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Neutral Citation Number: [2023] EWHC 1054 (Ch)

Claim No: PT-2020-000395 and PT-2021-000461

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

IN THE MATTER OF THE ESTATE OF MOHAMMED AMNIR BALA DECEASED

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 May 2023

Before :

MASTER BRIGHTWELL

- -

Between :

(1) SHAMA AMNIR **Claimants**
(2) AB
(a minor by his litigation friend, FARRAH MAJEED)
(4) CD
(a minor by his litigation friend, FARRAH MAJEED)

- and-

FAHID BALA **Defendants**
and 6 others

And Between

MN **Claimant**
(a protected party by her litigation friend,
TARANUM MOHAMED RAUF)

- and -

FAHID BALA **Defendants**
and 9 others

- -
- -

Julian Reed (instructed by **Stephen Rimmer LLP**) for the **First Claimant** in the first claim
Mark Dubbery (instructed by **Inspire Law Ltd**) for the **Second and Fourth Claimants** in the first claim
Aidan Briggs (instructed by **Ashfords LLP**) for the **Claimant** in the second claim
The Third Defendant in the first claim appeared in person

Hearing dates: 7, 8, 10 March 2023
- -

Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Tuesday 16 May 2023

Master Brightwell:

1. What follows below may be seen as an exhortation to parties embarking on litigation under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act") to consider in advance the potentially devastating consequences of fighting points of marginal relevance at inordinate cost with the effect of depleting a significant estate so that none of the competing claims on it can be fully met. It may also highlight the difficulties in determining claims before the value of the net estate has been established, and the futility of pursuing through to the end of trial claims of a magnitude which the net estate is on any view not large enough to meet.

2. These proceedings comprise the claims of four claimants against the estate of Mohammed Amnir Bala ("the Deceased"), who died of metastatic oral cancer on 20 March 2019, aged 53. Each claimant brings a claim for reasonable financial provision, pursuant to section 2 of the 1975 Act.

3. As I did at the trial, and to avoid any confusion, I refer to direct members of the deceased's family, with the exception of his mother, by their first name and do not intend any disrespect in doing so.

The parties

4. The claimant in the first claim, Shama Amnir, is the surviving spouse of the deceased. She was his third wife. They married in an Islamic law ceremony in Pakistan in 2005, and then in the United Kingdom in accordance with English law in 2012. Shama was born in July 1986. She has not worked since her first child was born in 2013. She currently lives in the matrimonial home, at 16 Coldershaw Road, West Ealing, which is an asset of the estate.

5. Shama and the deceased had three sons together: AB born on 14 May 2013, and twins, Abdullah and CD, born on 31 August 2017. The twins were born profoundly premature, and Abdullah, who was the third claimant in the first claim, had severe health complications as a result, and was tracheostomy and ventilator dependent. Tragically, he died on 25 November 2021, during the course of these proceedings. AB and CD are the second and fourth claimants respectively in the first claim. Their litigation friend is Farrah Majeed, who is Shama's sister. Ms Majeed made a trial witness statement dated 10 January 2023 but was not cross-examined on it, on the basis that Shama was cross-examined in detail on the financial needs of both herself and of her children.

6. MN is the claimant in the second claim. She is the daughter of the deceased and Shabina Amnir, the Deceased's late first wife. She is a protected party, acting by her litigation friend, Taranum Rauf, who is Shabina's sister. MN was born on 25 September 1992 and is now 30 years old.

7. MN currently lives at 38 Compton Avenue, Sudbury, with Shelina Amnir, the Deceased's second wife. This property was owned by the Deceased and Shelina as beneficial joint tenants both during their marriage and after their divorce, and has thus passed to Shelina by survivorship and there is no application under section 9(1) of the 1975 Act for it to be treated as part of the net estate. It is not in dispute that MN has significant physical and mental disabilities and is unable to live independently. MN formerly lived with the Deceased and Shama at 16 Coldershaw Road. The most significant dispute of fact raised by the parties is the date at which MN moved to live at 38 Compton Avenue; Shama says that MN moved permanently in 2015, whereas Shelina and Ms Rauf insist that she moved in early 2019, and that the move was intended only to be temporary. In any event, it is clear that her main carer at least since 2019 has been Shelina.

8. Despite her lack of capacity, MN was named as an executor in the Deceased's will and a grant of probate was initially made to her.

9. The first defendant in the first claim, Fahid Bala, is the son of the Deceased and Shabina, and was born on 30 March 1988. He was also a named executor in the will, a grant of probate at first being made to him and MN on 21 August 2019. He lives at least some of the time with Shelina, MN and Arman at Compton Avenue. He filed a witness statement on 26 October 2020 but, after the trial of a preliminary issue ("the Subsidiary Claim") which I discuss further below, he played no further role in the proceedings. He did not attend the trial. He continues to be represented by solicitors, who remain in correspondence with the administrator of the estate about its administration.

10. Sanowar Begum is the third defendant in the first claim. She is the Deceased's mother. Mrs Begum lives with Shama at the Coldershaw Road property (as does one of the brothers of the Deceased, Zahir Bala). Fahid indicated that in 2020 she was around 81 years old. She did not give evidence and did not attend the trial.

11. The third defendant in the first claim (and fourth defendant in the second claim), Arman Amnir, is the son of the Deceased and Shelina, and was born on 9 March 1999. He has graduated in business, marketing and accounting, and intends to study further. Arman lives with his mother at 38 Compton Avenue. I discuss his participation in the proceedings further below.

12. The fifth defendant in the first claim, Madeha Amnir, was born on 24 June 1991. She intimated a claim against the deceased's estate under the 1975 Act, which was settled by Fahid (and purportedly also by MN despite her lack of capacity), by his paying her the sum of £197,617. This sum now appears to have been paid by Fahid out of his own funds. Fahid's evidence, not

contradicted by any other witness, was that Madeha was estranged from the rest of the family. She did not appear at the trial.

13. The sixth defendant in the first claim, EF, is Fahid's son, and thus the grandson of the deceased. He acts by his litigation friend, Nazmina Bali, who was by an order of Deputy Master Francis made on 17 January 2023 given permission to rely on her short witness statement dated 17 October 2022. EF was 7 years old when that statement was made. Ms Bali did not appear at the trial and thus was not cross-examined, and EF was not represented.

14. The seventh defendant in the first claim, Cripps Trust Corporation Ltd ("Cripps"), was appointed as administrator of the Deceased's estate by an order of Deputy Master Marsh dated 10 September 2021. The original grant in favour of Fahid and MN had been revoked by an earlier order. Cripps, acting by its solicitors, Cripps LLP, have filed a number of reports on the current state of the administration of the estate of the Deceased, to which I will refer below.

The will

15. In his will, by clause 5 the Deceased first left from his dwelling house the value that comprises the Residence Nil Rate Band available to him. It is common ground that this gift fails as no residence was devised directly to the Deceased's direct descendants.

16. By clauses 7 and 8 of the will, a tortuously worded discretionary trust is created of that part of the estate that benefits from agricultural or business property relief. It does not appear that any property falls within this definition. Although clause 8 refers to "Nil Rate Trustees" there is no provision giving a sum equal to the nil rate band for inheritance tax purposes to the trustees of this trust.

17. Clause 9 then leaves the rest of the estate (in practice the whole estate) to trustees to pay the income to Shama for life (thus ensuring the application of the spousal exemption from inheritance tax), subject to overriding powers in favour of the Beneficiaries. The Beneficiaries are defined as Shama, Mrs Begum, the Deceased's children (who are all named individually) and his remoter descendants (thus including EF) and any persons added pursuant to a power of addition.

18. The trust contained in the will was accompanied by a letter of wishes also dated 30 January 2019, and addressed to the trustees of the will. It provides as follows:

'…I have given you power to pay capital to my beneficiaries, and depending upon tax laws prevailing at my death, it may be possible to appoint my residuary estate on new trusts.

I appreciate that I cannot fetter your discretion in any way, or impose any binding obligation, but in the hope that this may be of help to you in exercising your powers, I express the following wishes:

1. I would like the Trust Fund to be distributed in one hundred equal parts as follows:

1.1 As to 40 of such parts to my son Fahid Bala

1.2 As to 13 of such parts for my daughter Madeha Amnir

1.3 As to 13 of such parts for my daughter MN

1.4 As to 10 of such parts for my son Arman Amnir

1.5 As to 8 such parts for my son AB

1.6 As to 8 such parts for my son Abdulah Amnir

1.7 As to 8 such parts for my son CD

1.8 In the event that any of my children die before me or whilst there are assets still within the Trust Fund I would like that child's share to pass to their children.

2. I would like you to have regard to all assets received by various beneficiaries of my Will whether the assets comes from my estate or from outside of the estate (such as joint assets). I would also like you to consider my beneficiaries ages and personal circumstances before deciding whether to retain property in trust or whether to apply it to them outright. For example, I would not expect any beneficiary under the age of 25 to receive any capital distribution.

3. I would like my trustee's to seek guidance and approval from my son Fahid Bala with respect to the distribution of any income and how this is to be allocated on an annual basis to the beneficiaries.'

19. The principal assets within the estate are the properties at 511 High Road, Wembley, and 16 Coldershaw Road, together with three ground-floor units at 26 Whitton Road, Hounslow. 511 High Road is divided into commercial units, with a three-bedroomed first floor flat. The properties at High Road and Whitton Road are mortgage free. The Coldershaw Road house has an outstanding mortgage of £206,665.

Procedural history

20. The claims of Shama and her children were issued on 26 May 2020, then amended on 22 June 2021, adding EF as a sixth defendant. MN's claim was issued later, on 21 May 2021.

21. As I have already noted, the initial grant of probate to Fahid and MN was revoked, by an order of Deputy Master Dray made on 2 June 2021. Before that happened, Fahid and MN purported to take various steps in the administration of the estate, even though it must have been obvious to Fahid and should have been obvious to the solicitors acting on their behalf that MN had no capacity to act as a personal representative. On 28 January 2020, Shama signed a purported deed of appointment, transferring her beneficial interest in the estate to Fahid. It was her unchallenged evidence that she did not know what she was signing.

22. Despite accepting in his first witness statement that the properties at 16 Coldershaw Road and 511 High Road were assets of the estate, Fahid later contended that they belonged beneficially to him. He argued that he had an interest in 16 Coldershaw Road by an express declaration of trust or an implied common intention constructive trust, and in 511 High Road by virtue of a proprietary estoppel or common intention constructive trust. These claims were determined at the Subsidiary Claim heard from 2 to 4 March 2022.

23. Following the trial of the Subsidiary Claim, Deputy Master Marsh dismissed Fahid's claim on 20 April 2022. He rejected the claim that the purported declaration of trust of 16 Coldershaw Road had been executed by the Deceased during his lifetime, and also dismissed the claims to a beneficial interest in the properties by another route. Of some background relevance to the present claims are the comments made by Deputy Master Marsh about Fahid as a witness, at [50]:

> "50 I found Fahid to be a very unhelpful witness. I consider he was often evasive and slow to deal with points he considered unhelpful to his case. I can give six examples from his cross-examination which illustrate this point: (1) He was slow to agree that his sister, MN, has a mental age of 12. He clearly realised that to make that concession would reflect badly on him given the way he used her as his co-Executor; (2) He would not confirm that he and MN signed the application for probate when it is obvious that they must have signed the application form because probate was granted to them. It could not have been signed by anyone else. Again, he clearly realised that it was unhelpful for him to have signed a solemn declaration of truth on the probate form which declared that the two properties he now claims are his, belong to his father's estate; (3) He did not deal adequately with why he felt able to deal with formal legal matters

> using – and I use that term carefully – MN. It is inconceivable he thought she had capacity to act and that somehow he failed to appreciate this point; (4) He tended to hide behind his claimed limited schooling when convenient and yet was happy to talk about his entrepreneurial skills when running businesses; (5) He provided new evidence when cross-examined. One example of this is about the payment for the works on 511 High Road. He claimed in cross-examination that the money was in his account but none of the statements he produced showed that this was so; (6) He said his company's tax records reveal his earnings rather than his personal tax return, and this was obviously wrong, but was a convenient way of deflecting away from his personal tax records which showed a very limited income."

24. Once the Subsidiary Claim had been determined, directions were given for the determination of the four claims under the 1975 Act with which the present trial has been concerned. A remote case management conference came before Deputy Master Marsh on 28 July 2022. Fahid indicated that he did not intend to defend the 1975 Act claims, and the court recorded that only the four claimants were taking an active role in the proceedings, defining them as the active parties, giving directions for them to give Model B disclosure only and for the exchange of witness statements of fact between the active parties only. Fahid was not required to serve further evidence but was given permission to do so (which in the event he did not). Permission was also given to Ms Rauf to instruct an expert (and thus to rely on her report) to consider MN's physical health, mental capacity and learning difficulties, including any support she requires and her ability to live independently.

25. One result of that order was that there was, unusually, no remaining active party defending the claims on behalf of the estate, in the way that Shama, and not Cripps, had defended the Subsidiary Claims. No active party was representing the interests of the other beneficiaries named in the Deceased's will, but rather the claimants in the two competing sets of claims would in practice oppose the claims of the other competing claimant(s).

26. On the first day of the trial, I enquired whether any of the unrepresented defendants was present in court. Of those defendants only Arman was present. He indicated that he wished to give evidence to update the witness statement he had filed on 16 October 2020. For reasons given in a short judgment at the time, I did not permit him to give further evidence of which the other parties did not have notice. I did, however, permit him to confirm the witness statement he had filed, and to be cross-examined on it, and also to address me on the relief that should be granted on the claims.

27. It became clear that Arman had been fully aware of the steps that had been taken in the litigation since the hearing in July 2022, which he told me he

attended remotely (although he is not recorded in the recitals as having been present). He was also involved in an unsuccessful mediation which took place last year. Indeed, in his cross-examination, he said that one reason he had not sought employment in the past year was because of the present proceedings. It would have been open to him also to apply to give a further witness statement, either at the hearing in July 2022, or at the hearing on 17 January 2023, when permission was given for a witness statement to be filed by EF's litigation friend.

28. In the event, when cross-examining him, Mr Reed invited Arman to update his position and to state his current financial and employment situation. Arman thus had an opportunity to give the further evidence he had initially indicated that he wished to give.

The evidence

29. Despite the entrenched positions of the two sides of the family, when standing back it can be seen that there is a great deal of common ground on the facts. The cross-examination was relatively limited in its scope, although the points of controversy revealed a deep rift. That, coupled with the level of costs incurred, which mean that the estate is now not big enough to meet all the claimants' needs, and the ruinous consequences of Fahid's conduct no doubt explain why this case was incapable of settlement out of court. If ever 1975 Act claims cried out for settlement without incurring the costs of a trial, these claims did.

30. The house at 16 Coldershaw Road has been in the family for a long time, and the Deceased and Shama did not live there throughout their marriage. In 2016 or 2017, they and AB moved out of the property into rental accommodation whilst the house was to be converted into a house in multiple occupation. In 2017, the Deceased was diagnosed with oral cancer, and late in 2018 he and Shama moved back into the house. Abdullah remained in hospital. The Deceased would go to see Abdullah in hospital as far as he was able around his own treatment. He was admitted to Meadow House Hospice in November 2018.

31. As I have already noted, the property at 38 Compton Avenue was owned by the Deceased and Shelina as beneficial joint tenants such that it has passed to Shelina absolutely by survivorship. After they had separated, there was an agreement that an endowment policy would be taken out or continued in order to redeem the mortgage in the event of the death of the Deceased. Shelina also gave evidence that in order to support MN the Deceased in his lifetime paid the utility bills on the Compton Avenue property, and paid for food as well.

32. At the end of the trial, I was struck by the lack of impression I had formed from the evidence about the Deceased himself. Certainly, no-one spoke ill of him and it was clear that his death has had a profound effect on Shama, his widow, as well as, particularly, on MN. What was repeatedly conveyed was that he had been seriously ill for the last two years of his life, and that his condition was ever deteriorating during that period. I do not have much of a sense of his character and wishes before that time. He had built up significant assets, through running a butcher's shop and later a supermarket.

33. Apart from statements as to the sort of education he would wish his sons to have, the only indication of his wishes comes from the letter of wishes which, however accurately it may have recorded those wishes when it was written, is by its nature not intended to be a binding document. There must also be some doubt about how well formed these wishes were. Deputy Master Marsh found that he would not have been able to read and understand legal documents without them being explained to him. The will and letter of wishes were made a few weeks before his death at a time when he was very ill.

34. Another point to stress is that, even though the deceased was born in England, the Deceased's Pakistani heritage was important to him, as it plainly is to the rest of the family. There is a cultural expectation that family members will help one another where required, and a strong family ethos. Despite the rift evident in the present proceedings this family ethos is clear. Shama, as well as caring for her sons, also lives with Mrs Begum and with Zahir. She indicated that, if need be, MN could live with her. Whilst there was no particular enthusiasm behind this statement, I have no doubt that it was in recognition that it would not be appropriate to see her late husband's daughter homeless. A similar ethos is evident in Shelina accommodating Fahid and his son, and MN, as well as her own son and particularly in the care that Shelina has provided to MN.

35. Before turning to consider the points of dispute in the evidence, I comment on the individuals who gave oral evidence.

36. Shama was the first witness to be cross-examined. She gave her evidence in a quiet but composed manner. Despite her lack of formal education in English she presented as a conspicuously intelligent and capable young woman, who has endured a great deal in her life. She was able to engage without hesitation in all the questions put to her about financial matters, and clearly has a good facility with figures.

37. My overwhelming impression of her, however, was of the deep sadness she carries. She has suffered the loss of her husband, for whom she left behind her early life in Pakistan, and the depth of the loss she feels following the more recent death of Abdullah was palpable. She gave evidence that she struggles

with depression and sometimes finds it hard to get out of bed in the morning. I have no hesitation in accepting that. When asked if she would be expected, within her community, to remarry she did not deny the proposition but it was clear that she is presently in no condition even to contemplate this possibility.

38. Shama's evidence about her current financial outgoings (and, therefore, her future income needs) did not entirely withstand scrutiny. I consider this most likely to be indicative at least in part of a hasty and/or unduly optimistic approach taken by those acting on her behalf to the preparation of this part of her evidence. Nonetheless, Shama displayed a clear awareness and understanding of financial matters and showed no hesitation in grasping the questions that were being put to her, for example of how changes to her benefits after Abdullah's death had caused her to receive overpayments.

39. There was some uncertainty, not fully explained, about the composition of an indebtedness of £55,000 said to be owing to several people. When the various loans were broken down, they appeared to add up instead to £60,000 of debt. I was told that some of this indebtedness was incurred to pay legal costs, but I was not told how the balance of Shama's costs (in total £282,000) have been paid, or how much of them remain unpaid. Another example is that the current cost of gas and electricity was given as £470 per month, with an estimated future monthly cost of £500. On cross-examination, it became clear that the £470 figure based on one bill was for one winter month alone (January 2023) which was rounded up from £463.88, and gave no account for the £217 in government support for the month, such that the actual figure for January 2023 was £246.88.

40. Shelina was the next witness, who gave evidence for MN. She was also assured and articulate. It was clear, whatever the truth of the allegation that she had been caring for MN only since early 2019, that her responsibility in doing so has weighed heavily with her, and that her ability to have a life beyond that responsibility has been significantly curtailed. Shelina also displayed sensitivity towards MN's needs, extending beyond her immediate physical needs, describing for instance the effect her father's death on MN, and her need for counselling. On the other hand, there was a recognition that she could not meet all MN's needs.

41. Shelina's evidence was however partial and, on financial matters, I do not consider that I was given a full picture. Shelina claimed to have no income, save from a lodger living at 38 Compton Avenue, and not to be on benefits. Given that MN is in receipt of a personal independence payment ("PIP") of £325 per month (and a back payment in this regard appears still to be due), it is unclear how the needs of those living with Shelina are currently being met. In particular, it is wholly unclear how the staggering sum incurred on behalf of

MN on legal fees (some £319,000, even though she was not represented at the trial of the Subsidiary Claim) has been met.

42. Shelina gave evidence that she, together with Ms Rauf, obtained MN's financial information for disclosure. This is consistent with MN's medical records and with Shelina's evidence, that she is MN's main carer, described as her 'new mother' in one GP's note. The disclosure of bank statements was quite inadequate in order to give a full picture; only statement number 82 of a Nationwide account, dated 30 December 2020, was produced even the account had clearly been operated before that, and earlier statements were recent enough to have been easily available. It was thus not possible to see what earlier statements said about MN's address, nor whether the sums said to have been paid to MN when she was apparently working for Fahid for a few months after the death of the Deceased were in fact paid to her. An indication was given to the court on the second day of the trial that an attempt would be made to obtain these missing statements and to provide them to the claimants and to the court. This has not been done.

43. Another specific point makes me view Shelina's evidence with some caution. She was shown a letter written by her on 14 December 2011, after her divorce from the Deceased, when she wrote a letter of complaint to The Mortgage Business, apparently about the failure to put the mortgage on the Compton Avenue property onto a fixed rate after a tracker product had come to an end. In the letter, Shelina said 'my partner and I are constantly arguing over this', and 'my partner has been very angry and violent towards me all because of this'. Shelina indicated in evidence that the reference to her 'partner' was to her former husband, with whom she no longer lived. She also agreed that the Deceased had not been violent towards her, although she said he had been angry about the mortgage rate. I consider that this letter shows that Shelina is prepared to say things that are not entirely true when she considers it helpful to do so.

44. The next witness was Ms Rauf. She has a number of serious medical complaints and, as was evident when she was giving evidence, she suffered a stroke a few months ago. This meant that, in response to questions, she took time to respond. Mr Reed suggested to her that she was prevaricating in order to be obstructive. It would be unfair in light of her condition to find that this was so, and I intervened during her cross-examination more than I would have liked in order to ensure that she did not feel oppressed.

45. Having said this, I did not consider myself to be much assisted by Ms Rauf's evidence. She essentially supported the evidence given by Shelina, whom she described in terms that suggested a close friendship between them. I did not discern any real attempt to apply an independent and disinterested perspective. She indicated that Shelina's brother, Nadir, was originally intended to be the

litigation friend, but that he has made an offer to buy properties from the estate so could not act in that role. Ms Rauf agreed in cross-examination that Nadir was heavily involved in the litigation, although denied she was acting on his instructions. She indicated that Shelina had pursued MN's PIP application, although she was aware of the delays in progressing it, saying that a social worker assessment was awaited in order to see whether an increased PIP might be awarded (although I note that Ms Hill, the expert witness on whose report MN relies, says that this is incorrect). When I asked her at the end of her evidence what might happen if the estate could not afford to buy a property and to fund private carers for MN (as she had accepted appeared likely), I did not sense that she had given this any consideration.

46. One answer Ms Rauf gave concerned MN in the period before the death of the Deceased. Ms Rauf, consistent with Shelina and Arman, said that MN lived at 16 Coldershaw Road until early 2019. When asked how she was cared for when both the Deceased and Abdullah were very seriously ill, Ms Rauf answered that MN was not then the way she is now, implying that her condition has worsened. This was the very opposite of the evidence given by Shelina, who said when addressing a different issue that MN was improving, suggesting that she now may have a mental age of 14, rather than 12. Even though the effect of her father's death appears to have destabilised MN it is clear that she has always required significant care. These inconsistent answers were, I find, designed to support the narrative in issue in relation to the points disputed between the parties (i.e. when MN moved to 38 Compton Avenue, and whether she can now live independently), and were not principally designed to assist the court. (In fairness, I should add that in cross-examination Shama also sought to minimise MN's needs, whereas the submissions on her behalf were more realistic in this respect.)

47. The final witness was Arman. He graduated from Brunel University London with a degree in accounting and management, he said in 2022, with the performance in which he was disappointed, and he has not worked since graduating. His evidence was that he started his course in 2017, but took a gap year in 2018 to 2019 because of his father's illness. The course lasted three years (his evidence was that his student loans would amount to £27,000, i.e. £9,000 per year). When it was put to him more than once that the dates he gave would have him graduating in 2021, not 2022, he was unable to explain the discrepancy, nor why he had previously said that he graduated last summer, in 2022. Arman subsequently put in a short closing written submission in which he said, contrary to his oral evidence, that he started at university in 2018 and took a gap year from 2020 to 2021.

48. Very little of Arman's evidence is in dispute, but to the extent it is I did not find it convincing. In particular, in addition to his changing position on his

dates of study, his statement that MN appeared at Compton Avenue unannounced in 2019 and that his only reaction was to be pleased to see her did not have the ring of truth to it. I do, however, accept that he has been affected by the tragedies affecting the family (including the conduct of Fahid, to whom he seemed close, although there was no reason established for associating him with Fahid's wrongdoing in relation to the estate). Despite this there is, as he accepted, no reason why he cannot work.

49. As I have indicated above, there are on analysis few disputes of fact to be resolved.

50. The most significant such dispute is that of where MN lived in the period from 2015 to the date of death of the Deceased. Shama was clear in her evidence that MN moved to 38 Compton Avenue in 2015, although she returned from time to time to stay with the Deceased and Shama. The evidence of the other witnesses was that the Deceased brought MN to 38 Compton Avenue in the weeks before he died, asking Shelina to look after her on a temporary basis.

51. It will be clear from the discussion above that I accept Shama's evidence on this point. I find that MN had lived at 38 Compton Avenue for some years before the death of the Deceased, but that she had returned to stay at Coldershaw Road from time to time thereafter, and left belongings there. Shelina said that MN had been brought before, because of difficulties in her relationship with Shama, but that the Deceased previously picked her up. My principal reason for finding that this is not the correct characterisation of what happened is the inherent improbability of the Deceased or Shama having been able to care for MN whilst he was undergoing treatment for oral cancer, and whilst Abdullah was seriously ill in hospital, as he had been since his birth in 2017. Shelina, Ms Rauf and Arman gave evidence that MN appeared a month or so before the Deceased's death. I do not accept that this happened, not least as it was some time after the Deceased had entered hospice care. The fact that Grosvenor House GP Surgery changed her address to 38 Compton Avenue on 6 November 2020 does not change my view. On any case, MN had moved some time before that, so the fact that the address was changed then cannot be probative.

52. Another concerning issue to have arisen in relation to MN was whether attempts had been made to procure a marriage for her, despite her apparent incapacity to marry, and, if so, who was responsible. In her third witness statement at paragraph 11, Shama said the following as a criticism of Fahid:

> '…[Fahid] also does not want [MN] to get married or for her to live by herself this was proven to the family when he refused and turned MN marriage proposal from a man that liked her and she liked him too. She

> really wanted to get married to him but he had turned down the proposal as he wanted her to be the caretaker of EF.'

53. Any conduct carried out for the purpose of causing a person who lacks capacity to consent to marriage, whether or not any form of coercion is involved, is an offence if the person carrying out the conduct believes or ought reasonably to believe that the conduct may cause the other person to enter into the marriage without full and free consent: Anti-social Behaviour, Crime and Policing Act 2014, s.121.

54. It was clear from the oral evidence that steps had been taken by at least one person to arrange a marriage for MN, whether it was intended to take place in this country or elsewhere. It was equally clear to me from the medical evidence and the evidence of the parties that it must have been obvious to all concerned that MN seems to lack capacity to enter into a marriage. The example that kept recurring at trial was that she would not know what to do with a £20 note if she were given one (a point also made in the mental capacity assessment of her carried out on 16 November 2020). Whilst the fact that MN does not have capacity to litigate or to act as a personal representative does not automatically mean that she does not have capacity to marry, her inability to understand or retain information and her cognitive impairment means that she does not appear to have such capacity.

55. Shama indicated in cross-examination that the proposal to arrange a marriage for MN had nothing to do with her, but that Mrs Begum had indicated that MN was happy with it, possibly indicating that Mrs Begum was the instigator or was at least giving encouragement to the plan. It was not then put to her that this evidence about her own lack of involvement was not true (despite Ms Rauf later seeking to suggest such involvement during her own evidence), so I accept it. The evidence of Shelina and Ms Rauf, which was not challenged, was that Fahid put a stop to the marriage idea, as MN was upset by it.

56. The evidence in relation to each of the points made above is indicative of two things. First, Shelina and Arman seek to minimise Shelina's responsibility for looking after MN and to maximise the role of the Deceased, partly no doubt from a perception that this will strengthen MN's claim and weaken Shama's claim. As I explain below, the Deceased had a moral obligation to provide for MN, and in all the circumstances the question of precisely when she moved between the two addresses has a very limited effect on the scope of that obligation; it certainly has no effect on her needs going forwards. Secondly, it is clear that MN's care needs are, and will always have been, a significant burden. This has led those opposed to the claims of Shama and her children to rely on MN as a means of pursuing such opposition. The unrealistic claim put forward on her behalf, for the purchase of two properties for her benefit, could

never have been justified even if the estate was large enough to fund it (which it clearly is not).

57. It appears that to some extent MN is being 'used' (in the sense in which Deputy Master Marsh in his judgment in the Subsidiary Claim also found that she had been used) both to make a claim from which some indirect or future benefit might enure to those who are not pursuing a claim or might lose out as beneficiaries of the estate, and also to block the claims of Shama and her children. I have no doubt that there is also, at least as far as Shelina is concerned, a genuine and understandable desire to be relieved of the responsibility of caring for MN.

58. Another issue which was raised at trial was EF's parentage. There is no dispute that he is Fahid's son and thus the grandson of the Deceased (and, accordingly, an object of the residuary trust in the will). Shama raised the issue in her fifth witness statement dated 12 January 2023, shortly before trial, saying that it was her understanding that [*redacted*] was EF's mother. She has at no stage issued an application notice seeking an order for disclosure of EF's birth certificate. In those circumstances I am not prepared to draw any inferences from the fact that it has not been produced.

59. I consider, in light of the outcome below, EF's parentage to be of marginal relevance. I do record my view, however, that the issue ought not to have been raised in the way that it was.

MN's physical and mental health

60. While permission was given by the order dated 28 July 2022 for MN to rely on expert evidence of her physical health, mental capacity and learning difficulties, no such evidence was in the event adduced. She relies on the social work assessment of Ms Emma-Louise Hill dated 27 January 2023 (which falls within the rubric of expert evidence of the support MN requires and of her ability to live independently, for which permission was also granted).

61. There is some evidence of MN's physical health and mental capacity in Ms Hill's report, and also in the mental capacity assessment carried out in November 2020 by Mr Robert Keniwell of TSF Consultants. This evidence is consistent with the evidence of the witnesses of fact, and with the recent GP notes which were put into evidence.

62. The TSF report states that MN has a learning disability, which impacts on her ability to understand complex information. The report, which was geared to MN's ability to litigate and to act as an executor, commented that she did not understand how to manage finances on a small level, including examples with

£10 and £20. It also commented that she was unable to understand or to retain information, assessed in relation to the Deceased's estate.

63. The report of Ms Hill is consistent with this. It notes, by reference to the Education, Health and Care Plan formulated when MN was about 13 years old, that she has a severe learning difficulty and then had impaired cognitive ability – at 13 years, it was that of a six-year old. She was deemed vulnerable due to her social immaturity. Ms Hill highlights the ongoing treatment for depression and the high levels of emotional distress exhibited when she met MN. Ms Hill expresses the assumption ('I would envisage') that MN has not had the opportunity to be able to develop key skills in terms of her independence as she has a close family who have supported her in all areas of life, and that she should have the opportunity to live independently. It was also Ms Hill's opinion that MN would continue to have care needs throughout her lifetime, and that these would increase as she grew older.

64. Ms Hill makes the following comments about MN's needs, by reference to her physical health and mental capacity.

i) She needs support with personal hygiene and hair care and will not wash or clean her teeth without being prompted.

ii) She cannot independently manage her own routines without support and prompting.

iii) She is incontinent and cannot recognise when she needs to urinate at night. Management of incontinence is not always successful. She is awaiting an appointment with an NHS continence service.

iv) She is unable to select clothing or footwear that is appropriate for the weather.

v) She experiences poor mobility and pain, which impairs her ability to move around.

vi) She cannot safely access public transport, shops or recreational facilities without extensive support. She requires help to interpret her needs, to communicate them and to ensure safety. She has difficulty in speaking, in understanding what others are saying and in reading. She has a cleft palate, hearing loss and asthma and eczema.

vii) She experiences depression and low mood and reduced motivation and is at risk of significant isolation.

viii) She is seeing a psychotherapist to help her come to terms with the loss of her father, and the circumstances of his death.

65. Shelina, in particular, gave evidence of the difficulty in providing care for MN in light of the matters described above. In particular, she painted a sad picture of how MN spends much of the time sat silently in front of the television. When I heard this I immediately wondered how MN would fare living alone. From the extensive evidence about the difficulties she faces in navigating life, I could not help fearing that placing her in a flat on her own would not necessarily be in her best interests. It is a pity that Ms Hill did not appear to consider this beyond a statement to her by MN that she wished to live independently (nor, indeed, did anyone else consider this), or to comment on how MN might cope, never having lived alone before and coming from a community which values the care of one's own family and especially the most vulnerable of them.

66. Ms Hill's evidence was that MN told her that she wanted to live independently, and concluded that 'with MN's self-determination and the right support, she could live safely with a positive risk-taking approach in her own accommodation'. There was little evidence of self-determination in Ms Hill's report, and none in the other evidence before the court. Nonetheless, she concludes that MN's current circumstances are not suitable in the medium or long term and that her care needs are delivered in an acceptable way, but in a way which does not offer her any empowerment or development of skills.

67. Ms Hill's recommendation is that MN does not require 24-hour residential support, but can live independently. She indicates that, in order to live independently, MN will require a significant package of support, which is suggested to be up to ten hours per day of care, and that care at this level will be needed for a significant period of time, never likely reducing below five hours per day (and increasing again when MN is older). She says that two options are available, the first being a referral to the local authority for the support needed to transition to independence in accordance with this recommendation. This would have a significant time delay, depending on the local service. Alternatively, there could be direct commissioning of private care. The type of care package proposed is approximately £18.50 per hour, leading to an (approximately) weekly charge of £1,295 per week or £67,340 per year. Ms Hill points out that MN may be able to access local authority day services, which may help to alleviate her isolation.

68. Mr Reed was particularly critical of Ms Hill's evidence. Shama's solicitors wrote a long list of Part 35 questions to Ms Hill on 10 February 2023, which had as a principal (but by no means only) complaint that she had prepared the report by reference to the wrong act (i.e. she had based it on the Care Act 2014 and not the 1975 Act). Mr Reed submitted that 'Ms Hill was completely out of her depth and that she has driven a coach and horses through convention, to the extent that the report is of no useful assistance'.

69. I reject this criticism, which does not accurately reflect the role of an expert. It is not the role of an expert to give an opinion on what remedy the court should award; her task is to give an expert opinion on the questions within her competence as asked. That is what Ms Hill has done. The problem with her report is that its key purpose is to put forward a proposal which is entirely unrealistic if it is to be funded from this estate. She also acknowledges that she is not medically qualified; I am not sure that it is within her competence to indicate that independent living is likely to improve MN's cognitive ability although I can accept that Ms Hill may well have professional experience of others who have faced some of MN's obstacles seeing such an improvement. Her evidence of MN's wish to live independently is not expert evidence but evidence of fact, on which Ms Hill has not been cross-examined. There is no corroboration of this; the wish for MN to live independently is most keenly a wish of others, as can be seen from the misconceived (and probably criminal) attempts to marry her off. I have already commented on my impression that Ms Hill's evidence of MN's determination to live independently sits uneasily with the rest of the evidence and, indeed, with the rest of her report.

70. Ms Hill gives useful evidence, certainly within her competence, of MN's likely entitlement to benefits, and of the local authority support that is likely to be available. She does not address the key question of what would likely happen if Shelina indicated that MN could no longer live with her. Nobody has directly addressed that question, even though it is the very spectre against which my decision has to be made.

Diary entry

71. On the first day of the trial, I declined to permit Mr Reed to introduce into evidence a diary entry which had not been disclosed, and which had allegedly been produced by MN some years ago. I was told that it went to two points: first, the relationship between Shama and MN and, secondly, MN's physical capabilities. My reasons for not allowing the diary entry to be introduced for the first time at trial were as follows:

    i) No satisfactory explanation was provided as to why the document had been produced so late.

    ii) As far as the relationship with Shama is concerned, this is primarily a matter of conduct, Ms Rauf having made allegations about Shama's treatment of MN. I was not satisfied that a single diary entry would cast much light on that (the entry being addressed also to Madeha), and also considered it unlikely that such a conduct matter would be relevant to the outcome. In the event, those acting on behalf of MN did not pursue the matter.

iii) It was not appropriate to allow new evidence of MN's capabilities to be introduced when permission had been given for expert evidence (even though Shama was very critical of the expert evidence that had been adduced on MN's behalf), and there was significant evidence of MN's health, and of her capabilities before the court.

iv) The Extended Disclosure which had been ordered by Deputy Master Marsh in accordance with CPR Practice Direction 57AD was Model B disclosure, i.e. of the documents on which the parties relied, 'the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet', and known adverse documents.

72. In particular, paragraph 8.3 of CPR Practice Direction 57AD provides that:

> '(2) A party giving Model B Disclosure is under no obligation to undertake a search for documents beyond any search already conducted for the purposes of obtaining advice on its claim or defence or preparing its statement(s) of case. Where it does undertake a search however then the (continuing) duty under paragraph 3.1(2) will apply.'

73. That continuing duty, set out in paragraph 3.1(2) of the Practice Direction, is to disclose known adverse documents. It was accordingly not open to Mr Reed to rely on the continuing duty of disclosure in support of an attempt to introduce a new document at trial which was not adverse to Shama's claim.

The statutory framework

74. Each of the claimants apply under section 2 of the 1975 Act for an order for reasonable financial provision from the Deceased's estate on the ground that the disposition of that estate is not such as to make reasonable financial provision for them. Shama applies under section 1(1)(a) as his surviving spouse. The other claimants apply under section 1(1)(c), each being a child of the Deceased.

75. Reasonable financial provision for a surviving spouse is such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance. In the case of the other claimants, it is such financial provision as it would be reasonable in all the circumstances of the case for the applicants to receive for their maintenance: section 1(2). As Lord Hughes JSC explained in the leading case of *Ilott v Mitson (No.2)* [2018] AC 545 at [12]:

> '12 The supplementary provisions of section 3(2) add for applicants in that limited class the direction to the court to have regard to the provision that the spouse or civil partner might have been expected to obtain in the

> event of divorce or dissolution, so that the assessment of this kind of claim may well be an exercise similar to that undertaken by the family court on an application for financial remedies after divorce or dissolution with, of course, the difference that the other spouse or partner is now dead. In the case of all other applicants, however, section 1(2)(b) makes clear that reasonable financial provision means such provision as it would be reasonable for the applicant to receive *for maintenance*.'

76. He went on at [15] to say this about the maintenance standard to apply to claimants who are children of the deceased:

> '15 The level at which maintenance may be provided for is clearly flexible and falls to be assessed on the facts of each case. It is not limited to subsistence level. Nor, although maintenance is by definition the provision of income rather than capital, need it necessarily be provided for by way of periodical payments, for example under a trust. It will very often be more appropriate, as well as cheaper and more convenient for other beneficiaries and for executors, if income is provided by way of a lump sum from which both income and capital can be drawn over the years, for example on the *Duxbury* model familiar to family lawyers: see *Duxbury v Duxbury (Note)* [1992] Fam 62. Lump sum orders are expressly provided for by section 2(1)(b). There may be other cases appropriate for lump sums; the provision of a vehicle to enable the claimant to get to work might be one example and, as will be seen, the present case affords another. As Browne-Wilkinson J envisaged (obiter) in *In re Dennis* (above) there is no reason why the provision of housing should not be maintenance in some cases; families have for generations provided for the maintenance of relatives, and indeed for others such as former employees, by housing them. But it is necessary to remember that the statutory power is to provide for maintenance, not to confer capital on the claimant. Munby J rightly made this point clear in *In re Myers*; *Myers v Myers* [2005] WTLR 851, paras 89–90, 99–101. He ordered, from a very large estate, provision which included housing, but he did so by way not of an outright capital sum but of a life interest in a trust fund together with power of advancement designed to cater for the possibility of care expenses in advanced old age. If housing is provided by way of maintenance, it is likely more often to be provided by such a life interest rather than by a capital sum.'

77. The question whether a will makes reasonable financial provision for an applicant is an objective standard. The question is not whether the deceased acted unreasonably, but whether the will produces an unreasonable result: *Ilott* at [16]–[18], citing *In re Coventry, decd; Coventry v Coventry* [1980] Ch 461 at 474–475.

78. Lord Hughes' comments at [19]–[20] and [22] are also relevant to the present claims, bearing in mind that the principal issue here is one of balancing the competing needs of applicants where the estate appears to be insufficient to meet all the claimed needs:

> '19 Next, all cases which are limited to maintenance, and many others also, will turn largely upon the asserted needs of the claimant. It is important to put the matter of needs in its correct place. For current spouses and civil partners (section 1(2)(a)(aa)), need is not the measure of reasonable provision, but if it exists will clearly be very relevant. For all other claimants, need (for maintenance rather than for anything else, and judged not by subsistence levels but by the standard appropriate to the circumstances) is a necessary but not a sufficient condition for an order. Need, plus the relevant relationship to qualify the claimant, is not always enough. In *In re Coventry* the passage cited above was followed almost immediately by another much-cited observation of Oliver J, at p 475:
>
> > "It cannot be enough to say 'here is a son of the deceased; he is in necessitous circumstances; there is property of the deceased which could be made available to assist him but which is not available if the deceased's dispositions stand; therefore those dispositions do not make reasonable provision for the applicant.' There must, as it seems to me, be established some sort of moral claim by the applicant to be maintained by the deceased or at the expense of his estate beyond the mere fact of a blood relationship, some reason why it can be said that, in the circumstances, it is unreasonable that no or no greater provision was in fact made.
>
> 20 Oliver J's reference to moral claim must be understood as explained by the Court of Appeal in both *In re Coventry* itself and subsequently in *In re Hancock*, where the judge had held that there was no moral claim on the part of the claimant daughter. There is no requirement for a moral claim as a sine qua non for all applications under the 1975 Act, and Oliver J did not impose one. He meant no more, but no less, than that in the case of a claimant adult son well capable of living independently, something more than the qualifying relationship is needed to found a claim, and that in the case before him the additional something could only be a moral claim. That will be true of a number of cases. Clearly, the presence or absence of a moral claim will often be at the centre of the decision under the 1975 Act.
>
> 21 ….

> 22 Nor, if the conclusion is that reasonable financial provision has not been made, are needs necessarily the measure of the order which ought to be made. It is obvious that the competing claims of others may inhibit the practicability of wholly meeting the needs of the claimant, however reasonable. It may be less obvious, but is also true, that the circumstances of the relationship between the deceased and the claimant may affect what is the just order to make. Sometimes the relationship will have been such that the only reasonable provision is the maximum which the estate can afford; in other situations, the provision which it is reasonable to make will, because of the distance of the relationship, or perhaps because of the conduct of one or other of the parties, be to meet only part of the needs of the claimant.'

79. I should say that each claimant accepts, subject to one point, that the Deceased's will did not make reasonable financial provision for the other claimants, and Arman in his brief submissions did not suggest otherwise. The point is that Mr Briggs for MN did not accept (at least in opening) that there was no reasonable provision for AB and CD. He also submitted that there is considerable duplication between their claims and Shama.

80. There is significant disagreement on what reasonable provision should be. In particular, there is a dispute about the extent to which the Deceased maintained MN, in some measure tied in with the finding of fact I have made as to where she lived, and the extent to which he assumed responsibility for MN's maintenance (even though this is not expressly a criterion for applications made by a child of the deceased, as to which see section 3(3)(a) of the 1975 Act).

81. The claim by Shama as a surviving spouse is not limited to maintenance. Section 3(2) of the 1975 Act provides that the court must take into account:

> "(a) the age of the applicant and the duration of the marriage [or civil partnership];
>
> (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.
>
> …[and] unless at the date of death a [judicial separation order] was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a [divorce order][; but nothing requires

the court to treat such provision as setting an upper or lower limit on the provision which may be made by an order under section 2]"

82. Mr Reed begins his submissions on the approach of the court to claims by a surviving spouse with the decision of the Court of Appeal in *Cunliffe v Fielden* [2006] Ch 361. There, Wall LJ said this:

> '19 There can I think be little doubt that in relation to claims for financial provision and property adjustment in proceedings between divorced former spouses, the correct approach for the court to adopt, following the decision of the House of Lords in *White v White* [2001] 1 AC 596, is to apply the statutory provisions to the facts of the individual case with the objective of achieving a result which is fair, and non-discriminatory. Having undertaken that exercise, a way of assessing the fairness and non-discriminatory nature of the proposed result is to check it against the yardstick of equality of division. There is, however, no presumption of equal division of assets, but as a general guide, in the words of Lord Nicholls of Birkenhead, at p 605: "equality should be departed from only if, and to the extent that, there is good reason for doing so." He added:
>
> > "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."
>
> 20 With appropriate adjustments based on the different statutory provisions, I see no reason in principle why the *White v White* approach to marital financial claims should not be applied to proceedings under the 1975 Act brought by a widow, not least because, in any case brought under section 1(1)(a) of the 1975 Act, section 3(2) imposes a statutory cross-check of its own to the provision which Mrs Cunliffe might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce. This subsection assumes a particular importance in the instant case due to the brevity of the marriage.
>
> 21 Caution, however, seems to me necessary when considering the *White v White* cross-check in the context of a case under the 1975 Act. Divorce involves two living former spouses, to each of whom the provisions of section 25(2) of the Matrimonial Causes Act 1973 apply. In cases under the 1975 Act a deceased spouse who leaves a widow is entitled to bequeath his estate to whomsoever he pleases: his only statutory obligation is to make reasonable financial provision for his

> widow. In such a case, depending on the value of the estate, the concept of equality may bear little relation to such provision.'

83. In the leading matrimonial case of *Miller v Miller* [2006] 2 AC 618, Baroness Hale of Richmond said this at [144]:

> '144 Thus far, in common with my noble and learned friend, Lord Nicholls of Birkenhead, I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living.'

84. In *P v G (Family Provision: Relevance of Divorce Provision)* [2006] 1 FLR 431 Black J, as she then was, said this at [227]:

> '227 In my judgment, the emphasis in *White v White* upon the need to pay careful attention to the words of the Matrimonial Causes Act 1973 rather than elevating to prominence particular factors from a simple list drawn up without any weighting reinforces the correctness of the preference for the *Besterman* approach properly reflects the language of the 1975 Act.'

85. The approach of Oliver LJ in *Re Besterman (Deceased)* [1984] 1 Ch 458 (at 469) was that 'the section 25 exercise is merely one of the factors to which the court is to "have regard" and the overriding consideration is what is "reasonable" in all the circumstances. It is, however, obviously a very important consideration and one which the statute goes out of its way to bring to the court's attention'. The exercise is thus not the starting point in the assessment of the surviving spouse's claim, but something to be taken fully into account.

86. In *P v G*, the parties made submissions as to what the appropriate division would have been on divorce, taking account of the section 25 factors. In light of those submissions and on the facts of that case, Black J said as follows:

> '235 I do not think it is helpful to go further with the divorce fiction and to attempt to translate the percentage division of the categories of asset into more precise figures. One has only to begin upon the process, as I

> have done before abandoning it, to realise that any appearance of accuracy and precision in such an exercise is spurious….
>
> 236 Ultimately I have concluded that what the statute contemplates in a case such as this is not that the entire fictional ancillary relief case should be played out within the Inheritance Act claim but that the court should simply reach sufficient of a conclusion about how it would have been resolved to take that factor into account in considering what would be reasonable financial provision under the 1975 Act. I am comforted to find that, looking at the provision that the plaintiff might have expected to get on divorce in *Re Besterman*, Oliver LJ does not adopt a particularly precise approach but comments: "What that is is a matter of speculation, but I would not seriously quarrel with Mr Johnson's suggestion that an overall sum of £350,000 could not be considered excessive". My conclusion that an equal division of assets would have been the likely outcome on divorce is, in the light of all of this, sufficient guidance for s 3(2) in the circumstances of this case, in my judgment.'

87. Black J concluded her consideration of the divorce analogy, by saying the following at [242]. It is important to remember that *P v G* is a case where the net estate was of such size that it enabled more than the fulfilment of needs.

> '242 I am struck by the force of the repeated observations in the decided authorities about the difference between divorce where there are two surviving spouses for whom to make provision and death where there is only one. It seems to me probable that this difference will not infrequently be reflected in greater provision being made under the 1975 Act than would have been made on divorce, and that this may legitimately be so even where the estate is a relatively large one, as it is here. In saying this, I have not ignored the importance of testamentary freedom. The wish to be in a financial position to make provision by will for adult children, whilst not a financial need as such for the purposes of s 25 of the Matrimonial Causes Act 1973, was recognised in *White v White* as a valid consideration where resources exceed need and I have already said that I take into account the obvious desire of the deceased to make provision by his will for his children, even though they do not seek to put forward a case of "need" under the 1975 Act.'

88. One consequence of the decision in *Miller*, as shown by Baroness Hale's statement above, is that the court in matrimonial financial remedy cases considers whether needs or compensation justifies departure from a yardstick of equality. At [142] she also said this:

> '142 Of course, an equal partnership does not necessarily dictate an equal sharing of the assets. In particular, it may have to give way to the needs of

> one party or the children. Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution: see, e g, the observations of Munby J in *B v B (Mesher Order)* [2003] 2 FLR 285. Recognising this is one reason why English law has been so successful in retaining a home for the children.'

89. This is a comment which I consider will, in its reference to the surviving spouse and her children, have even greater weight in a 1975 Act case where the breadwinner in the marriage no longer needs to be provided for, and where the net estate is not large enough to meet all the surviving spouse's needs. It also stresses the need for the children of the marriage to be provided for during their childhood, in particular with their need for housing in mind.

90. In that context, as Mr Dubbery for Shama's children reminded me, section 25(1) of the Matrimonial Causes Act 1973 provides that it is the duty of the court in deciding whether to exercise its powers …. 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. This highlights also that provision for a mother provides a benefit to her infant children, and very clearly so where it is to meet housing needs or to meet household expenditure or other expenditure incurred directly or indirectly for the benefit of the children. See, albeit in the context of consideration of whether a mother should act as her daughter's litigation friend in 1975 Act proceedings, *Keays v Executors of Parkinson* [2018] EWHC 1006 (Ch) at [45]: 'To the extent that provision is made from the deceased's estate, this will reduce the demands made on [the claimant's mother's] financial resources and, possibly the time that she spends caring for the claimant. Her interests and those of the claimant are to that extent coincident.'

91. Of course, a distinction between 1975 Act and matrimonial cases, other than the requirement to bear in mind the principle of testamentary freedom, is the fact that the financial needs and financial resources of other claimants and other beneficiaries under the will or intestacy fall to be taken into account.

The statutory criteria

The financial resources and financial needs which the applicants have or are likely to have in the foreseeable future

92. The court considers the financial resources and financial needs of each applicant, both in relation to their own claim and in relation to claims pursued by others (see section 3(1)(b) of the 1975 Act).

93. I have expressed above scepticism about Shama's presentation in evidence of her current income and expenditure. Her fifth witness statement indicates that she currently has monthly outgoings of £4,250, projected into the future to be £5,061 per month. Her income from universal credit and child benefit is said to be only £1,214.06 per month. The current discrepancy is unexplained, and I infer that Shama's current outgoings are much less than she has said. It is also likely that she has received undisclosed financial assistance, most likely from other family members. I reject Mr Reed's optimistic submission that the figures for expenditure were not undermined in cross-examination. Mr Briggs aptly described Shama's statement of current outgoings as aspirational.

94. I have clearly been provided with an inaccurate picture of Shama's finances, not least as no indication has been given, beyond loans of around 20% of the legal fees incurred in these proceedings, how the litigation has been funded, either for Shama or for her children. While the figures for utilities other than gas and electricity are probably accurate, I have little confidence in the others. As to the more general figures, it is said for instance that Shama is currently spending £150 per month on school uniforms. This was not raised in cross-examination but I would be shocked if the parents of children in a state primary school were required to spend £900 per child each year on school uniforms.

95. Despite this, it is clear that Shama will have significant needs going forwards (a proposition not disputed by Mr Briggs), for her own needs and for those of her children, the two very much overlapping for as long as they are children. Shama will also lose her entitlement to universal credit if awarded a lump sum, save to the extent that it is used to buy a home for her and the children. No attempt has been made to capitalise Shama's future income needs, using the *Duxbury* tables or otherwise.

96. Shama's main financial need is for housing. Her case is that modest accommodation would cost around £720,000 to £750,000 and something is needed for moving costs. The evidence before me is that this would buy a three-bedroomed house in the area in which the family has been living and which is familiar to them. As a first-time buyer Shama would pay 5% stamp duty land tax on the purchase price of a property to the extent it exceeded £425,000. No relief is available for properties costing more than £625,000, and 5% SDLT would then be payable on the price exceeding £250,000.

97. As far as capital costs are concerned, Shama seeks the cost of a Peugeot estate car worth around £40,000, which she indicates would be cheaper to run than

the Range Rover which Fahid sold (and the proceeds of which he has indicated were either given to Shama or used in the administration of the estate).

98. Shama also indicates that she has a liability for £55,000 in loans, which I accept despite the confusion in explaining in cross-examination the way in which it is comprised, and £11,250 in unrecovered costs of the Subsidiary Claim, which was unchallenged.

99. I take into account that Shama may well remarry, and that she has some earning capacity, at least when her children are older. She is clearly capable, and financially literate, and her English is good. Before AB was born she worked for the Deceased. Not least given the family's cultural heritage, I accept that her sons will when they are adults likely fulfil a moral obligation to support her if necessary and there may be other sources of support, such as the Deceased's brothers (one of whom has been living at Coldershaw Road) and their families.

100. As I have already indicated, AB and CD will be dependent on their mother during their childhood. Presently they each have only £250 in a child ISA. Ms Majeed says on their behalf that she sees that 'they are in great financial need and their life has changed dramatically since their father's death. They no longer have access to the essential and luxury items that their father used to provide to them when he was alive'. This is consistent with my impression that Shama's current outgoings are less than she stated because of her reduced household income following the death of the Deceased. Ms Majeed expresses the wish of the Deceased that his children would be privately educated in an Islamic school. (I would note that the evidence does not suggest that his older children were so educated.)

101. Their claimed needs, not explored in cross-examination as Ms Majeed did not attend the trial, are for school fees, activities and trips at £6,000 each per annum, £6,000 each per annum for clothes and holidays (which is also claimed by Shama), and for private tuition and other activities, £500 each per annum for smartphones and laptops and £66,600 each for university costs. £181,000 is claimed for AB and £231,000 for CD, the discrepancy accounted for by the latter's younger age and his need for extra tuition. These sums are reached by the crude method of multiplying the annual sum claimed by the number of years of childhood remaining rather than by capitalising a future income stream.

102. Mr Dubbery's justification for these figures did not extend far beyond the fact that they were contained in Ms Majeed's statement. He compared them with the figures put in for EF, noting that they showed what this family considered

to be reasonable. The notion that this estate could fund them, even if they were all reasonably required for the children's maintenance, is far-fetched.

103. MN's most obvious financial need is for housing. She has no beneficial interest in property and no legal right to live at 38 Compton Avenue. Shelina has said that MN cannot continue to live with her. For reasons explained above, I consider that one of the motivations for putting forward this case is to bolster MN's claim in these proceedings. I also accept that Shelina's life has been dramatically and adversely affected by her caring for MN and that she genuinely wishes to be relieved of this obligation. But, principally because of the moral obligation she (and the other family members at that address) have to ensure that MN is not rendered homeless, I doubt whether MN will in fact be made homeless. If she ever is, she will unfortunately have to fall back on the resources of the state. MN would certainly be in priority need in such circumstances, due to her vulnerability. The Homelessness Code of Guidance for Local Authorities expressly deals with cases where adults with learning difficulties are asked to leave accommodation previously provided by family members.

104. I reject, however, the suggestion made on behalf of Shama that the fact that 38 Compton Avenue was owned by the Deceased and Shelina as beneficial joint tenants after their separation and divorce, and supported by an endowment policy, is evidence that Shelina had agreed (or, as Mr Reed put it, struck a deal) to look after MN on a long-term basis. This arrangement was entered before MN moved to the property and makes sense as a way of ensuring that Shelina's continued ownership and thus occupation of the property could be protected. I do not believe it had anything to do with MN.

105. As to MN's other financial needs, they are addressed both in Ms Hill's report and in Ms Rauf's evidence. These estimates are predicated on MN living independently with extensive privately paid care. This is not something which can be funded from this estate. Aside from these projected expenses, Ms Hill identifies a paid continence service at £780 per year, for as long as NHS provision is unavailable, equipment in the home to assist with lack of mobility and physiotherapy at £80 per session. As I have noted, she indicates that MN may benefit from a local authority day service at around £50 per day. Putting aside the projected costs relating to MN living independently, which is not presently viable to be funded from the estate, she has a need for occasional holidays with family, some transport costs (noting that her ability to travel may be limited by agoraphobia) and clothing.

106. Mr Briggs also suggests that a fund for the appointment of a deputy for MN and management fees for a discretionary trust on her behalf would amount to around £5,000. Whilst not the primary basis on which MN's claim has been presented, I consider that the evidence clearly suggests that wherever she is

living MN may benefit from some ability to fund carers. This would provide Shelina with some respite if MN continues to live with her, and (without wishing to criticise Shelina's considerable efforts) may provide some improvement to certain aspects of her care, thus improving MN's quality of life. There is, unfortunately, uncertainty in MN's future and there will be merit in some fund being available in the event that she is housed in inadequate accommodation, or inadequate care is available for her.

107. MN's only income is her PIP of £325 per month, based on the lower rates (and based on the 2022-23 figures). Ms Hill indicates that the higher rate ought to be available for the daily living component, which would be an increase of some £30 per week. Ms Hill also indicates that MN may be entitled to some other benefit payments, such as Universal Credit, but can give no indication what MN's award would be. I do not consider that MN is likely to have any future earning capacity.

The financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future

108. I have no evidence of Fahid's financial resources and financial needs.

109. Mrs Begum has not participated in the proceedings and there is no evidence from her or on her behalf. She currently lives with Shama, but Shama wants to live apart from her. There is some evidence that she is not without means, it having been suggested that she loaned money to the Deceased in relation to 16 Coldershaw Road. The Deceased did not mention Mrs Begum in the letter of wishes even though she was housed in a property owned by him. I surmise that he would have assumed that the family would ensure that she has a home. Nobody has made any submissions in relation to her financial resources and needs.

110. Likewise, Madeha has not participated in the proceedings. She received £197,617, apparently from Fahid, which (if correct) will mean that any claim to recover that sum from her will most likely be a matter between the two of them. I have no other evidence about her financial situation.

111. Arman has loans of £29,000, mostly comprised of student loans. He intends to take a further course and then to look for employment. At the date of the hearing he had around £1,500 left from the loans and from income he received from Fahid for work carried out after their father died. Shama suspects that this income may have derived from the estate and may have been improperly paid to him, but Cripps have not suggested that any claim lies against Arman. He currently lives with his mother and did not suggest that there was any reason why he could not continue to do so. He is disappointed by his degree, but there is no suggestion that he has any impairment to his earning capacity.

112. The evidence of EF's litigation friend suggests he requires roughly £350 per month for school and extra-curricular activity and clothes, and £400 per month for clothes, plus £60,000 for university costs and £10,000 for driving lessons and car expenses. Ms Bali indicates that EF's mother has decided to have no contact with him. She gives no indication how EF's current financial needs are being met, and makes no reference to his father, Fahid. She says, 'EF's grandfather [i.e. the Deceased] had undertaken all financial responsibilities such as the bills for where EF is/was staying'. This jars with the letter from Fahid's solicitors to Cripps dated 26 January 2023, in which it is said that none of the income from the properties was paid to the Deceased in his lifetime, and that when the Deceased needed extra money, he would ask Fahid who would then arrange the necessary funds.

113. The evidence filed on behalf of EF has not been tested in cross-examination. I am not prepared on the basis of the untested evidence to find that EF's financial needs are not met by his father. Indeed, Ms Bali does not say that they are not.

Any obligations and responsibilities which the Deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the Deceased

114. Shama, AB and CD were living with the Deceased up until shortly before his death. He had a responsibility to make reasonable financial provision for his wife and his infant children.

115. I do not consider that the Deceased had assumed a moral obligation to fund post-secondary education for his younger sons (or his grandson). Arman funded his own university course by means of loans and it is most likely that the Deceased would in due course have expected his younger sons to do likewise. Given the size of this estate this is in any event an academic question.

116. I consider that he also had a moral obligation to make financial provision for MN. He had accommodated her into her adulthood, and as I have found above, she continued to spend time at 16 Coldershaw Road even after she had moved to live with Shelina. Shama accepted in evidence that the Deceased did not want MN to leave. My finding of fact about where MN lived in the period before her father's death has little, if any, impact on this moral obligation. MN has considerable challenges ahead of her and, as evidenced by Shelina's agreement to house MN, the whole family understood a moral obligation to ensure that she was looked after.

The size and nature of the net estate of the Deceased

117. The size and nature of the net estate remains uncertain, which poses a significant difficulty in the resolution of this case. Cripps, following its appointment as administrator of the Deceased's estate, has produced four interim reports on its administration. No complaint was raised by any party about Cripps' conduct in this regard. The fourth and most recent report is dated 20 February 2023.

118. In that report Cripps indicate the following in relation to the assets of the estate:

i) 16 Coldershaw Road – valued at £850,000 for probate purposes, and is subject to a mortgage of £206,665.

ii) 26 Whitton Road – valued at £350,000 for probate purposes. Cripps suggested shortly before the trial that the flats might fetch £600,000 with vacant possession, or £475,000 with sitting tenants, there being such tenants at the moment.

iii) 511 High Road – valued at £1.1m for probate purposes.

iv) Property in Pakistan – it appears that the Deceased formerly owned a property in Pakistan but that it was sold in July 2017. Cripps do not presently consider that the proceeds of sale are part of the estate and it was not suggested otherwise at trial.

v) The Deceased had some rings valued at £480 and, much to Shama's chagrin, Fahid sold his Range Rover whilst acting as executor, realising £15,000.

vi) Cripps consider that the Deceased was entitled to the sum of £65,527.50 remaining in an HSBC account (ending -774), in the name of Wembley Central Indoor Mall Ltd, and that it thus forms part of the estate and that Fahid should also account for monies received from the High Road and Whitton Road properties. The draft estate accounts do not provide a figure for this income but Cripps says that its provisional view is that Fahid owes the estate £170,118.22, not including the HSBC balance referred to above. Cripps indicates that this sum may be reduced to £116,694.69 on the provision of further information. Fahid's solicitors challenge the figures and have indicated that they will provide a report to Cripps accordingly.

119. Cripps say the following about the liabilities of the estate:

i) A claim to the payment of the sum of £550,000 in relation to the Coldershaw Road property has been made on behalf of the Deceased's brothers, Zahir and Shakeel Bala and Mrs Begum. Cripps consider that those persons have not yet begun to establish a legitimate claim against the estate and have indicated that Cripps will likely apply to court for directions once the properties are sold, i.e. for permission to make distributions on this basis.

ii) A claim to repayment of a loan of £60,000 has been made by solicitors acting for Mr Rauf on behalf of himself and his mother. Cripps are not yet in a position to make a determination of whether it considers this sum to be due. I proceed on the basis that it may well be due.

iii) I was told at trial that Cripps' fees to date stand at around £116,913. There will undoubtedly be further costs in administering the estate and they could increase significantly if a dispute with Fahid, or those claiming that the Deceased was indebted to them, becomes litigious, or if an application to court under CPR Part 64 becomes necessary.

120. The award the court makes is made out of the net estate as it is. Mr Reed submitted that I should make a finding of fact on the balance of probabilities as to what the value of the net estate is, and then make an award out of that sum. The power of the court under section 2 of the 1975 Act is to make an award out of the net estate. By section 25(1), the 'net estate' is defined as 'all property of which the deceased had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities, including any inheritance tax payable out of his estate on his death', together with provision for other sums treated as part of the estate, which are not relevant for present purposes.

121. I am quite satisfied that in this case the award of financial provision can be made only out of the net estate as it proves to be at the end of the administration, and not out of some hypothetical net estate that is based on a finding of fact which ultimately proves to be inaccurate. In a case where the estate is not large enough to meet the parties' needs and the whole estate is to be consumed in meeting awards under the 1975 Act, those awards need to take account of the uncertainty in the value of the estate as at the date of the hearing (as to which see section 3(5)). With an estate that will not be exhausted by the claims of the parties, an assessment of the probable value of the estate will be needed, as occurred in *P v G*.

122. Mr Briggs helpfully provided as part of his closing submissions a table showing both the 'certain' assets and liabilities of the estate (although the realisable value of the assets is of course not certain), and a best and worst

case scenario for the ultimate value of the net estate. I reproduce those tables here, leaving out of account for the time being the parties' litigation costs. The other counsel did not suggest that use of these tables was unjustified.

Certain assets and liabilities

Certain Assets	Cripps estate account	35,270
	511 High Road	1,000,000
	16 Coldershaw Road	850,000
	26 Whitton Road	475,000
Certain Liabilities	Mortgage on 16 Coldershaw Road	(206,665)
	Funeral costs	(7,146)
	Administrative costs to date	(116,913)
	Further admin costs, say	(50,000)
NET ASSETS		**£1,979,546**

Best- and worst-case scenarios

	'Best' case (£)	**'Worst' case (£)**
Net assets	**1,979,546**	**1,979,546**
Properties 15% under/ overvalued	232,500	(232,500)
Disputed estate debts	-	(610,000)
Recovery of Fahid's debts	235,646	-
Assets held by Fahid (Jewellery, Range Rover)	15,480	-
Additional costs of recovery	(10,000)	(50,000)
Position before costs	**2,453,172**	**1,087,046**

123. It seems to me that it must be likely in the present economic climate and associated housing market that there is a real likelihood of the properties selling for less than their probate valuation or the values attributed above. The prospect of undervaluation would seem remote. I also consider that the costs of recovery of liabilities from Fahid are uncertain, as is his ability to meet his liabilities, and that it presently appears unlikely that others will make good their claims against the estate, although the claim by the Rauf family members may be stronger than the other intimated claims. I also doubt whether this table takes adequate account of Cripps' final costs of administration, which are likely to be approaching £200,000.

124. Taking these factors into account, the net estate presently seems as though it will most likely be in the range of £1.6m to £1.7m, but could realistically be considerably less than this. This, of course, does not take account of the payment of any of the parties' litigation costs, which is a subject to which I will come below. It is clear that the properties will all have to be sold, and that the costs of sale will accordingly be borne by the estate (compare *P v G* at [70]).

125. I am assuming for these purposes that there is no claim in respect of the settlement of Madeha's claim. Although Madeha has been ordered to repay to the estate the amount paid to Madeha, it now appears to be accepted that Fahid paid this sum out of his own moneys, at a time when he had a grant of probate. As he acted in this regard without a *Beddoe* order, the prospect of his being entitled to recover any of these moneys from the estate under a claimed right of indemnity would seem remote.

126. It should also be noted here that, as previously mentioned, the spousal exemption means that the provisions of the will led to no inheritance tax liability as Shama was left a life interest in the whole estate. An award under the 1975 Act is deemed to have effect as from the deceased's death subject to the provisions of the order (section 19(1)). It is common ground that the nil-rate band available to the Deceased was £650,000, including the transferable nil-rate band from his late first wife. Although this was not apparently appreciated by the parties, it seems to me that this nil-rate band will be partly used up by the transfer of value to Shelina of the net value of 50% of 38 Compton Avenue to her by survivorship. The draft estate accounts value this interest at £252,026.16 (which takes account of the remaining mortgage on the property as at the date of death).

127. This will leave around £400,000 of nil-rate band to be used in making awards to parties other than Shama. Any sums awarded in excess of that sum will incur a liability to inheritance tax of 40% of the excess. Whilst it is possible to create a trust for the benefit of a bereaved infant child of the Deceased or a disabled person, which will be outside the periodic charge to inheritance tax under Chapter III of the Inheritance Tax Act 1984, this will not avoid the charge to tax on the transfer of value on death.

Any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased

128. I have set out above the evidence about MN's cognitive impairment, and its impact on her daily life.

Any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant

129. Shama invites the court to take account of Fahid's conduct, in taking out a grant of probate with MN and acting as executor in circumstances where it was apparent that she did not have capacity to do so and also in pursuing the Subsidiary Claim in which he dishonestly claimed that two properties in the estate belonged to him. Although again academic because of the size of the net estate, I consider that in light of these matters Fahid has exhausted his right to be considered.

130. The other factors that were raised at trial, and which I have taken into account, are set out above where I deal with the factual disputes raised by the parties. No other relevant conduct issues were pursued at trial.

In relation to AB and CD, the manner in which they were being or in which they might expect to be educated or trained

131. Whilst I accept that the Deceased may in principle have wished for his sons to have a private Islamic education, none of his children have been so educated. I consider this to have been at most an aspiration if resources so allowed which, in the event, they currently do not.

Considerations relevant to Shama as the surviving spouse of the Deceased

132. I have set out above the statutory considerations. As they had been together since 2005, although not married in English law until 2012, the marriage of Shama and the Deceased is to be treated as approaching a long marriage.

133. There was no suggestion that Shama made anything other than a full contribution to the marriage, working for the Deceased before she had children and then looking after their three children once born. In particular, she supported the family, and Abdullah himself, through Abdullah's health problems and supported the Deceased in his terminal illness. She has also accommodated Mrs Begum and the Deceased's brother.

134. The only submission I received about the application of the divorce analogy was from Mr Reed, that the authorities on the widow's entitlement demonstrate a starting point of between 50% and 60% for a wife but, with two young children to support, there is an entitlement to a higher level.

135. This is not quite the right approach. The question when applying the divorce analogy is what award would have been made for Shama if the marriage had ended by divorce rather than death. But, when one considers the yardstick of equality, and in particular the apposite comments of Baroness Hale in *Miller* at [142] (cited above), I consider that Mr Reed's conclusion is correct. The Family Court would be astute to ensure first of all the provision of a home for the wife and children during their minority. If the Deceased had still been alive, he would have continued to have an earning capacity, possibly through

partnership with Fahid and other family members. If the value of the assets available to satisfy a matrimonial financial remedy application was the same as the net estate, I have no doubt that Shama would have been awarded significantly more than 50% if the children were to live with her.

Discussion

136. It will be apparent that a number of difficulties arise in the evaluation of the claims in these proceedings. The value of the net estate is uncertain in circumstances where, on any view, not all of the claims of the parties can be met. I do not consider that either Shama or Ms Rauf on behalf of MN have given me full and accurate information about their financial needs and financial resources. Any real explanation of how any party has met their litigation costs is conspicuously absent. The only evidence I have of an outstanding liability for litigation costs is of the £55,000 indebtedness assumed by Shama.

The parties' positions

137. Mr Reed submitted on behalf of Shama that a capital sum should be awarded to her first, and that it should be at least £750,000 for housing (which would entail £25,000 of SDLT being payable), £10,000 for moving costs, together with £40,000 for a car. He also submitted that Shama needed an income. Perhaps with an eye to the limited size of the net estate, he did not make any positive submission as to what sum should be awarded in order to allow income needs to be met.

138. Mr Dubbery submitted that the provision for AB and CD should multiply the estimated annual costs in Ms Majeed's evidence by the number of years they have left in education, plus add on the claimed sums for university costs, making a grand total of £367,270. He did not explain how this sum could be funded from this estate in addition to Shama's housing costs and other income needs, in light of the size of the net estate. Any attempt to do so would have been forlorn.

139. Mr Briggs' submission was that the will should be varied so as to provide for a 50% split of the net estate between Shama and her children on the one hand, and MN on the other. In the obvious absence of sufficient funds to pay for the care which Ms Hill suggests that MN would need if she lived independently, it was unclear to me what was the suggested purpose of such a large award in MN's favour.

140. Arman's submissions were brief and focused. He acknowledged that Shama and her children needed accommodation, and also said that MN needed a home, but that the estate did not have enough funds to cover all care costs. He

asked that the claimants be given what they reasonably required and then to be considered if anything was left in the pot. Despite the problems with his factual evidence, his brief intervention showed some real maturity.

141. None of the claimants seriously addressed the question of how the claims competing with their own should be met. This was because each, no doubt understandably in the context of this litigation, put forward a solution which necessarily would not allow the other side's claims to be met. The figures proposed by Shama and her children would not allow any provision for MN on even an optimistic view of the likely value of the net estate. The equal split proposed by MN would leave Shama with less than on divorce, and would very likely at most allow the provision of accommodation of less than desirable standard and nothing to meet other expenditure.

142. I should also add that both Mr Reed and Mr Briggs suggested that the order should be framed so as to minimise the incentive for tactical behaviour by the other side. Mr Reed suggested that if the residue was divided, Fahid would have an incentive to continue to act litigiously. Mr Briggs responded by suggesting that Shama might delay in moving if she has no motivation to co-operate in selling 16 Coldershaw Road at the highest possible price. I initially saw force in this line of argument, but Fahid is considered by Cripps to owe money to the estate, not the other way round. As to Shama, this kind of consideration is perhaps more relevant to how the estate is to be administered than to what form of award ought to be made. It will be for Cripps to determine how to complete the estate administration in light of this judgment.

The costs of the litigation

143. The represented parties were agreed at trial that the parties' litigation costs should be paid out of the estate first, i.e. before the court considers what award to make to each of the parties. The agreement in this regard was caveated by Mr Reed to the extent that he submitted that some reduction should be made to MN's claimed costs (of £319,000), to take account of the fact that Ms Rauf changed solicitors in the months before the trial, which will have led to some duplication of costs, and because of the attacks on Shama contained within Ms Rauf's written evidence. I am told that Shama's costs stand at some £282,000 and those of AB and CD at £102,000.

144. I have been given little assistance on the legal principles said to justify the payment of legal costs in this way. Mr Briggs referred me to *Hirachand v Hirachand* [2022] 1 WLR 1162. The question in that case was whether a success fee could be recovered as part of a maintenance-based award. At [58], King LJ said that it could be:

> '58 In a financial remedy case, outstanding costs which could not otherwise be recovered as a consequence of the "no order principle" are capable of being a debt, the repayment of which is a "financial need" pursuant to s25(2)(b) MCA 1973. In my judgment a success fee, which cannot be recovered by way of a costs order by virtue of section 58A(6) CLSA 1990, is equally capable of being a debt, the satisfaction of which is in whole or part a "financial need" for which the court may in its discretion make provision in its needs based calculation.'

145. Mr Briggs' submission was that a party's liability for their own legal costs of the proceedings is part of their financial needs and resources for the purposes of the 1975 Act and that it is legitimate to include a sum to pay that liability. What King LJ said was that the satisfaction of debt was a legal liability which may be treated as a financial need. As I have mentioned, the evidence does not reveal whether the parties do have a current debt for the full extent of their legal costs (either to their solicitors or to others from whom they have borrowed for the purpose).

146. It is a persistent myth that the costs of the parties, or possibly the costs of the claimant(s), are invariably paid out of the estate in a 1975 Act claim. That may have been the practice of the courts in the earlier days of the 1975 Act and its predecessor, but the practice was deprecated in *In re Fullard (Deceased)* [1982] Fam 42, especially in cases where the claim failed.

147. That proceedings under the 1975 Act follow the general rules as to costs in civil litigation, and not the rules in matrimonial financial relief proceedings, is clear. As Briggs J, as he then was, said in *Lilleyman v Lilleyman (No.2)* [2012] 1 WLR 2801 at [26]:

> '26 I must in concluding express a real sense of unease at the remarkable disparity between the costs regimes enforced, on the one hand for Inheritance Act cases (whether in the Chancery or Family Divisions) and, on the other hand, in financial relief proceedings arising from divorce. In the latter, my understanding is that the emphasis is all on the making of open offers, and that there is limited scope for costs shifting, so that the court is enabled to make financial provision which properly takes into account the parties' costs liabilities. In sharp contrast, the modern emphasis in Inheritance Act claims, like other ordinary civil litigation, is to encourage without prejudice negotiation and to provide for very substantial costs shifting in favour of the successful party. Yet at their root, both types of proceedings (at least where the claimant is a surviving spouse under the Inheritance Act) are directed towards the same fundamental goal, albeit that the relevant considerations are different, and that there is the important difference that one of the spouses has died, so that his estate stands in his (or her) shoes.'

148. The real difficulty in applying this costs regime is that if I make awards without directing that the parties' costs be paid out of the estate first, either the entire estate will be exhausted in so doing (and especially if the estate turns out to be worth less than I have estimated), or there will be insufficient sums left within the estate to meet the costs of the parties, either to allow an order that costs come from the estate, or that there be an indemnity for such costs if not recovered pursuant to any inter partes costs orders that may be made.

149. Even though Arman addressed me briefly at the trial, he was not defined as an active party following the case management hearing on 28 July 2022. There was no active defence of the claim by any person on behalf of the estate after that date and I surmise that the bulk of the costs are likely to have been incurred since then. Because the only active parties are claimants, it is likely that there will be no defendant against whom to seek a costs order, at least for the period since there was an active defence of the claims by a beneficiary of the estate. In practice, the trial was a dispute between competing claimants.

150. In principle, there is no reason why the various claimants could not seek orders for costs against the other claimants following the handing down of this judgment. That may generally be justified where offers of settlement have been made (the issue as it arose in *Lilleyman*). But this is a claim where as it seems to me there are two other contrary considerations. First, save (possibly) as to MN's position in relation to AB and CD, it is accepted by each claimant that the Deceased's will does not make reasonable provision for any other claimant. Even in relation to AB and CD, the thrust of Mr Briggs' argument is that their maintenance needs are adequately met by Shama's claim. While he did not make this point explicitly, he did not suggest that the will made adequate provision for them absent an award to Shama, at least in the circumstances as at the date of the hearing. Whether an award is made to Shama or to them directly, it will be in substance at least in part for their benefit.

151. The second consideration is that, despite the point mentioned in the paragraph above, each claimant (no doubt with self-interest in mind) agrees that the other claimants' costs can be paid out of the estate and that their claims will between them exhaust the net estate. I agree with the last of these propositions.

152. For these reasons I am satisfied that it is appropriate to order that the costs of the claimants be paid out of the estate first, after payment of the Deceased's testamentary expenses and the costs of administration. As matters have turned out, it is unfortunate that no costs management order was made. I do not consider that the costs should be paid in full without further consideration, but should be assessed on the indemnity basis unless agreed by Shama, in the case of MN, and by MN in the case of Shama and her children (in the event that MN's maximum entitlement is otherwise not able to be met). The costs will

be payable in the course of the administration of the estate, so the question of the timing of payments will, subject to the assessment process, be in the hands of Cripps.

153. I am fortified in the view that it is permissible to make an order in this form, notwithstanding the general rule on costs in 1975 Act proceedings, by the comments of Black J in *P v G* on this subject. In that case, the defendants had by the date of the trial already paid their litigation costs out the estate and prepared estate accounts on that footing. The judge said this, at [247], after setting out the value of the net estate in light of those costs:

> '…it is, in my view, inappropriate that they should have taken their costs of this litigation from the estate without the consent of [the claimant] or reference to her. It does not necessarily follow in litigation of this type that the defendants' costs will be paid from the estate, particularly not where there is a beneficiary in P3's position [i.e. the child of the claimant] who has not been a defendant in the proceedings and has not had a say in (and may not agree with) the way in which the defence to the claim has been run.'

154. Black J's comments in this regard were, of course, premised on the usual costs-shifting approach to costs in 1975 Act claims. But she indicated that the position may be different where the claimant consents; the court can always depart from the usual approach to costs where the parties agree. It is relevant that I have formed the clear view that the entire net estate will be consumed in meeting the competing claims upon it. The consent of all those who will benefit from the estate has therefore been given to the payment of costs from the estate before the parties' claims are satisfied. It would not be fair to leave the claimants only to the prospect of recovery of costs inter partes when such orders may well prove to be inappropriate. On that footing, I do not need to determine whether there is a present financial need for those costs to be paid; as I have indicated the evidence before the court would not enable such a determination to be made.

155. The combined litigation costs of the parties are said to be just below £700,000, but will inevitably have increased once this judgment is handed down and matters consequential on it are dealt with. Based on the estimate I have reached above, and if (say) 80% of the costs or £560,000 are agreed or allowed on assessment, this will leave the remaining estate at around £1,050,000 to £1,150,000. These figures are a little higher than, but broadly consistent with those I ventilated with counsel during their closing submissions, without an apparent suggestion that they are unrealistic.

156. The assumption of the parties was that the amount paid out of the estate in costs would be treated as an award in favour of the party in question, read

back to the date of death under section 19(1) of the 1975 Act, and thus treated as a testamentary disposition to that party for inheritance tax purposes. Given my decision below and the ultimate size of the estate, it may not be a material point.

157. I am, however, not prepared as it was suggested that I might order Shama to pay all the parties' costs and then to make an award in her favour in order to enable her to do so. The court takes into account the parties' financial needs, including their debts, in making an award under the 1975. I consider that the proposition that the court can, let alone should, artificially create new debts owing by a surviving spouse in order to justify a larger award to her, with the sole purpose of reducing the inheritance tax payable on an estate, seeks to stretch the discretion of the court too far.

Decision

158. In my view, none of the claimant parties fully recognised the limitations placed upon their claims and none of the parties adopted a realistic position. Once costs have been paid, the estate will not be large enough to meet the claimed financial needs of either Shama and her children, or of MN, let alone both of them.

159. As the Supreme Court indicated in *Ilott*, there are two separate questions, which can be addressed together: whether the Deceased's will fails to make reasonable financial provision for the claimants (for maintenance in the case of his children, and without that limitation in the case of Shama) and, if so, what order ought to be made?

160. It is accepted by all claimants that the will did not make reasonable financial provision for Shama or MN. Mr Briggs did not accept that there was such a failure in respect of AB and CD. But the will makes no provision for their accommodation or other reasonable needs during their childhood. In the circumstances as at the date of the trial it seems to me clear that the will objectively fails to make reasonable financial provision for them. Whether that need for maintenance is fulfilled by an order in favour of their mother or partly in favour of them directly is a different question.

161. While it was not in issue, I make clear that even when viewed against Shama's meritorious claim, the failure to make any provision for MN was also not objectively reasonable. She is a daughter of the deceased with learning difficulties and other persistent impairments to her quality of life and no earning capacity who will always require a significant amount of care. She was also close to the Deceased and he to her, as evidenced by her traumatic response to his death. Her moral claim is a strong one. The issue of where she lived in the period up to 2019, which so exercised the parties at trial, is of

peripheral relevance to the strength of that moral claim. It is equally peripheral to the determination of what provision is possible and reasonable, given the size of the net estate in this case.

162. The real question, therefore, is what reasonable financial provision ought now to be made? In practice, this means what balance should be drawn between the needs of Shama and her children and the needs of MN.

163. Mr Briggs did not submit that Shama and her children did not have a need for accommodation, nor that it should not be provided to them out of the estate. In light of my conclusions about how MN's accommodation needs will be met, I consider that the provision of a home for Shama, AB and CD is the first priority. Given that the net estate is likely to be between £1.05m and £1.15m, there is unlikely to be as much as £750,000 available for this purpose. There was no suggestion that the provision for this purpose should be other than outright provision.

164. Mr Briggs said that provision for MN which left her dependent on the goodwill of Shelina, Fahid and Ms Rauf was not reasonable provision for MN. This submission does not engage with the unfortunate fact that, even without provision of accommodation for Shama and her children and let alone with it, this estate simply cannot fund accommodation for MN together with the carers which both the expert evidence and common sense suggest would be necessary for that to be viable. I am driven to the conclusion that Mr Dubbery expressed the position correctly when he said that the impossibility of providing care for MN at the level she apparently requires leaves only two possibilities: either she shall remain in the care of her family or she will be provided for by the state.

165. This factor provides a real limit to the financial needs which can presently be identified on behalf of MN, but the strength of her moral claim and the nature of her needs means that some provision should be made for her even though it is not possible to satisfy all of Shama's financial needs. Wherever MN lives, some financial provision for her will enable some improvement in her care, enabling her to improve her mobility and continence and, possibly, the confidence to undertake some activities outside the home. This is consistent with the fourth option put forward by Mr Briggs in his closing note, i.e. a sum to provide therapy and support to improve her independence and future income to provide respite care. The other options all involved the funding of accommodation.

166. Mr Briggs' arguments against the provision to Shama of more than 50% of the net estate depended on criticisms of her evidence as to her financial needs and resources (which criticisms are well founded) and the fact that Shama has the option to obtain paid employment and to remarry, and that she can rely on the

future support of her sons and their own families. These are relevant considerations but they are not as weighty as is suggested. I do consider that Shama has some future earning capacity and may remarry in due course, but she faces great challenges in the meantime, not least from her depression.

167. The size of the net estate means that once accommodation is paid for, the balance of any provision for Shama and her sons is going to meet her further expenditure only for a limited period. Even on the assumption that her outgoings could be limited to around half of her projected future expenditure, this would still be around £30,000 per year, which would be a more modest existence than she enjoyed whilst the Deceased was alive. I have been given no basis for capitalisation of these income needs, but it is any event clear that the estate can fund only a proportion of her income needs for the future once a home is bought, or for a limited period.

168. The possibility of either 16 Coldershaw Road or 511 High Road being given to Shama was canvassed, but not seriously maintained in the case of either property. The Coldershaw Road property needs considerable work doing to it, and the mortgage needs to be paid, and the High Road property is not really suitable. The value of the properties also renders this option unviable. The properties will need to be sold, and provision made from the proceeds of sale.

169. The property particulars put forward by Shama suggest that around £750,000 is required to buy a three-bedroomed house in the area where she has been living. This would entail payment of stamp duty land tax of £25,000 plus the costs of moving. I consider that it is most likely that Shama will be required to buy a property which costs less than £750,000, whether by buying a flat and/or moving to a different area, but that will be a decision for her once the size of the net estate is established.

170. With the most likely range of values for the net estate in mind, I consider that the first charge on the net estate, after payment of costs and testamentary expenses, should be an award of £550,000 to Shama. In the unlikely event that it transpires that the net estate after payment of costs is less than £550,000, the entire estate will be awarded to Shama. That is the minimum sum reasonably required to accommodate Shama and her children, and move them to their new accommodation. I have well in mind that Shama considers that she needs to spend considerably more than this.

171. I then consider that, once this fixed sum of £550,000 is paid to Shama, the next £300,000 of the net estate should be divided equally between Shama and MN, leaving a maximum award in favour of MN of £150,000. Any amount in the net estate over £850,000 will then be awarded to Shama. In practice, this is likely to leave Shama with a total award of around £900,000 to £1m. In the absence of any method of capitalisation having been proposed, and working

backwards using the now out-of-favour multiplier-multiplicand method where the income need is multiplied by roughly half of the number of years for which the income need exists, and if £600,000 is exhausted on accommodation and capital costs and the income need is £30,000 per year, the balance of £300,000 to £400,000 would allow such income needs to be met for between 20 and 26 years. In reality, I recognise that it would not likely last that long, given low interest rates, inflation and the additional expenses the boys will have as they are older. I take £600,000 as an indicative figure for initial costs, to include the cost of moving and a car, although Shama is likely to spend more than £550,000 on accommodation if she is reasonably able to do so.

172. This all allows for a relatively limited amount of expenditure, and less than when the Deceased was alive. It also provides no real capital cushion for the future. It is premised on Shama buying a cheaper property than she considers that she reasonably requires. It can be seen that, even if the net estate proves rather higher than presently appears likely, it will still be able to meet only some of Shama's reasonable financial needs, i.e. maintenance, and not more. I therefore do not consider it appropriate to place an upper limit on her award to be ascertained in the way I have indicated above.

173. The award for MN is considerably less than she seeks but, once it is appreciated that the provision of independent accommodation for her is not possible, (even if that were really in her interests, about which I have real doubts), her financial needs are necessarily much more limited. If the current cost of care is taken at £20 per hour (rather than £18.50 given the current very high rate of inflation), a little over 300 hours of care per year or 25 hours a month would cost £6,000. Some of this sum could instead be spent on therapy, if desirable. Again, using the multiplier-multiplicand approach, and assuming £30,000 for expenditure on the other sorts of things discussed by Ms Hill, and the appointment of a deputy, the balance of £120,000 might allow up to 40 years of such expenditure if the fund were properly invested. Again, I recognise that in practice it may not provide as much as this. It would also inevitably not be spent as evenly as this, but as MN's needs dictated.

174. I do not consider the sum of £150,000 to be excessive given MN's young age. The fund (or as much of it as the size of the estate ultimately enables to be constituted) should be held on a trust compliant with section 89 of the Inheritance Tax Act 1984, with a deputy to be appointed and to act as trustee. Such an award can be made under section 2(1)(d) of the 1975 Act.

175. An award in this form will not affect MN's entitlement to PIP, or to means-tested benefits. The award should not exceed, or significantly exceed, the nil-rate band available on the estate when together taken together with the award to MN of an amount to meet her costs of these proceedings.

176. I recognise that my award does not make any provision for AB and CD separate from that for their mother. The provision for them is in the award in favour of their mother, who has parental responsibility for them and will be responsible in fact for meeting their financial needs whilst they are children. The income needs put forward on their behalf are the sort of needs that all parents are accustomed to having to meet and I have no reason to suppose that Shama will not strive to meet these needs. Ensuring a roof over their head is the main maintenance need. It was not suggested to me that Shama will not ensure that their other needs are met. If an award is put aside for them alone, either Shama must be excluded from benefit from it in order to ensure beneficial inheritance tax treatment, or that treatment will not be available and there will be no difference in practice from an award direct to Shama, except that a discretionary trust might be imposed. The evidence suggests that Shama is well able to manage her finances and I consider that she should have the freedom to use the award in her favour both for her and her sons' benefit as she thinks fit. The award is most unlikely to meet all their financial needs and it would accordingly not be appropriate to make an award to her sons from which Shama could not benefit. Furthermore, the nil-rate band available to the Deceased's estate will likely be exhausted, or all but exhausted, by the award to MN.

177. I bear in mind that the award of a capital sum will mean that Shama loses her entitlement to universal credit. No method of avoiding this has been put forward, save for a discretionary trust which would be unwieldly and would itself likely have adverse inheritance tax consequences given the amount of nil-rate band available.

178. I have not forgotten the principle of testamentary freedom, nor Arman's request not to be left out altogether. I have no doubt at all that his father wanted some provision to be made for him; he was after all named as an object of the discretionary trust in the will and mentioned in the letter of wishes. The reality with which the court must deal, however, is that he is an adult with a degree and a lifetime of earning capacity ahead of him with student debts but no other stated outgoings and no current housing needs. The estate cannot meet all the reasonable financial needs of the claimants. I do not consider that it could be a correct exercise of my discretion under the 1975 Act to leave those needs unsatisfied for the purpose of allowing provision for the other beneficiaries who are not claimants.

179. On that point, it is relevant that the Deceased did not leave legacies or leave the residue to named individuals but created a discretionary trust which would allow his will trustees to determine how the estate assets should be applied. None of the named beneficiaries has any vested interest in the estate, even of a contingent nature. The Deceased's intention as expressed in his will was that

the estate would be used as needed and Shama is named as a beneficiary, together with reference to her life interest in the letter of wishes and with an indication that it might be 'possible' to appoint the residuary estate on new trusts. No beneficiary is being deprived of an interest by this judgment; in substance the exercise of the will trustees' discretion has been substituted for what is in form four claims brought under the 1975 Act.

180. One point on which I was not addressed is the fact that Shama was left by the will an interest in possession in what in the event is the entire estate. She has received some income from it, but it seems to be Cripps' position that she has not received it all and that Fahid should account for it. A variation on the order I intend to make would be to vary the will so that the post-death interest in possession in favour of Shama remains in effect, with the awards to the parties to take effect from a later date. This would preserve the inheritance tax spousal exemption on the death of the Deceased, but may have other tax consequences on which I have not been addressed. I will invite the parties to address me on the point after the judgment has been handed down. In any event, I do not consider that Shama should be required to repay to the estate any sums she has received from it to date.

181. Finally, I am asked by Mr Reed to direct that 26 Whitton Road and 511 High Road should be sold first, so that Shama and her children are not rendered homeless before new accommodation can be bought. I do not consider that I have before me any application to direct the way in which Cripps administer the estate. Having said that, the suggestion appears sensible and I would expect Cripps to seek to endeavour as far as possible to ensure that Shama is not left without accommodation for any period. That is part of the administration of the estate on which the court's directions can be sought if necessary, although I earnestly hope that further cost can now be avoided.