lead her own life as she chooses following divorce.'

- In Fleming v Fleming [2003] EWCA Civ 1841: The Court observed that Atkinson remained sound law notwithstanding social changes. In assessing the impact of cohabitation, the Court should have regard to the overall circumstances, including its financial consequences and duration. In an appropriate case considerable weight might be placed on this feature.
- In Grey v Grey [2009] EWCA Civ 1424: Setting aside a first instance decision on the question of relevance of cohabitation to the outcome it was held the Court had to investigate the implications of a wife's cohabitation asking whether a cohabitee was making a contribution to the household and if not what his capacity to make a contribution was and that the weight to be applied arising from this feature would turn on the facts of the case.

## The evidence

10. I will outline the key evidence by reference to the identified issues noted above.

### The Applicant's ability to contribute

11. Late in the day the applicant served a note of board minutes of the company for which he works [206]. This noted difficult trading conditions and indicated there would be no additional bonus or dividend payments in the near future with directors' salaries being frozen at the current rate. He was challenged as to the timing of the same and as to the fact these were the only minutes ever disclosed. Further it was put to him that this might be subject to subsequent revision. He maintained the view that trading conditions were difficult and there was no sign of a likely change in the near future. Separately he was taken to his Form E2 [123] in which he outlined his recent history of earnings. It was noted that in the year of the consent order the applicant had received a global gross salary of £106,000 which approximated the claimed likely salary for the coming years. On this basis it was put to him that nothing material had changed for him between the date of the order and the date of the hearing. As a result, it was suggested his ability to pay was not encumbered. I did not understand him to dispute this contention.
12. Note was also drawn of the fact that between 2019 and 2022 the applicant had on two occasions earned a significantly higher global income [2020: £165,000 and 2022: £176,000]. It was noted the child support had not been varied to reflect this change. The inference was that the applicant had solely benefitted from this enhanced income. I heard brief evidence as to the applicant's new-wife's circumstances. It is

clear she has been a relatively high earner and continues to work on a consultancy basis. Unfortunately, she has been diagnosed with cancer and her future prospects are very unpredictable. That being noted the evidence was not developed and I was not asked to place any particular weight on this feature when deciding the case.

Change of circumstances from which order?

13. This point was considered in submissions. The respondent argued the relevant order was the 2021 order and by that time the role of the cohabitee was well known. Notwithstanding this within the same order the maintenance was maintained without change. It was therefore not possible to contend that the issue of cohabitation was in any way a change of circumstance from the date of this order. The applicant disagreed suggesting the focus was on the 2019 order and that the point of cohabitation was not a 'use it or lose it' point in 2021. In any event the applicant had in fact raised the cohabitation in 2021 but it had been put to one side so as to resolve the pressing issue of the property. For the respondent it was said the Judge's approval of this order was on all matters including the maintenance. For the applicant it was said this belied the reality of the situation in which the focus of the 2021 order was on resolving the housing issue.

Does the respondent have an improved earning capacity?

14. The applicant claimed this was the case. The respondent no longer has young children to care for and has greater freedom to seek gainful employment. The children are now 15 and 17 and enjoy greater independence. Further the cohabitee is supportive which provides further room to seek employment. Whilst acknowledging the respondent's undoubted health issues it was said these are not such as to rule employment out entirely and particularly so given the applicant sets earning capacity at a modest level of under £10,000 per annum. The applicant pointed to job adverts as suggestive of the options available to the respondent and noted reference to such points being 'disability aware.' The implication of the applicant's argument was that the respondent was electing not to work whilst receiving maintenance. Separately, there was a limited suggestion that the respondent had been working in a cleaning capacity - a point denied by the respondent.
15. The respondent (supported by the cohabitee) pointed to the respondent's ill health as an explanation / justification for her inability to work. She suffers with a range of conditions but most importantly a connective tissue disorder and Raynaud's Disease. It was pointed out that these conditions had been present throughout the marriage and the applicant was well aware of the implications of the same. The fact the respondent had successfully raised five children did not change this reality. These were conditions which deteriorated over time and the applicant was poorly placed to assess the extent to which the respondent was impacted on a daily basis. The respondent told me about how she was affected and explained this left her fatigued and unable to offer reliable availability for any employment. She would rather this was not the case but it was a fact of her life. The fact that the children were now

older did not make her any more available to carry out paid work. Her conditions had a stress element and this would further limit her abilities.

16. I should pause to note it was agreed that the child maintenance component payable to the respondent would reduce in September 2023 and I was told this would be to £850 per month. I heard evidence as to the oldest child's difficulties and whilst he is likely to be pursuing an apprenticeship the sense the respondent has is that he will remain somewhat dependent. The applicant accepted there were some issues but was more optimistic. I also note the child maintenance will terminate on the younger child completing secondary education and that this will likely be in the summer of 2026 at about the same time as the property must be sold.

*The role of the cohabitee / what may happen in 2026?*

17. The following matters are known / are agreed. The respondent and cohabitee appear to have formed their relationship in early 2020 and they have now been living together for 3 years. The cohabitee made a significant financial contribution to reduce the mortgage (see above) to preserve the home for the respondent. The cohabitee claims to input £1,068 per month into the family budget. He plays a supportive role for the respondent and helps with the children and grandchildren. The respondent/cohabitee are engaged since March 2021 but deny any plans to marry or any concerted effort to avoid marriage so as to prolong maintenance. He told me that he has borrowed off family to help the respondent with her legal costs. The cohabitee provided a statement and set out his budgetary demands which include some level of support to his own children. He claims a net income of about £2,600pcm and spending needs almost equal to this. Of his spending needs £1,068 are paid into the household (41%). A further 21% of his income goes towards his own property, which is rented and provides part of his net income. This leaves him a little under £1,000pcm for his personal spending. He noted that recently the mortgage on the property came off a fixed period and went up by about £300. As the respondent cannot afford this, he has met this additional sum. This is part of the total sum he pays as noted above.
18. He was unwilling to commit to a settled answer as to what would happen in the future but was of the view that on sale of the property in 2026, he would take the monies repaid to him to settle the mortgage he had taken out on his own property to fund the lending. He pointed to stresses in his relationship with the respondent without any particular detail. He was unwilling to confront the likely outcomes in 2026.
19. The respondent denied any strategy to avoid marriage to keep her maintenance. She agreed the basic facts above but was equally cautious to reach conclusions as to what would happen in 2026. She did though agree that without the cohabitee's support she would have no obvious housing options in 2026. She did not consider this was a reason for maintaining the relationship. The inference of her evidence was that the cohabitee was contributing as much as she could expect from him. She agreed any contribution from him was in excess of the expectations when the 2019

order was reached. She agreed that the issue of cohabitation had been raised in 2021 but she had refused to vary the order as a result and it was not pursued.

20. The applicant made the point that viewed from the respondent's perspective she was £1,068 better off than at the time of the 2019 order and that even allowing for the increased mortgage was £768 better off. This should be brought into account when considering her maintenance needs. It seemed part of the applicant's case was that the cohabitee should improve his employment position. The cohabitee explained his historic working patterns and why he worked as he currently did.

### **My analysis**

21. I intend to provide a focused judgment addressing the above points before bringing my conclusions together. Plainly, the focus of this hearing has been on the perceived change of circumstances arising out of the respondent's cohabitation but I do not lose sight of the other points or indeed all the circumstances of the case.

#### *Change of circumstances from when?*

22. **In my assessment the applicant is entitled to argue change of circumstances arising out of the cohabitation notwithstanding the 2021 order.**
23. In my assessment an issue such as cohabitation is dynamic rather than static in character with its potential relevance capable of changing over time. On day one of the cohabitation the circumstances may be markedly different from how the relationship exists on day one hundred. Relationships can of course wax and wane and commitment is often a developing emotion. As such it would be foolish to identify a specific point at which a change has to be raised if it is to be examined by the court. I agree it is wrong to suggest there is a 'use it or lose it' principle in play. In any event section 31 does not restrict itself to a change of circumstance as justification for variation although I consider a natural focus will be on changes to avoid a variation application being an appeal by the 'back door'.
24. It appears clear to me that the 2021 process did not attempt to meaningfully engage with the issue of maintenance. It was a particularly focused application which sought to resolve the continuing issue as to preservation of the property. Whilst I accept, in approving the order the Judge was approving an order which included a paragraph which referenced the continuation of the maintenance obligation, I consider it is highly artificial to suggest this amounts to a resetting of the maintenance obligation. I doubt very much either party would have explained the purpose of the order in those terms if asked at the time. In my assessment the addition of the paragraph referencing the maintenance was simply there for the avoidance of doubt.
25. I am therefore satisfied the issue of cohabitation is a matter properly placed before me and open to evaluation. In considering its relevance I am not attracted by notions of conduct. I note *Atkinson* but struggle for my part to identify circumstances in which an individual's decision not to remarry could be said to be conduct which is so grave that the Court cannot disregard it when settling the finances. I find comfort in the observation made by Waterhouse J. that this would amount to an 'unjustified



fetter on the freedom of the [party] to lead her own life as she chooses following divorce.' It is not clear to me why a party should be effectively sanctioned (by having a financial distribution skewed) for taking a decision which is within the law and which financially advantages them. Furthermore, where in such an assessment are the attitudes and opinions of the cohabitee? A party may choose not to marry to maintain maintenance but this does not automatically demonstrate that but for this the cohabitee would be open to marriage. I note section 25(2)(g) was 'new' at the time of the judgment. I cannot recall seeing any judgment since *Atkinson* in which a decision not to marry has been held to be conduct for the purposes of section 25(2)(g). In reality a cohabitee's financial role is more properly understood as a change in resources for the party since the date of the original order (section 25(2)(a) MCA).

Can the applicant afford the current maintenance?

26. **On the evidence I find he can.**

27. I have had regard to the updating financial information relating to the applicant's business but I consider it appropriate to treat that with some caution as to whether it provides a reliable account of future remuneration on which the Court can base its decision making. In my assessment I do not doubt the authenticity of the minutes but I gauge they must be taken as a snapshot rather than a guaranteed conclusion as to what the future holds. After all there are good grounds for believing the 2019 consent order was founded upon the remuneration package in place at that time yet, over the following three years it provided a poor indication of the actual remuneration received by the applicant. In any event there is force in the point that the applicant agreed the terms of the 2019 order when his finances were set at a similar level to that noted in the minutes. Furthermore, at that time it is not at all clear that any account was taken of his now-wife's resources. Finally, in examination he did not resist the suggestion that the maintenance remained affordable. I accept the point that the maintenance is globally set at about 50% of his net income if he earns around £100,000, however that was the position in 2019 and if nothing else changes this will be automatically addressed as child support falls to £850 at the end of this month and then terminates in summer 2026 followed by maintenance reducing to £1,250 the following year. At that point if nothing else changes global maintenance will have fallen to 25% of likely net income with the gross contribution falling from £2,450 to £1,250. I also note in the interim period between 2019 and this application the maintenance obligation has been substantially eased by reason of the applicant's income exceeding the levels of 2019. This will have provided the applicant with an opportunity to save against future uncertainty.

What view do I take of the relationship between respondent and cohabitee?

28. **In my assessment the relationship has a high level of commitment which whilst falling short of marriage is nonetheless of significance in an assessment of this nature.**

29. Although this is not a question directly posed above, I consider it is important to form a view in this regard. Cohabitation can come in many shapes and forms and the

mutual obligation between the parties to a relationship can differ significantly. I have reached my conclusion starting from the position taken by the respondent. She told me that she and the cohabitee became engaged to signify their commitment to each other. It is this commitment that is of relevance when assessing the relevance of the relationship to issues of maintenance. I have no reason to question the evidence of the respondent that she has not formed an intention to remarry nor consciously held this off to maintain support from the applicant. In reality and for the reasons set out above with respect to 'conduct' I am far from clear this makes any real difference to my assessment. It is noteworthy that both the respondent and cohabitee have been married before and this may provoke in their minds a level of opposition to remarrying. It would seem unrealistic not to expect the respondent to be conscious of the implications to her of getting married (i.e., losing support) but this does not mean this is the operative factor in her decision making. The evidence from the applicant in this regard was based on what 'unnamed' family members have said to him. This is hardly a foundation for a safe conclusion.

30. Putting the above to one side, the cohabitee has shown real commitment to the respondent as evidenced by the lump sum contribution to the property. I remind myself he has loaned an interest free sum close to £270,000 and has tied the same up until summer 2026. To enable this, he mortgaged his own property. This evidences real commitment. In addition, the respondent and the cohabitee have now lived together for three years in the context of the respondent's poor health and the demands of the children from her previous marriage. I heard nothing to suggest their relationship was anything other than strong and stable. The cohabitee provides significant monthly income support and practical help. All the evidence illustrates this flows from his commitment to the respondent and vice versa. Indeed, he has borrowed from his family to enable her to meet her legal fees. In my assessment this relationship has all the hallmarks of a strong and enduring relationship. It is in no way transitory or casual in character. Of course, no one predict the future but at this time the signs are good. I am of the view their mutual commitment will continue and that the cohabitee will continue to provide support to the respondent to the best of his ability. All things being equal I can see no basis for believing this will cease when the time comes to sell the property. In reality this property has become a home for the respondent and her children, but also for the cohabitee who has rented his own property out. In my assessment there is a strong likelihood that these individuals will continue to plan their futures together beyond 2026 and an aspect of this will be mutual planning as to accommodation.

*Should the cohabitee be contributing more / working more?*

31. **I do not consider it fair or reasonable to impose on the cohabitee an expectation of working more to fund this domestic economy.**
32. Whatever I have noted above the cohabitee does retain a significant level of personal autonomy and is entitled to resist the suggestion that he should now increase his working hours to assist with the issues placed before me. It is in my assessment something of an ask on the part of the applicant to expect the cohabitee to take on a second job so that the applicant can be relieved of his maintenance

obligations which arose out of a lengthy marriage and which produced five children, two of who are still under eighteen. In any event I accept the cohabitee's evidence as to his working history and how he has found himself somewhat unqualified after returning from East Asia in around 2016. I heard nothing in the evidence to suggest that he is not doing his best and appropriately maximising his income. As noted, he has rented out his property as part of this planning and enhanced his income as a result. He might not be working full time but I do not consider it appropriate to calculate on the basis that he should seek a second job as was suggested to him. I should also bear in mind the role he provides in assisting the respondent although I appreciate this feature does depend to an extent on my findings as to the respondent's ability to work.

33. **On balance I consider he is contributing a fair and appropriate balance at this time to the domestic economy of the respondent and that it is not appropriate to expect a greater level of support at this time.**

34. This is not a case in which one finds a cohabitee free riding in the home of the receiving party. I have outlined the level of contribution made by the cohabitee both in financial and non-financial terms. Whilst he contributes 41% of his income into the home directly, I do not lose sight of the fact that he also meets additional expenditure at 21% which reflects the consequences of borrowing to enable the property to be preserved. This is an indirect contribution. This leaves 38% of his income available. Of this he provides an account of how the balance is spent. Now, whilst one might seek to forensically probe this account, I question what the upshot of any probing would be. It cannot be right to argue he should not support his own children in circumstances where the applicant accepts, he continues to support his own adult children in addition to those at home. Why should he not contribute to a pension or have a gym membership? I have to bear in mind the cohabitee is not a party with any responsibility to the applicant in making his own financial choices. Ultimately, I can see how the budget might produce some limited savings (see running car at £250) but I note there is no allowance for holidays or clothing. I am of the clear view the cohabitee is not a realistic source of additional support at this time.

*But should the respondent be helping herself by working?*

35. **Having heard the evidence I do not think this is a point which carries the weight suggested by the applicant.**

36. I accept the answer is not materially affected by the fact of the children in the home. I agree time has moved on and the children now aged 15 and 17 are not the encumbrance they would have been in 2019 as to ability to hold down a job. I have regard to the issues around the older child's engagement with education and struggles but this of itself does not prevent the respondent from pursuing a level of employment. I also accept there are many positives in respect of the respondent. She appears presentable and I am sure is an engaging and interested individual. She may have many characteristics which might attract an employer. The difficulty is her undoubted ill health and the presence of conditions which are associated with

deteriorating health. None of this is new to the applicant and it is agreed many of the conditions have been present throughout her adulthood and through the marriage. I appreciate in the marriage the respondent nonetheless held down a significant role as home maker and mother. But the applicant loses sight of the fact she was a younger person then and these are conditions which worsen with age. The respondent is entitled to point to the limited interaction she has had with the applicant in recent times and there is strength in the submission that he simply does not have a clear understanding of how her conditions impact upon her now.

37. The respondent gave evidence as to her conditions and the related impact upon her of the same. She spoke of regular flare up during which she is bed bound for up to 4 days. This happens at least once a month and is unpredictable. Her medication has some associated problems and there are concerns about it being continued at the same level. Even when not subject to flare ups, she lives a largely home bound life and is assisted by the cohabitee as to daily routines. I found this evidence to be genuine and compelling. I accept the account given by the respondent that she felt she could not hold down a post which required regular fixed attendance and that this would lead her to be stressed which impacts negatively on her conditions. She was shown a post which was 'disabled aware' but nonetheless required full-time weekend attendance. The respondent pointed out she could not reliably commit to being able to attend to such a post and that she was far from sure she would be able to physically engage with the job responsibilities.
38. I note the point made by the applicant that the respondent opposed the instruction of the occupational therapist and that this might suggest resistance to evidence which would identify where her abilities might lie. However, I also note the Court determined such evidence was not necessary and did not fulfil the part 25 criteria. In reaching my conclusions I bear in mind the applicant does not set his case at a high level (arguing an income capacity of under £10,000) but in my assessment the evidence tells me this is not a realistic expectation.
39. I also note the point made by the respondent that the 2019 order reduces maintenance in 2027 (when both children had left school) but only to £1,250. This stepped reduction does suggest a recognised ongoing need at that point which is consistent with the respondent's case as to her working ability. Further, the respondent gave me straightforward evidence as to her limited working experience during the marriage. I am not persuaded the applicant has made out a case that the respondent should now obtain and hold down employment as argued. I was not assisted by the photographs in the bundle which purported to show the respondent in an active state.

*Are there predictable future events which have relevance?*

40. **I have noted the planned stepping down of gross maintenance in 2023/2026 and 2027. I have reached conclusions as to the cohabitee's income and contribution levels at this time and the respondent's earning capacity.**

41. **I consider the additional material feature is the predictable event relating to sale of the property in 2026. I consider it is likely on balance that the respondent and cohabitee will pool their resources and will be in a position at that time to fund a mortgage free property.**
42. The 2021 order provides for the property to be retained until summer 2026 (more correctly when the younger child ends secondary education – but this is the likely point in time) after which it will be sold. The respondent has a right to buy out the applicant’s interest but importantly the cohabitee is entitled to his monies at that point as well. So, a buyout could only arise in circumstances where the cohabitee left his money in the property and further funds were obtained to fund the applicant’s interest. On balance this seems an unlikely state of affairs unless the cohabitee was to sell his own property and use these funds to pay to the applicant. What is far more likely is that the property will be sold as anticipated and the proceeds distributed. On current figures the cohabitee would receive his monies £271,000) with the applicant receiving around £195,000 (using a mid point of the values given by the parties’). When questioned the respondent accepted, she would not be able to fund rehousing with her funds alone. This is likely to be the case given her lack of earning capacity and thus absence of mortgage capacity.
43. On my assessment of the evidence as set out above, it is likely the relationship with the cohabitee will endure and as a function of this it is likely the respondent and cohabitee will pool resources to fund a replacement property. Together they would be able to fund a mortgage free property at around £450,000 without reference to the cohabitee’s own property. Whilst I heard the cohabitee suggest he would use the funds to settle the mortgage on his property I found this evidence somewhat confusing as the cohabitee failed to see that this was simply shifting (but not changing) resources. In such a circumstances I would find it likely that this property would then become a likely home for the respondent and cohabitee (whether or not she then contributed to this property by paying to the cohabitee a share of her proceeds). The upshot does not alter my conclusion as to the likely pooling of resources as to accommodation.
44. Strong support for this conclusion can be found in the current circumstances in which the cohabitee has made available to the respondent significant funds to preserve her home. In circumstances in which the relationship is continuing it would be odd for the cohabitee not to maintain this position when the house is sold. As I noted above there is no obvious reason a decision to resettle the mortgage on his own property would alter his commitment to the respondent.

*Can the respondent’s claimed needs be reduced?*

45. **In my assessment this is likely to be possible but in all likelihood is already being done to avoid mounting deficit. Beyond this the ability to reduce further is not evidenced.**
46. I have in mind the respondent’s schedule of expenditure [107] and the challenge to the same found in the applicant’s position note. Within her statement the

respondent cites expenditure needs of £3,018 and identifies income of £2,891 leaving a deficit of £127 per month. I note the approach taken to the mortgage and the contribution of the cohabitee within the schedule but this nets off. I note from September 2023 this deficit will increase to about £250 per month as child maintenance reduces by £125. It is important to note that in the applicant's position note no allowance is made for the identified contributions made by the cohabitee to the domestic economy. These are said to total £768 per month (excluding the mortgage contribution).

47. It therefore follows that absent amendment the applicant's note should show the respondent/cohabitee being £371 per month in deficit at this time rising to around £500 per month after September 2023.
48. Generalised challenges were made to the expenditure budget. Some of the points had merit and there was a sense of generality rather than particularity in the calculations underpinning the budget. However, I have struggled to see where the level of savings can be found which will not only bring the budget back into balance with income but also further cut it substantially to permit the savings required to allow for the reduction in maintenance sought.
49. In one sense the evidence I heard is self-proving as to the first point. I did not hear evidence of mounting debts on the part of either respondent/cohabitee with regards to day to day needs (this differs from the monies borrowed to fund the litigation) any more than I heard of savings being accumulated. The evidence was of getting by. This means expenditure cuts are being made as compared to the budget and I sense these will likely be being made in the areas probed by counsel. Without detail I can just about see how these might come close to £370 and at a stretch could be pushed to £500 if needed. But I struggle much beyond this without intruding on reasonable elements of the budget.

***What do I make of all of this?***

50. I approach this assessment with two time periods in mind. First one has the period through to sale of the property. Then one has the period after sale.

***Through to 2026***

51. In the first period I have assessed the cohabitee to be contributing at an appropriate level and I have found needs cannot be further reduced beyond the available income resource. I have also rejected the argument as to earning capacity. This would appear to answer the question as to the merits of a variation through this period.
52. I do though have regard to the logic of the applicant's argument that in 2019 maintenance was set at a given level and that the respondent has only seen an obvious positive since then in the form of the addition of the cohabitee's contribution. This being the case and absent any other change the respondent should be around £768 per month better off and could therefore require £768 less from the applicant without suffering any hardship. This argument benefits from a certain simplistic attraction but I fear it fails to have regard to a number of relevant

points. First a significant deduction has to be made to reflect the fact that the cohabitee is now also a member of the household with the consequence that costs will have arisen (food and utilities for example). He does not live in the home free of cost. Whilst this cannot be calculated with exactitude, I suspect it may amount to a significant portion of the £768. I consider an allowance of £325 per month might fairly represent this feature. Second, it should not be lost on the parties that we are living during a cost-of-living crisis. Inflation has been running in excess of 10% in the last year or so. Whilst the maintenance has stayed fixed costs have gone up. I note there has been no change in maintenance since 2019 and I calculate that £2500 (in March 2019) upgraded for inflation would equate to £3,067 (in August 2023 – see At A Glance Table 6 updated for August 2023: 131.3). This means that just to stand still the respondent would have had to make savings. I appreciate the same point bites equally on the applicant's budget. I consider the cohabitee's additional contribution has been eaten away by inflation to the point where it is wholly offset. So, I accept the global income coming into the home has increased but that this has been offset by increasing costs with the net effect that the respondent and cohabitee are living at a level just within the available resources. There is no scope for reductions beyond those noted above.

After sale in 2026

53. Matters will improve as the mortgage is shed and the opportunity for mortgage free living arises. I understood the evidence of the respondent to confirm that at such point her priority would be to reduce her costs of housing over preserving a larger home. On today's information this would reduce the costs by the sum of £1,126 being the current mortgage on the property. On my assessment it is likely the cohabitee will continue to rent his property as the net return on this is a valuable part of his income. He would only likely stop doing this if it were no longer needed. I am therefore not minded to fundamentally change his likely income reducing it to income from employment only. But were I to do that I would then have to set off the current costs on the that property (£558 per month) and attempt some form of calculation as to the likely return on his capital (if as I find they will pool their resources). On the information I have the better assessment is the approach taken at the outset of this paragraph.
54. So, in simple terms the respondent/cohabitee will be £1,126 better off. However, matters do not end there as it is reasonable to assume there will be (i) some reduction in living costs associated with this replacement property being smaller than the current home; (ii) it is reasonable to assume the older child will be less dependent as he will be close to twenty-one by this time, and; (iii) generally all of the children will be less reliant on the support they currently receive. In my assessment these points taken together will likely accumulate to reduced needs (taken globally for the respondent/cohabitee with respect to their domestic economy) of around £1,600 per month. In reaching this figure I allowed £1,126 for the mortgage; £250 per month related to a smaller property and the balance of £226 relating to the child costs. I did not remove children spending altogether having regard to the younger child only just being eighteen at that point; out of respect for the entitlement of the cohabitee to wish to spend on his children and in the light of the evidence of the

applicant of continuing to provide some support to his older adult children in any event.

55. However, at the same time the respondent will lose her child maintenance entirely. For these purposes I use the figure of £850 per month as I have had regard to the September 2023 loss in the calculations already undertaken above. In the following year she will see her maintenance step down by £250 to £1,250. Together these deductions total £1,100 which has to balance against the £1,600 figure above reducing it to £500 per month. This might justify a reduction of maintenance to £750 per month (whether before but no later than April 2027). In contrast the applicant argues for an immediate reduction of maintenance to £500 now and a cessation of all maintenance as of 2026. For the reasons set out in the narrative and detailed calculations above this is not a maintainable position.
56. I have reached the conclusion there is no justification for a phased reduction between summer 2026 and April 2027 and that a single adjustment can appropriately be made. I have reached the conclusion that there should be a single step down on the youngest child leaving secondary education and at that point maintenance should reduce to £750 per month. For these purposes and to avoid any doubt this date shall be no later than 1 September 2026. It will then continue until the operation of the s28 bar in 2036. Pending the 2026 reduction maintenance shall continue at the current rate. I have considered all the circumstances of the case but have plainly focused on those points which have been primarily placed before me. I accept the concession as to a £ for £ reduction for any PIP award received.
57. I will now send this decision to counsel who have my permission to share the same with their respective solicitors and clients. Can I ask for the following:
- Any proposed corrections and/or requests for clarification by 4pm on Friday 22 September 2023. As this judgment may be published any proposed amendments required to preserve anonymity by the same time
  - I would like to hand this judgment down and make a final order in the week of 25 September 2023. I can accommodate a 30-minute handing down on any of the following dates 27, 28 or 29 September 2023 at 10am. Can I ask counsel to liaise to agree the best date. If there are no matters for me to consider then I will release all from attending if they wish. If counsel is unavailable, I am happy to release them so long as any attending party is represented (if an attended hearing follows). Can I have the proposed date by 4pm on Monday 25 September 2023.
  - Can I have a draft order in any event no later than 4pm the day before the handing down.
58. This completes my judgment.

His Honour Judge Willans