In the Family Court at Harrogate
Mr Recorder Salter

Before:
Mr Recorder Salter

W v H (Financial Remedies: Pensions) [2021] EWFC

RESERVED JUDGMENT OF MR RECORDER SALTER DATED 14 SEPTEMBER 2021

Introduction

[1] This judgment follows the hearing of the financial remedy application of the applicant wife Mrs W. The respondent to the application is the husband Mr H. I shall refer to them respectively for the sake of convenience as the wife and the husband, intending no disrespect in so doing. The wife is represented by Mr Duncan Maxwell-Stewart and the husband by Mr Roger Bickerdike.

[2] I must begin this judgment by commenting that, as will become apparent, almost every aspect has been hotly contested. For reasons which once again will become apparent, these proceedings have taken longer than should ordinarily have been the case. Certain issues have been pursued only to be conceded at a late stage in the hearing. There was not even an agreed schedule of assets and liabilities. I have therefore been required to construct such a schedule before I am able to carry out the distributive exercise required of me. The bundle filed did not comply with FPR 2010, PD 27A, para 4.3 in that it did not contain a case summary or chronology.

[3] The combined legal costs are over £200,000. However, this is not in any sense a "big money" case. One of the few issues which the parties can agree is that this is a needs case. Taking the position at its highest, the parties' combined net liquid assets (excluding pensions) amount to just over £450,000. The costs therefore represent in very broad terms 45% of the liquid assets.

[4] In *Azarmi-Movafagh v Bassiri-Dezfouli* [2021] EWCA Civ 1184, in a judgment handed down the day after I had concluded the present hearing, King LJ made these opening comments:

[1] This is a second appeal in a straightforward financial remedy case 'marked' as HHJ Robinson put it at the trial, by 'extreme positions and a degree of bitterness'. The judge if anything understated the position; the degree of acrimony on both sides has been such that the parties embarked on a course of litigation which became an exercise in self-destruction. As a consequence, the costs have become so disproportionate relative to the assets that it is now hard to achieve an outcome in this uncomplicated needs case which will not leave each of the parties profoundly discontented.

The learned judge might well have been speaking of this case.

Factual background

[5] The wife is aged 46 and works part-time as a teaching assistant. The husband is aged 51 and works as a technical architect/IT manager.

[6] The parties began cohabitation in or around October 1995 and married on 26 July 1997. The wife moved into a separate bedroom in the family home in September 2018 and left the property in February 2019. This is therefore a marriage of approximately 23 years' duration including pre-marital cohabitation.

[7] There are three children of the family. The eldest will be 23 in September 2021 and is working; he lives in the former family home with the husband. The middle child is 20 and is at university but uses the former family home as his base during university vacations. The youngest child is aged 14, who is subject to a shared care arrangement, under which he spends his time equally between the parties' households.

[8] The wife suffers with Crohn's disease, anxiety, depression and an eating disorder.

[9] In 2015, the wife's father sadly died shortly after a cancer diagnosis. He and the wife's mother, Mrs W Senior, had lived in North East Lincolnshire. Apart from the wife, Mr and Mrs W senior, had another child, X who lives in Lincolnshire. Following a family discussion, it was agreed that Mrs W senior would move to Yorkshire, where the husband and wife lived, to provide support for her. Accordingly, a suitable property was purchased on 7 October 2015 for £235,000 and vested in the names of the husband and the wife. The reason for this was that Mrs W senior was only able to provide the deposit until her former home in Lincolnshire had been sold and the husband and wife bridged the purchase with

a mortgage in their names. Mrs W Senior's property was transferred by the husband and the wife into the names of the wife and Mrs W senior as joint tenants on 1 September 2016. On 20 December 2018, the wife and Mrs W senior entered into a Declaration of Trust, under the terms of which the beneficial interest in Mrs W senior's property was to be held entirely for the benefit of Mrs W senior. A restriction in relation to the Declaration of Trust was registered at HM Land Registry on 10 December 2019.

[10] The husband remains in the former family home In West Yorkshire, which has five bedrooms and a triple garage with a large garden. The husband works from home. The property is one which he first lived in 1979, when he was nine years old. The property was purchased by the husband and the wife in November 2003, six years after the marriage, when the husband's mother chose to downsize.

[11] The wife lives in a rented two-bedroom terraced property in West Yorkshire. She does not currently have accommodation for the two elder children to sleepover.

[12] The wife has a new partner who works at the same place of employment as the wife. She has known him for five years. He has his own rented accommodation, although he stays overnight at the wife's address for approximately two or three nights per week. The wife's partner is still married and no divorce proceedings have been instituted. The wife's partner has been introduced to the three children.

[13] The husband also has a new partner who has been introduced to the children. She and the husband spend overnights together.

Litigation history

[14] The wife filed her petition for divorce based on the husband's unreasonable behaviour on 19 February 2019. A decree nisi of divorce was pronounced on 7 June 2019, which has not as yet been made absolute.

[15] The wife filed Form A seeking the full range of financial relief on 5 December 2019.

[16] An order for maintenance pending suit was made by District Judge Wood in favour of the wife on 3 February 2020 as a global order for the benefit of her and the youngest child at the rate of £1,210 per month. The husband was ordered to pay costs of £2,615.

[17] A first appointment, again before District Judge Wood, took place on 17 March 2020. The wife was directed to serve her Form A on Mrs W senior as a potential intervenor with notice that Mrs W senior's property was the subject of these proceedings. Apart from the conventional direction as to questionnaires, an order was made for the instruction of a single joint expert to value the former family home and also to provide a pensions report. The parties were directed to file evidence regarding mortgage raising capacity and housing needs. The order contained a recital in these terms:

> "2 The respondent acknowledges that the applicant's mother provided all the monies to purchase the property at ….. and that she has an entitlement to live there for life."

[18] There were delays in obtaining the pensions report, as a result of which a Financial Dispute Resolution appointment did not take place until 26 February 2021. This was unsuccessful and the application was initially listed before me for directions on 10 March 2021. I gave permission for an updated valuation of the former family home as well as permission to instruct a single joint medical expert to prepare a report on whether the wife's Crohn's disease affected her capacity to work full-time in her current employment. Permission was also given to file a further statement from Mrs W senior as well as a statement from a private investigator who had carried out surveillance of the wife. Both parties were directed to file narrative statements dealing with the relevant factors in the Matrimonial Causes Act 1973 s 25 other than s 25(2)(g) (conduct).

[19] The final hearing before me commenced on 1 June 2021. Much of the first day of the hearing was taken up with arguments that parts of the wife's narrative statement contained allegations of conduct in breach of the direction given on 10 March 2021. The wife agreed to certain parts of her statement being redacted. I heard arguments in relation to the balance of her statement and directed that one paragraph only (paragraph 26) should be struck out.

[20] I then heard evidence from Mrs W senior on the second day, 2 June 2021, and began hearing the evidence of the wife. During the course of the short adjournment, it became apparent that the husband was unwell and I decided to adjourn the application until 3 June 2021 so that the position could be reviewed. On what should have been the third day of the hearing, 3 June 2021, it transpired that the husband had been admitted to hospital where he had remained overnight. He had been diagnosed as suffering from kidney stones. He had come to court having discharged himself, despite being medicated on morphine, intending to return later to hospital. Whilst I could readily understand the husband's wish to draw the proceedings to a close, I had no hesitation in reaching the conclusion that it was inappropriate for the hearing to continue immediately.

[21] The hearing was therefore adjourned until 28 and 29 July 2021, when I heard the balance of the wife's evidence and that of the husband. Following submissions from counsel, I indicated that it was my intention to reserve judgment. This judgment fulfils that obligation.

[22] The issues which fall to be determined may be summarised as follows:

(a) What are the parties respective housing needs? Two subsidiary issues arise in this context, namely, whether the former family home should be sold or retained by the husband and the extent of the parties' mortgage capacities.

(b) Whether the wife is cohabiting and, if so, the relevance of such cohabitation.

(c) Whether the wife has a beneficial interest in Mrs W senior's property.

(d) What debts are owed to Mrs W senior and by whom?

(e) What is the extent of the wife's earning capacity in the light of her state of health?

(f) What is the appropriate pension sharing order to be made in favour of the wife and should this be reduced to reflect any beneficial interest which she may be found to have in Mrs W senior's property?

(g) Is a clean break achievable?

(h) Does the court have jurisdiction to make a periodical payments order in respect of the youngest child and, if so, what is the appropriate level?

The legal framework

Overarching principles

[23] In exercising the court's powers when making financial remedies orders on divorce, the starting point is the Matrimonial Causes Act 1973, s 25. Under s 25(1), I must 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. In particular, I must have regard to the matters listed in s 25(2)(a)-(h), in so far as they are relevant to the facts. Section 25A of the 1973 Act imposes on the court a duty to consider whether it would be appropriate to terminate the financial obligations of each party towards the other and effectively impose a clean break or a deferred clean break, if this can be achieved without undue hardship to the payee.

[24] As a starting point in the division of capital after a long marriage, fairness and equality usually ride hand in hand. The court should check its tentative views against the yardstick of equality of division and, as a general rule, depart from equality only if, and to the extent that, there is a good reason for doing so. The yardstick of equality is to be applied as an aid and not a rule (*White v White* [2000] UKHL 54; *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24). The goal is fairness and not mathematically equality. Since the decision of the House of Lords in *Miller v Miller*, cases such as the present are decided by the parallel application of the two principles of sharing and needs, compensation very rarely playing any part. The authorities make clear that fairness represents the result which is the higher of the two figures generated by each of these principles. Needs in this context is a question of fact and invariably centres upon the provision of housing and meeting present and future income requirements.

Ownership of Mrs W senior's property

[25] Mr Bickerdike relies on the well-known decision in *Stack v Dowden* [2007] UKHL 17 and asserts that the onus of proof is upon the person seeking to show that beneficial ownership differs from the legal ownership. The key question is whether the parties intended the beneficial interests to be different from the legal

interests. With this background, Mr Bickerdike invites me to examine with care the transactions in 2016, 2018 and 2019 to which I have referred at paragraph [9].

[26] There is before me no application under the Matrimonial Causes Act 1973, s 37 for an avoidance of disposition order to set aside any of the transactions relating to Mrs W senior's property. Mr. Bickerdike asserts that no application is necessary. There is support for his proposition in the Court of Appeal's decision in *Purba v Purba* [2000] 1 FLR 444, where it was held that the ownership of the money which the husband had transferred to his relations remained his and the judge could have dealt with it on that basis without going through the formality of setting aside orders under s 37. This approach was also taken by the Court of Appeal in *Read v Panzone* [2019] EWCA Civ 1662, where it was found that the belt and braces addition of an avoidance of disposition order just in case served significantly to muddy the waters when there was a finding that the husband in that case had at all times held the beneficial interest in the property in question. Mr Maxwell-Stewart counters Mr Bickerdike's arguments by contending that there is no pleaded case that the Declaration of Trust is a sham or that the transactions relating to Mrs W senior's property should be treated as conduct. He argues that to impugn these transactions without a formal application would be to permit the raising of arguments as to conduct by the back door notwithstanding the order made on 10 March 2021.

Cohabitation

[27] This issue can be approached in two stages: first, do the facts give rise to a finding of cohabitation and secondly, if so, what is the impact of that finding?

[28] So far as the first stage is concerned, in *Kimber v Kimber* [2000] 1 FLR 383, HHJ Tyrer reviewed the authorities on the criteria for determining cohabitation. He drew the following (non-exhaustive) factors from authorities and the Social Security Contributions and Benefits Act 1992:

(a) the parties were living together in the same household …….;
(b) the living together involved a sharing of daily tasks and duties;
(c) there was stability and permanence in the relationship;
(d) the financial affairs of the couple were indicative of their relationship;
(e) their sexual relationship was admitted and ongoing;
(f) there was a close bond between L and the wife's child;

(g) as regards the motives of the couple it was clear that the wife had denied cohabitation and acted as she had so as to continue to enjoy the payment of maintenance from her husband; and

(h) there was sufficient evidence that cohabitation existed in the opinion of a reasonable person with normal perceptions.

[29] The *Kimber* markers, as they have become known, have been relied upon in a number of subsequent decisions, including *B v B (Assessment of Assets: Pre-marital Property)* [2012] 2 FLR 22 and *IX v IY (Financial Remedies: Unmatched Contributions)* [2019] 2 FLR 449, as an aid to assisting the determination of whether cohabitation exists at a given time.

[30] The issue of whether or not cohabitation exists at a given point may arise when determining the length of marriage, having regard to seamless pre-marital cohabitation (pre-marital cohabitation), or in a financial context of the sort with which I am concerned here (post-marital cohabitation). Whilst the determination of whether or not cohabitation exists in either context may be similar, I acknowledge that its impact is different, as I shall explain.

[31] More than two decades have passed since *Kimber* was decided. Social norms have changed considerably. This is reflected in the decision of Mostyn J in *E v L* [2021] EWFC 60 at [75] where he held, in the context of assessing the length of cohabitation for the purposes of fixing the point at which the marital acquest began to arise:

> "The start date for the purposes of the calculation of the acquest will be January 2016. By then the parties were in a very serious committed relationship. It was not then…..merely one of boyfriend and girlfriend. It was far more than that. It may not have been traditional in its functioning in that there was not conventional cohabitation; the wife did not move in lock, stock and barrel to [*the other's property*]. But it was…. from that point a committed sexual, emotional, physical and psychological, if somewhat itinerant, relationship. In my judgment that is the appropriate point in time at which the acquest begins to arise.

[32] The second stage of assessing the impact of cohabitation arises in both a capital and income context. So far as capital is concerned, the fact that a wife is living with another man is one of the circumstances of the case within the Matrimonial Causes Act 1973, s 25(1) and may on the facts affect her needs. However, once it is established that her needs are at a given level, the fact that she is cohabiting with another man does not render it inappropriate for her to receive a lump sum

(*Duxbury v Duxbury* [1990] 2 All ER 77). In cases where an applicant has made a contribution as a breadwinner or as a homemaker, and is found to have made an equal contribution to the welfare of the family, then he or she is entitled to share in the family wealth earned during the marriage. Thus, as a general proposition, where a claim is based on entitlement, and fairness permits no discrimination between spouses, the cohabitation prospects of either spouse post-separation should be of little relevance (*White v White* [2001] 1 AC 596). This general proposition is relevant to cases where the assets are substantial, and perhaps of less relevance to cases of modest assets where cohabitation might be a relevant factor in considering housing needs (*Martin v Martin* [1977] EWCA Civ 777; *Williams v Lindley* [2005] EWCA Civ 103).

[33] So far as income is concerned, I recognise that the wife does, as I shall explain, not seek continuing maintenance. It is, nonetheless, necessary that I set out the relevant principles so as to underline that post-marital cohabitation is not to be equated with remarriage in terms of its impact. If a spouse cohabits with another person, that is not in itself a reason for reducing or terminating his or her maintenance (*Atkinson v Atkinson* [1988] Fam 93; *Grey v Grey* [2009] EWCA Civ 1424). Cohabitation is relevant insofar as it results in some diminution of the payee's needs, either on account of financial support given by the cohabitee, or because it is simply cheaper for two people to live together in the joint household than to live separately (*MH v MH* [1982] 3 FLR 429; *Fleming v Fleming* [2003] EWCA Civ 1841).

Pensions

[34] The Pensions Advisory Group published its *Guide to the Treatment of Pensions on Divorce* in July 2019 (*the PAG Report*). It has subsequently received judicial endorsement in a number of cases including *W v H (Divorce: Financial Remedies)* [2020] EWFC B10. In that case, the approach was taken that, in a needs case, the starting point was assessed to be pension sharing by reference to equality of income and not capital, reflecting *the PAG Report*, Part 4 and indeed the Family Justice Council's report *Guidance on Financial Needs on Divorce*.

[35] Part 7 of *the PAG Report* deals with what it describes as the dominant practice of pension offsetting, namely, the process by which the right to receive a present

or future pension benefit is traded for present capital. The report highlights the complexity of offsetting and highlights the potential for irrational or unfair results, the main problem being that one is invariably trying to compare to very different asset classes (sometimes referred to as the "apples and pears" analogy). I consider offsetting in the context of the current application at paragraph [92].

Child support

[36] Mr Maxwell-Stewart for the wife submits that I have jurisdiction to make periodical payments order in respect of the youngest child because it is agreed that his care is shared equally between the parties.

[37] Mr Maxwell-Stewart cites in support of his submission a passage from *Rayden and Jackson*:

"[18.289]
Where care is shared equally, the CMS will have no jurisdiction to make a calculation.
This is because, in order to make a calculation there must be a non-resident parent. Regulation 50 of the Child Support Maintenance Calculation Regulations 2012 provides for the identification of a non-resident parent where two people each have day-to-day care of a child, but a person can only be identified as a non-resident parent where he provides care to a 'lesser' extent that the other parent.
[18.290]–[18.300]
The Child Support Maintenance Calculation Regulations 2012 identify six 'special cases' where there are specific rules for the calculation of child maintenance.
[18.301]
If two people each have day to day of a qualifying child, one of them may be treated as the non-resident parent [1]only if he provides day-to-day care to a lesser extent than the other. Accordingly, if care is shared equally, there will be no non-resident parent. 'Day to day care' in this context is a question of fact and is not defined in the legislation. In considering whether care is shared equally, the number of overnight stays is a factor but not a trump card[2]. In MR v Secretary of State for Work and Pensions, Jacobs J reiterated that the test was about 'providing care', which did not necessarily equate to overnight care, nor did it depend upon the level of financial contributions made by any parent[3].
The regulations do provide that where the person applying for a child support calculation is receiving child benefit, that person shall be presumed to be providing care to a greater extent. This is a presumption, however, which can be rebutted by evidence that this is not in practice the case￼.

1.Child Support Maintenance Calculation Regulations 2012, reg 50.
2.*JS v SSWP [2017] UKUT 296*.
.3 *[2018] UKUT 340*, *[2019] 1 FCR 494* at [16]–[20].
.4 *CF v SSWP [2018] UKUT 276*, *[2019] 1 FCR 414* at [21], but see also *MR v SSWP [2018] UKUT 340*, *[2019] 1 FCR 494* at [10].

[38] Mr Bickerdike, on the other hand, asserts that the court has no jurisdiction to make an award of periodical payments in respect of the parties' youngest child

because the wife is in receipt of child benefit in relation to him. He invites the wife to apply to the Child Maintenance Service and proposes that my order should contain an undertaking from the husband not to challenge the jurisdiction of the Child Maintenance Service.

The evidence

[39] I have heard oral evidence from each of the parties and from Mrs W senior. I have before me a two-volume bundle which runs to 631 pages. There is additionally a separate electronic bundle ("the conveyancing bundle") comprising conveyancing documentation relating to Mrs W senior's property. I also have the benefit of the transcript of the evidence given by the wife at the first part of the hearing on 2 June 2021.

[40] I do not regard either of the parties as completely satisfactory witnesses. I believe that they are fundamentally decent people who have been caught up in an increasingly bitter litigation struggle. The husband's bitterness stems from his unshakeable belief that the wife is attempting to take the roof of the former family home from over his head in circumstances where she is living with another man. This has resulted in the wife not being as open and honest as she might otherwise have been. I remind myself of the *Lucas* direction (*R v Lucas* [1981] QB 720) that because an individual has lied about one issue does not mean that all of their evidence is false and that people lie for a variety of reasons, for example, to bolster a weak case, to protect someone, out of panic or to cover up disgraceful behaviour. In assessing the credibility of the parties, I have regard to the consistency of their evidence and its consistency with contemporaneous documents and other evidence, how it was given and whether the party had a motive to tell something other than the truth.

[41] I propose only to refer to some elements of the evidence during the course of this judgment, but have taken all the evidence into account when determining the issues relevant to the application and how to exercise my powers under the Matrimonial Causes Act 1973. I decide the evidence on the civil standard of proof, that is to say, on a balance of probabilities.

The wife's position

[42] The wife seeks to be independent. She asserts that this can be achieved if she has a mortgage-free property and her debts (including legal costs) are cleared, which would require a payment to her of £500,000, with the parties' pension positions being equalised by reference to income as indicated by the pensions expert. Her case is that she has no beneficial interest in Mrs W senior's property. To achieve this would involve a sale of the former family home (unless the husband is by some means able to buy the wife out) and payment to the wife of almost the entirety of the equity in the property.

[43] She seeks a lump sum order only to the extent of £11,480 so as to be able to repay to Mrs W senior the debt which she asserts is due to her mother from the husband. She asserts that the court has jurisdiction to make a periodical payments order in respect of the child and seeks an order at the rate of £500 per month. The contents of the former family home should be divided by agreement. Each party should retain their own investments and other assets and be responsible for their own debts.

[44] On the above basis, she invites the court to make clean break orders in life and on death. There should be no order as to costs. I have set out below the net effect of the wife's open position on the basis the findings that I have made, in particular the course I have adopted in paragraph [51]. My detailed workings are set out in paragraph [52].

ASSETS/LIABILITIES	**Husband**	**Wife**
Equity in FMH	£23,411	£500,000
Bank accounts and ISAs	£40,700	£37,525
Loan to W's brother		£500
Subtotal	£64,111	£538,025
Less liabilities	(£52,796)	(£93,686)
Net total	£11,315	£444,339
Percentage	2.48%	97.52%

The husband's position

[45] The husband is clear that he wishes to remain living in the former family home, which was originally owned by his parents. His proposal is that he should buy out the wife's interest for £260,000, which represents approximately half of the equity. He would assume responsibility for the current mortgage.

[46] So far as pension sharing is concerned, his approach is that of a partial offset. He asserts that the wife has a beneficial interest in Mrs W senior's property which he values at £235,000 being the acquisition cost in 2015. His position is that this interest should be treated as part of the wife's "pension pot", as a result of which the total "pension pot" of the parties increases to £932,311 with a pension sharing order in favour of the wife of £215,939 being required to achieve equality in capital terms.

[47] Each party would retain their respective savings and other assets. He will pay child support of £337.60 in accordance with a Child Maintenance Service calculation and undertake not to challenge the jurisdiction of the Child Maintenance Service.

[48] On this basis, the husband also seeks a clean break and proposes that there should be no order as to costs. Once again, I have set out below the net effect of his position on the basis of my findings.

ASSETS/LIABILITIES	**Husband**	**Wife**
Equity in FMH	£263,411	£260,000
Bank accounts and ISAs	£40,700	£37,525
Loan to W's brother		£500
Subtotal	£304,111	£298,025
less liabilities	(£52,796)	(£93,686)

Net total	£251,315	£204,339
Percentage	55.15%	44.85%

Discussion

[49] I turn, first of all, to review the matters set out in the Matrimonial Causes Act 1973, s 25.

Section 25(1)

[50] I must have regard to all the circumstances of the case, first consideration being given to the welfare of the parties' youngest son, who is aged 14 and still a minor. His care is shared between the parties and his welfare requires that he should be appropriately housed with each of them near to his school in West Yorkshire. The circumstances of the case also include whether either of the parties is cohabiting or formed a new relationship.

Section 25(2)(a) (income, earning capacity, property and other financial resources….. including in the case of earning capacity any increase in that capacity which it would be reasonable to expect a party to take steps to acquire)

[51] At the beginning of this judgment, I have commented upon the absence of any agreed schedule of assets. One complicating factor has been brought about by the necessary adjournment caused as result of the husband's illness. Changes have understandably occurred in the course of that period of just under two months. Mr Maxwell-Stewart submits that I should draw a line on the computation process on day one of the final hearing on 1 June 2021. Mr Bickerdike, however, submits that I should take account of changes that have occurred in the interim. I acknowledge that Mr Maxwell-Stewart's approach is the normal one. However, the necessity to hold a split hearing means this is not an entirely normal circumstance. In the absence of any circumstances which I

would regard as suspicious, I propose to adopt the course suggested by Mr Bickerdike, which reflects the reality of the situation. The husband's liabilities may have increased, but his outstanding legal fees have decreased.

[52] I set out in below in summary form only the overall capital position based on the findings contained in this judgment.

ASSETS	Husband	Wife	Joint	Notes
FMH			£523,411	Net of mortgage on 29 July 2021 and costs of sale 1.75%
Bank accounts and ISAs	£40,700	£37,525		
Loan to W's brother		£500		Husband already repaid £500
Subtotal assets	£40,700	£38,025	£523,411	Overall total £602,136
LIABILITIES				
Joint: loan from Mrs W senior	(£11,480)	(£2,520)		Paragraph [95]
Wife:				
NatWest loan (dog)		(£2,635)		

Loan from Mrs W senior (legal fees)		(£34,846)		Paragraph [96]
Litigation loan		(£24,891)		
Outstanding legal fees		(£28,794)		
Husband:				
Barclaycard	(£12,513)			
Tesco credit card	(£1,460)			
Outstanding legal fees	(£4,873)			
Hitachi loan	(£22,470)			
Subtotal liabilities	(£52,796)	(£93,686)		Overall total (£146,482)
TOTAL **Assets less liabilities**	(£12,096)	(£55,661)	£523,411	Overall net total £455,654

[53] Each of the parties has pensions. These are detailed in the pensions report of Mr Jonathan Galbraith. The total cash equivalents of the husband's pensions amount to £682,065, whereas the wife has much lower pension provision with total cash equivalents of £15,216.

[54] I have left out of account what the husband asserted to be loans from friends and his family, in particular, his mother, Mrs H senior. The husband acknowledges that certain of the payments made to him were gifts. There is a lack of clear

evidence as to the terms of repayment as to the other sums involved so as to be able to characterise them as loans.

[55] I have also left out of account the chattels in the former family home and wife's jewellery. Each of the parties has a car with a loan attached, leaving little if any equity; these I have left out account. Much time and energy has been spent on arguing over the value of a classic BMW owned by the husband. Eventually, the wife accepted that no value should be attributed to this car. I have left out of account the shareholding which the husband formerly held with his employers. This shareholding has been sold and the proceeds absorbed into the husband's living expenses including his legal costs. There are some life policies which have no surrender value.

[56] It may be that in the fullness of time the wife will inherit a sum from Mrs W senior. However, this is uncertain both as to timing and amount. As the wife observes, the husband himself may similarly inherit from his mother.

[57] The husband's income is gross of £158,116 per annum (basic and bonus based on Form P60 to 5 April 2021). This equates to £94,347 net per annum (£7,862.25 per month). These figures include, as an exceptional item, the proceeds of sale of shares from his employer, as a result of the husband's exercising share options. The husband also received £600 per month by way of rent from the parties' eldest child. The wife's net monthly earnings are £733.91 (again based upon Form P60 to 5 April 2021). She also receives monthly child benefit in respect of the youngest son of £91.43 and Universal Credit of £1,019 per month. At the present time, the husband also pays the maintenance pending suit of £1,210 per month to which I have referred in paragraph [16].

Section 25(2)(b) (financial needs, obligations and responsibilities)

[58] The primary focus in terms of financial needs is to provide suitable housing for the parties and for their three children. The wife is currently living in rented accommodation and it is common ground she should be able to purchase a property in her own name. The wife puts accommodation needs for each of the parties at an average price of £401,500 with prices ranging from £390,000 to £420,000. This would enable her to purchase a three or four bedroomed house, where she could offer accommodation to the two eldest children, from time to

time, as well as to the youngest. The husband's case, however, is that she could suitably rehouse for an average price of £305,780 in a two or three bedroomed property with prices ranging from £285,000 to £319,950. The wife has a limited mortgage capacity based upon her current earnings, of £65,000, but would wish to be mortgage-free. The husband's wish is to remain in the former family home which is valued at £700,000, taking on responsibility for the current mortgage of £165,647 and purchasing the wife's interest in the property. The husband has a mortgage capacity without maintenance payments of £486,000. If the husband is not able to remain in the former family home, he puts his accommodation needs for a four or five bedroomed property at an average price of £548,990, the price bracket ranging from £425,000 to £699,950. The husband justifies his need for a larger property on the basis that he works from home.

[59] Each party has debts which they would wish to clear, which are set out in paragraph [52].

Section 25(2)(c) (standard of living)

[60] The wife describes the standard of living as being very high, whilst the husband refers to a well-supported family environment. A feature of this was regular meals out and multiple cars and a family home of the type which I have described.

Section 25(2)(d) (age of the parties and the duration of the marriage)

[61] As already indicated, the wife is aged 46 years and the husband 51 years. Each of them therefore has a good number of years prior to retirement. This is a marriage of approximately 23 years' duration including pre-marital cohabitation. It is therefore on any view a long marriage.

Section 25(2)(e) (any physical or mental disability of either of the parties)

[62] The husband enjoys good health apart from the issues to which I have referred in paragraph [20] and from which he appears to have made a successful recovery. As I have already observed, the wife suffers with Crohn's disease, anxiety, depression and an eating disorder, which she asserts has a bearing upon her earning capacity.

Section 25(2)(f) (contributions of the parties to the welfare of the family, including by looking after home or caring for the family)

[63] Both parties fully contributed financially, emotionally, and practically to their marriage, to looking after their home and to the welfare of each other. Both have played (and will in the cases of the two younger children) a very active role in caring for their three sons. The husband further asserts that he made a contribution towards the acquisition of the former family home which was acquired in November 2003 from his mother. The parties purchased the property at a discounted price representing what husband refers to as an "advance inheritance" of £65,000. This is, he asserts, a contribution unmatched by the wife.

Section 25(2)(g) (conduct)

[64] I have already ruled the directions hearing on 10 March 2021 that issues of conduct are not relevant to the exercise of my discretion.

Section 25(2)(h) (the value to each of the parties of any benefit which, by reason of divorce, that party will lose the chance of acquiring)

[65] The only loss of benefit which falls for consideration is the substantial inequality as between the parties in their respective pension provisions. It is common ground between them that this can be addressed by means of a pension sharing order in favour of the wife, the issue being the extent of that order.

Findings of fact

The wife's earning capacity and health

[66] I take these matters together as they are clearly inter-related.

[67] The wife currently works around 22 hours per week spread over four days. It is a demanding job working with children with educational and behavioural needs, but clearly one which the wife enjoys and finds fulfilling. She concedes that there would be opportunities for her to increase her hours at her current school in her current role to work 5 days per week. She regards this as a possibility, but indicates that she does struggle with tiredness. The work fits in with her

youngest's school times and school holidays. The wife is also partially reliant upon Universal Credit which will be impacted by the outcome of this application.

[68] No report from a consultant, addressing the impact of the wife's medical conditions upon her earning capacity, was presented in evidence despite the permission given. I accept that from the evidence presented on behalf of the wife there was difficulty in locating a suitable consultant prepared to offer an opinion, particularly during the pandemic. I have a letter from the wife's general practitioner dated 9 April 2021. That letter confirms the conditions which the wife herself has outlined. It does not comment upon any consequential impact upon earning capacity. It states that the wife "needs to continue to manage her fatigue by pacing herself".

[69] The wife acknowledges that she has only rarely had time off work for health reasons. Indeed, she concedes that her work helps her to get round the issues which she has.

[70] On behalf of the husband, Mr Bickerdike submits that there is an absence of admissible medical evidence to support the adverse impact of the wife's health upon her earning capacity. It is incumbent upon her to exploit that capacity. At the present time, she is earning approximately one half of the national minimum wage. He describes her current situation as being a lifestyle decision. Instead, the husband suggests that the wife could resume being a self-employed childminder, a role which the wife undertook for two years between 2009 and 2011. The husband estimates that, in this role, the wife could earn up to a maximum potentially of £40,000 per annum.

[71] The wife is no longer registered as a child-minder and it is not a career which she wishes to pursue. It would mean leaving work that she enjoys and working entirely on her own in isolation at home. Furthermore, her case is that she could not carry out this work adequately in the type of property which she wishes to purchase as a further bedroom would be required equipped with cots. Alternative avenues of employment are restricted by reason of the fact that the wife does not have A levels or a degree.

[72] I accept entirely that the wife has the medical issues to which I have referred. However, on the basis of her own evidence, I find that the practical reality is that

they have not in real terms restricted her ability to work in the career which she has chosen. I accept that it is reasonable that she should undertake work which is personally fulfilling. I do not accept that it would be reasonable for her to switch careers to child-minding factoring into the equation her health issues. I accept her position that the downsides of this in terms of the need for larger property and the isolated working outweigh the potential advantages. I find that she is capable on her own admission of working a five-day week in her current career. Nonetheless, I also accept that the overall financial benefit of working 5 days per week would be marginal because of the impact upon the wife's Universal Credit. In any event, the issue of earning capacity is of limited relevance as each of the parties approach the application on the basis of a clean break.

Cohabitation

[73] There is no doubt that the issue the wife's relationship with her partner has heightened the temperature in this litigation for some time. This was only increased further by the instruction of the private investigator by the husband.

[74] In her narrative statement dated 13 May 2021, the wife accepted that her partner stayed overnight with her "usually a few nights each week, sometimes more, sometimes less". She repeated this in her oral evidence, when she indicated that she had known her partner for five years and their relationship became intimate in August 2019. She indicates that he has been an invaluable emotional and moral support. However, she makes it clear that both she and her partner intend to remain living separately and that there is no financial inter-relationship. She asserts that she has no desire to remarry or cohabit.

[75] What does the private investigator's report add to the picture? It covers six observations during February 2021. Significantly, England was subject to lockdown restrictions at this time. It was not until 8 March 2021 that people were able to meet one person from outside their household for outdoor recreation. The report does add fresh insights to the overall picture. The wife's partner has a key to her property. The wife's partner walks her dog. He puts the bins out at her property. He is seen bringing shopping into the property.

[76] I do not believe that the wife did herself justice in her evidence on this issue, when it has never been her case that her partner did not stay over at her

property. I appreciate that she was very anxious about its perceived sensitivity. It was therefore difficult to accept her evidence that, when he was seen at her property by the private investigator early in the morning, he may have come round to deal with her dog because she was not well. I also have difficulty in accepting her evidence that the shopping, which her partner was carrying into the property, was for Mrs W senior and that, rather than take the shopping immediately to her mother, it was retained at wife's home until later in the day.

[77] In answer to my questions, the wife indicated that she and her partner had taken a short holiday together and that he and the parties' youngest son get on well together. The wife's partner does some of the cooking at her home. Most tellingly, she candidly admitted that friends at the school where they both work "know we are a couple".

[78] As I have indicated, in 2021, cohabitation comes in all shapes and sizes. There is no legal definition of cohabitation as such. Having regard to the law as outlined at paragraphs [27]-[33] and all of the evidence before me, I find that the wife and her partner are in a stable cohabiting relationship reflected best by the wife's admission, to which I have referred at paragraph [77].

[79] I must then consider, as I shall later, the impact of this type of cohabitation in reaching my conclusions just as I must take into account as one of the circumstances of the case the husband's relationship with his new partner, about whom I have very little information beyond the unchallenged evidence contained in the wife's narrative statement.

Mrs W senior's property

[80] I have set out in outline the factual background to the purchase of, and subsequent transactions relating to, this property in paragraph [9]. I have heard evidence on this issue not only from the parties, but also from Mrs W senior.

[81] The case put by Mrs W senior (and the wife) is that, when she had sold her former home in Lincolnshire and was therefore able to discharge the bridging loan which the husband and wife had taken out to fund the purchase of her property in West Yorkshire, she chose to have the wife's name added to the title deeds. This was done in September 2016. Mrs W senior asserts that it was never

intended that the wife should have any financial interest in the property, but that it was done as a paper exercise to help her. She received no legal advice at this time as to the types of joint ownership of property and the property was vested in the names of Mrs W senior and the wife as joint tenants. It was only when she took legal advice from the wife's solicitors in late 2018 that she appreciated that the form of ownership chosen, a joint tenancy, did not reflect her intentions. As a result of this, she entered into a Declaration of Trust on 20 December 2018 reflecting what she considered to be the true beneficial ownership, while still keeping the wife's name on the deeds. The purpose of this was to give Mrs W senior peace of mind by ensuring that the wife was able to assist her with the paperwork and not to give the wife any financial gain. Mrs W senior rejected the idea of that any benefit that the wife would receive in Mrs W senior's property would balance help which she had provided to her son X, at the time of the financial crisis in 2008. She acknowledged that she had provided such help which had now been repaid.

[82] The wife instructed a Notary Public, Mr Merlin Batchelor of Notary Express based in Norwich, to prepare the transfer of Mrs W senior's property from the husband and the wife to Mrs W senior and the wife. The emails between the wife and Mr Batchelor are contained in the electronic conveyancing bundle. On 29 August 2016 at 10:33, Mr Batchelor asked the wife whether she and Mrs W senior wished to hold the property as joint tenants or as tenants in common. He attached an advice guide (p91 of the electronic bundle) setting out the difference between the two forms of ownership. At 11:35 on the same day, the wife replied indicating that they wished to take the transfer as joint tenants. The transfer was completed on 1 September 2016. In her oral evidence, the wife indicated that she had forgotten about the provision of this legal advice and that she chose the option with which she was familiar without understanding its implications. The wife's replies to the husband's questionnaire dated 26 April 2020 indicate, however, that she did not recall being giving given any advice about the technicalities of ownership by Notary Express.

[83] The wife confirms Mrs W senior's account that it was only when Mrs W senior went to renew her will in late 2018 that the implications of the form of ownership chosen were appreciated, as a result of which the solicitors prepared a Declaration of Trust, effectively severing the joint tenancy and recording Mrs W

senior's intentions that the wife was to have no financial interest in the property, which was to pass on her death under the terms of her will. The wife sent off the Declaration of Trust to the Land Registry herself. She acknowledges that there is no evidence of any initial attempt to register the Declaration. She checked the position later online at the Registry and discovered that the Declaration of Trust had not been registered by means of a restriction. She therefore tried again, and a restriction was eventually registered on 10 December 2019.

[84] The husband makes a number of submissions in relation to Mrs W senior's property. He asserts that, when it was possible to discharge the bridging finance, a deliberate decision was taken to transfer the property into the joint names of the wife and Mrs W senior as joint tenants rather than into the sole name of Mrs W senior. Mrs W senior was to have the right to live in the property during her lifetime but, upon her eventual death, it was to pass entirely to the wife by survivorship. This, the husband asserts, was agreed as between the three of them. It also reflected the early inheritance which he had received when the former family home was acquired from his mother. The transfer was also to provide an equivalent inheritance for the wife to the significant support her brother had received, to avoid inheritance tax and to avoid Mrs W senior having to sell the property, should she require means-tested social care services in the future. The husband is clear in his recollection that both the wife and Mrs W senior were fully aware of the implications of a joint tenancy when the transfer was completed in September 2016. The husband further asserts that steps were only taken to depart from this agreement when the initial separation occurred in September 2018, when the wife moved into the spare bedroom. He asserts that there is no coincidence in the timing of the Declaration of Trust some three months later. Similarly, the husband asserts that it is no coincidence that the restriction was not registered until 10 December 2019 shortly after Form A was filed on 5 December 2019.

[85] I regard the evidence of the wife and of Mrs W senior as far from convincing on this issue. I prefer entirely and accept the account of the husband, which is supported by contemporaneous documentation. Indeed, the wife's own replies to the husband's questionnaire state in terms "As the relationship between the applicant and the respondent was by that time [November 2018] in the process of breaking down, Mrs W senior wished to make a declaration of trust to ensure

that the true intention of Mrs W senior and the applicant, as at the time of the transfer, was properly documented". I find that the wife was fully aware by August 2016 of the distinction between a joint tenancy and a tenancy in common. I find that the Declaration of Trust was entered into in December 2018 in an attempt to remove Mrs W senior's property from the equation. I do not accept the reason given for the wife's name being placed on the title by Mrs W senior and the wife of helping Mrs W senior with paperwork.

[86] I find therefore that, ultimately, the wife will benefit to an extent upon Mrs W senior's death from the sale proceeds of Mrs W senior's property. The husband acknowledged in the recital refer to at paragraph [17] that Mrs W senior has an entitlement to reside in the property for life. However, the extent and timing of this interest cannot currently be determined, as it is impossible to say when it will fall in. Mrs W senior is a sprightly 81-year old. Furthermore, there remains a possibility that it may be necessary for the property to be sold prior to Mrs W senior's death for any number of reasons. It is certainly not in any way "cash at the bank", as Mr Bickerdike put it. For the reasons given in paragraph [26], I do not need to consider setting aside any of the under MCA 1973, s 37. I do, however, factor into account that the wife is likely to receive some future benefit just as I factor into account that the husband may benefit from his mother's estate.

Conclusions

Housing needs

[87] The sum which is available to meet housing needs is now considerably diminished by the costs of this litigation. Each party will have to make compromises on what might have been there ideal choices for a new home. Each will have to borrow to an extent greater than they might have wished, but not to full extent the of their respective mortgage capacities. In my judgment, the husband would be over-housed by remaining in the former family home. I appreciate the familial attachment to the property. That said, I do not consider that significant weight can be attached to the contribution made by him as a result of the purchase at a discount from his mother of an asset which is clearly matrimonial in character in what is overwhelmingly a needs case. I do, however, take account of the fact that he works from home. I also take account of the fact

that the extent of his mortgage capacity alone will enable him to rehouse in more extensive accommodation than that which will be available to the wife, even when she receives a greater share of the net proceeds of sale. It may well just prove possible for the husband to remain in the former family home if he is able to secure a non-commercial loan from some source. That is entirely a matter for him. My order will provide for the husband to have the facility to buy the wife out or, in default, for there to be a sale.

[88] Taking into account all of the considerations I have already addressed, I have ultimately reached the conclusion that the wife should have a housing fund of just short of £280,000 to include £20,000 to cover the costs of her move and some new furnishings, although I will make a further direction as to the contents of the former family home. I predicate this fund on the basis that the wife will borrow £50,000, which is below the full extent of her mortgage capacity. I therefore award her £335,000, which will enable her to clear her net liabilities of £55,661 and apply the balance of £279,339 to housing, enabling her to purchase a property at around £310,000 with the incidentals to which I have referred of £20,000 on the basis of a mortgage of £50,000. If she is uncomfortable with borrowing as much as £50,000, it may be possible for her to reschedule some of the debt owed to Mrs W senior, as has happened in the past. As in the case of the husband, that is a matter for her to determine. I take fully into account my finding as to the current form of the wife's cohabitation. However, I have no evidence which would enable me safely to conclude that the wife and her partner intend to rehouse in a single property. Whilst her credibility has been called seriously called into question in relation to a number of issues, such evidence as I have, indicates that this is not their intention. I have no information as to wife’s partner’s means and it would be unjust for me to draw assumptions.

[89] Turning to the husband, if he retains the former family home, his net asset position will leave him with £511,315, after clearing his debts. After paying to the wife a lump sum of £335,000, he will be left with £176,315. If he were to borrow up to the full extent of his mortgage capacity (which I acknowledge is predicated on the basis of no maintenance payments which is not the case under the form of order contemplated), he would then have available to him up to £662,315 for housing.

[90] I have set out the net effect of this distribution at paragraph [99].

Other needs

[91] The principal other need of the parties is to clear their debts. Those of the wife are greater than those of the husband simply because he has from time to time realised assets to reduce his liabilities. Enabling each of them to clear their remaining liabilities including legal costs represents a fair approach. Their overall respective costs liabilities are broadly equal. This approach does not represent an order for costs by the backdoor. I refer specifically to the loans from Mrs W senior at paragraphs [95]-[96].

Pensions/Mrs W senior's property

[92] I do not consider that it would be appropriate to approach the issue of pensions in the way that the husband suggests, that is say, by means of a partial offset. All I have by way of valuation is the historic purchase cost of Mrs W senior's property of £235,000 in 2015. I appreciate that the husband regards taking an historic valuation as a concession on his part. However, there is no means of assessing value subject to wife's undisputed life interest against the background of the possibility of the property being sold prior to Mrs W senior's death in order to meet her future needs. In short, there is no guarantee as to what, if anything, the wife will receive and when that sum might be received. I recognise that it is possible to use a mixture of offsetting and pension sharing if the circumstances of the case so dictate (*PAG Report,* paragraph 7.8); I refer to this as a partial offset. However, the whole rationale for offsetting is to trade present or future pension benefits for present capital or 'money now' (*PAG Report*, paragraph 7.1). In paragraph 6.1.5 of his report, Mr Jonathan Galbraith, the pensions expert, concludes "that, if the case is to be settled by means of partial pension sharing and partial offsetting, it is simply a matter of saying that for every £1 of non-pension capital that wife retains by way of offset, the pension credit from pension sharing she receives should be reduced for [*sic*] £1, subject to adjustments for tax/utility". Mr Galbraith continues to state in paragraph 6.1.7 that this approach only works when defined contribution funds are being shared (the funds here being both defined contribution and defined benefit, although predominantly the former) and does not necessarily extend to other cases with more complex pension sharing solutions. Leaving aside the complex issues of

discounts for tax and utility, the simple fact is, as I have said, that it cannot be said with any certainty how much (if anything) the wife might retain by way of offset and when such sum might be received. Mr Galbraith's report does not address this issue nor, in fairness to him, was he instructed to address it (paragraph 1.2.1 and joint letter of instruction dated 26 June 2020). What the husband is proposing is what might be described as a "deferred offset". Whilst this is not an approach I have previously encountered, I cannot see any objection to it in principle providing the amount in question and timing of receipt are both certain so as to be capable of being factored into the actuarial equation. That is not the case here. Depending on the timing of receipt, questions of the application of a utility discount, which is a matter for the court (*PAG Report*, paragraph 7.38), may still arise.

[93] This is a needs case. The pension benefits of the parties are summarised in paragraph 2.1.2 of Mr Galbraith's report. I am satisfied that the appropriate approach is to equalise pension income from age 60 in the manner recommended by Mr Galbraith in paragraph 5.1.2 of his report. This will require a pension credit for the wife of £337,640, which should be given effect by pension sharing orders in her favour of 73.3% of the AS PMF awarded pension and of 100% of each of the Aegon SIPP annuity, the Aegon (formerly Scottish Equitable) annuity and the Aviva funds annuity. This approach accords with the approach recommended by the *PAG Report*, to which I refer at paragraph [34]. The pension sharing charges should be shared equally between the parties.

[94] The point is raised on behalf of the husband that he has continued to contribute to the Aegon SIPP. I appreciate the perceived unfairness which the husband may feel because of this. It is, nonetheless, an inherent incident of what has been termed "moving target syndrome" in that the actual amount of the pension debit and pension credit will fluctuate upwards or downwards up to the point of implementation given that the schemes involved are defined contribution schemes. However, the relevant benefits to be valued for implementation purposes are those on the 'transfer day', which is the date the pension sharing order takes effect and not the subsequent date chosen by the pension schemes for implementation purposes (Welfare Reform and Pensions Act 1999, s 29).

Loans from Mrs W senior

[95] This issue is addressed by the second statement of Mrs W senior dated 23 March 2021. It records a series of loans which were repaid in full by monthly instalments. In February 2017, Mrs W senior made a loan of £14,500 which consisted of £12,420 to pay off the final balloon payment on the husband's Lotus and the balance of £2,080 to top up the parties' joint bank account. A further loan was subsequently made in June 2017 of £5,000 to fund the purchase of an Audi. Monthly repayments were made in relation to the combined loan of £19,500 until January 2019. By this date, a total of £5,500 had been repaid leaving an overall balance outstanding to Mrs W senior of £14,000. The husband sold the Lotus for £25,000 in February 2020 and retained the proceeds. The husband asserts that his liability to Mrs W senior is for one half of the liability of £14,000 ie £7.000. The wife approaches the matter on a more precise footing. She calculates that the amount referable to the Lotus is 64% of the loan of £14,500 and that 64% of the amount outstanding is £8,960. She accepts that each of the parties should be responsible for one half of the balance of the joint debt. This results, on the wife's calculation, in the husband owing Mrs W senior £11,480 and the wife £2,520. I prefer the approach of the wife, having regard to the fact that the husband has had the benefit of the proceeds of sale of the Lotus. This issue will be dealt with by means of a lump sum order for £11,480 to be paid by the husband to the wife against the wife's undertaking to pay this sum to Mrs W senior.

[96] Mrs W senior has also loaned the wife in total £34,845.66 to assist her with her legal costs. Mrs W senior is now left with savings of only approximately £15,000. Given the history of repayment of previous loans, I do not regard this as a soft loan. This sum is in addition to the sum repayable of £2,520 previously mentioned.

Periodical payments for youngest child

[97] Having regard to the legal position discussed at paragraphs [36]-[38], I have no hesitation in finding that I have jurisdiction to make a periodical payments order in respect of the youngest child. It is common ground that the parties share equally in his care. There is therefore no non-resident parent. I acknowledge that the wife receives child benefit, but I conclude that any presumption arising from this fact that she is providing the greater care is rebutted by the clear

evidence of the parties. I assess an appropriate level of periodical payments to be £350 per month. In reaching this figure, I take into account the CMS calculation produced by the husband. The order will be subject to automatic annual variation by reference to the CPI, the first variation to take place one year after the date of commencement of periodical payments, which shall be made by standing order.

Resultant order

[98] The resultant order will therefore be as follows:

(a) There will be a lump sum order in favour of the wife for £335,000 payable within 56 days. This is on the basis that the former family home is transferred into the husband's sole name subject to the existing mortgage from which the wife is released. If the husband is unable to discharge the lump sum within this timescale, the former family home should be sold, and the net proceeds of sale divided, so that the wife receives £335,000 and the husband the balance. The asking price, selling agents and solicitors with the conduct of the sale should be agreed between the parties or, in the absence of agreement, determined by a district judge.

(b) There will be a lump sum order payable by the husband to the wife within 28 days for £11,480 to cover his debt to Mrs W senior against the wife's undertaking to repay this sum to Mrs W senior.

(c) Maintenance pending suit (or interim periodical payments) at the current rate specified in the order of 3 February 2020 will continue until payment of the lump sum of £335,000, whereupon the periodical payments in respect of the youngest child specified in paragraph [97] will commence.

(d) There will be pension sharing orders in the terms set out in paragraph [93].

(e) The parties should agree a division of the contents of the former family home; in the absence of agreement by 31 October 2021, the issue will be determined by a district judge.

(f) In all other respects, there will be an income and capital clean break and a clean break upon death, each party retaining the assets in their own name and being responsible for their own liabilities.

[99] I set out below in tabular form the net effect of the order. In my judgment, this division fairly reflects the needs of each party and their respective contributions as well as the other section 25 factors. I take into account that the order is framed on a clean break basis. I have cross-checked the outcome against the yardstick of equality departing from it only to ensure that the needs of the parties are met. I am satisfied that the overall effect of the division is one which achieves a fair outcome.

ASSETS/LIABILITIES	Husband	Wife
FMH	£521,411	
Bank accounts and ISAs	£40,700	£37,525
Loan due from X		£500
Less liabilities	(£52,796)	(£93,686)
Subtotal	£511,315	(£55,661)
Lump sum	(£335,000)	£335,000
Net resultant total	£176,315	£279,339
Percentage	38.69%	61.31%

[100] That is my judgment. Counsel indicated that they would wish to agree the precise form of order arising from this judgment. That should be filed no later than 4pm on 10 September 2021. Any further submissions on costs should also be filed no later than 4pm on 10 September 2021 and be limited to five A4 single-sided pages. In the absence of any such submissions, there will be no order as to costs.

Addendum

[101] I sent out a draft of this judgment to counsel on 31 August 2021 requesting that I receive comments on any typographical errors and legitimate requests for clarification by 3 September 2021. I have received written submissions, as requested, from each counsel. I am now informed that the parties have agreed that there should be no order as to costs. I have incorporated in this revised final version of my judgment such minor corrections as are appropriate.

[102] A number of issues have been raised, purportedly by way of clarification, and I will deal with each of these in turn.

The wife's housing needs

[103] Mr Maxwell-Stewart suggests that the wife is being asked to rehouse for approximately £260,000 and the court has, impermissibly, taken judicial notice of the housing market without appropriate evidence. He further suggests that I have ascribed to her a mortgage capacity of £65,000.

[104] I do not suggest that the wife should rehouse for £260,000. As I have made clear at paragraph [87], each party will have to make compromises in their choice of a new home as result of the costs of this litigation. What I am ordering is that the wife should seek to rehouse for a sum in the region of £310,000, which figure is marginally above the average cost of the property particulars produced by the husband as being suitable for the wife. Within my award, she has the additional sum of £20,000 to cover the costs of the move and some new furnishings, which may afford her some flexibility. I am not suggesting that she should attempt to borrow £65,000, which figure I acknowledge is predicated on the basis of a continuation of the current level of interim maintenance. She does, however, have an ability to borrow commercially based upon an amalgam of consistently-paid Universal Credit and her increased earned income, as well as child maintenance, together with the opportunity to reschedule her indebtedness to Mrs W senior as, on the clear evidence before me, has happened in the past, as I indicate in paragraph [88]. If she is not comfortable with raising £50,000 or is unable to do so, the evidence before me produced by the husband indicates that there are suitable properties available to her in West Yorkshire for £285,000.

Pension sharing

[105] Mr Maxwell-Stewart asks me to reflect that “it would be wrong in principle to reduce a pension share built on entitlement to marital sharing by reference to non-matrimonial property (absent need)”. Mr Bickerdike confesses to being somewhat perplexed by this request. I confess to being in a similar difficulty. However, this is not framed as a legitimate request for clarification. The basis of my decision as to pension sharing is clear and follows established principles.

[106] Mr Bickerdike, emboldened by the scope of Mr Maxwell-Stewart's requests, asks that I should revisit the issue of pension sharing in the light of the impact of moving target syndrome, to which I have referred at paragraph [94]. He reminds me of what was said by Mr Galbraith in Appendix D, paragraph 7 of his report, namely, that the calculations in the report are predicated not only on the CE amounts being correct as at the date of the report (1 February 2021), but also remaining so at the date any pension sharing order is implemented, which is assumed to be within six months of the date of the report. Mr Galbraith goes on to draw attention to the impact of moving target syndrome and invites the parties to consider having the calculations in the report updated using new CEs. No such request for an update was made. Mr Bickerdike has submitted figures showing increases in relation to two of the pensions between the date of the report and early September 2021, which I find difficult to reconcile with the figures used in Mr Galbraith’s report. Mr Bickerdike asks that the parties should now be required to make a further approach to Mr Galbraith to “recalibrate” the figures. I reject this request. The expert advice given by Mr Galbraith could not have been clearer: moving target syndrome was and is in operation. If the parties wished an addendum report to have been prepared by Mr Galbraith, this should have been done prior to the commencement of the final hearing as he suggested. This is precisely the situation to which Moylan LJ drew attention in *Finch v Baker* [2021] EWCA Civ 72, which was a second appeal. The Court of Appeal held that the judge hearing the first appeal was not wrong to refuse permission to admit a new pensions report. Moylan LJ observed (at [53]) “…. there will inevitably be some delay, and possibly an extensive delay, between the date of the pension sharing order and its implementation. As a result, depending on its form, the order may well have a different effect of that assumed by the court. Further, ….. the pension trustees ….. will recalculate the CE value when implementing the order with the result that the value is likely to be different to that used when the court made the pension sharing order” and at [54] “These

factors point, generally, against allowing an appeal simply on the basis that a pension sharing order made by the court will, as implemented, not have the same effect as that assumed by the court on different figures and at a different time. This is another example of the court's powers under the MCA 1973 being exercised in a broad, discretionary manner and not necessarily with the expectation of achieving mathematical precision." The message is clear: first, if parties wish to adduce an updated pension report prior to a final hearing, permission should be sought in advance of the final hearing, usually at the conclusion of an unsuccessful FDR appointment in accordance with FPR 2010, r 9.17(9) and, secondly, the parties should be advised of the impact of moving target syndrome generally and particularly between the making and implementation of a pension sharing order. This will be of particular relevance where the member is continuing to make contributions into a defined contribution pension.

Child maintenance

[107] Mr Maxwell-Stewart contended at the hearing for periodical payments at the rate of £500 per month. This figure was not supported by any CMS calculation. He now asks me to direct that the parties should carry out a CMS calculation in line with my findings at paragraph [57] as to the husband's gross income. Mr Maxwell-Stewart contends that the husband's gross income is £165,316 per annum including the contributions paid to the husband by the parties' eldest son. In response, Mr Bickerdike makes the point that the income referred to at paragraph [57] includes the exceptional item in relation to the sale of shares and that HMRC do not count family contributions such as those made by the eldest son as earned income. The husband's basic salary is £105,500 together with a bonus of between 8% and 12%. In making my award, I have followed the authority of *CB V KB (Financial Remedies: Calculation of Income Streams and Child Maintenance)* [2020] 1 FLR 795 and slightly rounded up the CMS calculation produced by Mr Bickerdike.

D A Salter
Recorder

Dated 14 September 2021