

Neutral Citation Number: [2023] EWFC 323 (B)

Case No: SD20P00764

**IN THE FAMILY COURT SITTING AT COUNTY AND FAMILY COURT AT
HORSHAM**

Hurst Rd, Horsham RH12 2ET

Date: 25 September 2023

Before :

District Judge Spanton

Between :

PS

Respondent Mother

- and -

CS

Respondent Father

Mr Marc Samuels (instructed by **Family Law in Partnership**) for the applicant.

Ms Tara Lyons (instructed by **Stowe Family Law**) for the respondent.

Hearing date: 01 February 2023 and 15 August 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on **29 September 2023** by circulation to the parties or their representatives by e-mail and by release to the National Archives

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

1. This is an application pursuant to Schedule 1 of the Children Act 1988.
2. The Applicant mother is PS (M), and the Respondent father is CS (F). I shall refer to the parties as M and F for shorthand purposes.
3. M was represented by Mr Samuels, and F was represented by Ms Lyons of counsel. I am grateful to them both for the assistance they provided the court.
4. I heard the evidence in this matter on 01, 02 and 15 August 2023. There was a gap as Ms Lyons was unwell on the scheduled third day. Written submissions were provided by the parties on 01 September 2023.

Factual Background

5. M is 44 years old. F is 47 years old. The parties' relationship began in 2005 when they started living together and they separated 5 years ago in August 2018.
6. The parties have 3 children, C1 aged 16, C2 aged 13 and C3 aged 9. C1 attends a fee-paying school, X whilst the other two children attend state schools.
7. The parties care for the children on a shared care arrangement with the children spending 50% of their time with each parent.
8. During the relationship the parties purchased three properties in their joint names. In 2009 they purchased a house in London Property A. In 2015 the parties purchased Property B which they let out.
9. The parties remortgaged Property A and B in July 2018 to fund the purchase of Property C in Sussex. This needed substantial renovation. At the time of completion on that property the parties had separated, but they agreed to continue with the renovation. The parties rented Property D whilst the work was carried out, until September 2020 when M moved to rental accommodation Property E.
10. Property C was then sold. F purchased Property F. The property had to be extensively renovated which necessitated F renting property for 18 months to allow the work to be undertaken.
11. F has now moved back into Property F with his partner and their 5 children. F's 3 children and his partner's 2.
12. F is a financial consultant and a partner at Y Firm. He works full time but has negotiated flexible hours allowing him to care for the children. He is paid by a combination of base pay, performance pay, and discretionary returns on Y Firm's equity. At the present time he receives monthly drawings of £13,875, with a top up of any profit share. The court was told that this is estimated to be £111,000 for this year. Further, that it would be received between August and the end of the year.
13. M lives with the 3 children in the rented property in X Road.
14. M's total income is £6,000 per annum from her beauty work and her charity work. Adding interim child maintenance to this of £3,000 per month her current annual income is £42,000.
15. The three properties that were jointly owned have all been sold with the proceeds being held in escrow accounts.

16. Property A and B were the subject of a TOLATA 1996 claim that was to be heard with this Schedule 1 application but was compromised prior to the final hearing.

Procedural Background

17. It is understood that the parties have spent roughly £500,000 in legal costs in respect of the disputes between them. This is an astronomical amount and of course is money that could have been far better employed. Likewise, it barely needs saying that the energy the parties have had to expend in respect of the litigation is energy that would have been better spent in other areas of their lives.
18. Nothing appears to have been capable of agreement with several applications having been made which were compromised at the 11th hour, when doubtless substantial legal costs have already been incurred.
19. The proceedings were issued on 09 June 2020. A first directions hearing was listed on 29 October 2020 and directions were agreed in advance.
20. The parties agreed to dispense with a court FDR and on 26 February attended a private FDR to address the schedule 1 claim and the intended TOLATA claim but this was unsuccessful and the TOLATA claim was issued in May 2022.
21. On 13 October 2022 the court gave directions to progress the matter to trial listing it for a PTR and a 3-day hearing.
22. The PTR took place on 01 June 2023. The TOLTA claim was settled shortly before the final hearing.
23. In preparing for the hearing, I read the relevant documentation. I was provided with substantial non-compliant bundles. The only oral evidence came from the parties themselves.

The Law

24. The test to be applied is as set out under paragraph 4 of Schedule 1 para 1 (2) of the Children Act 1989 which confirms that the orders are for the benefit of the child.
25. The court is to have regard to all the circumstances including:
 - (1) The income, earning capacity, property, and other financial resources which each person mentioned in sub para (4) has or is likely to have in the future.
 - (2) The financial needs, obligations, and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the future.
 - (3) The financial needs of the child.
 - (4) The income, earning capacity (if any), property and other financial resources of the child.
 - (5) Any physical or mental disability of the child
 - (6) The manner in which the child was being or was expected to be educated or trained.

24. The power of the court is construed widely where a benefit to the mother also benefits a child. A Schedule 1 award is discretionary and involves striking a balance between the statutory factors and considering all the circumstances.
25. Both parties have approached the application in a very different way. F's primary complaint is that M has approached the matter as if it were an application under the Matrimonial Causes Act, whereas M complains that F has been too miserly in what is offered, and in respect of maintenance F has stuck rigidly to the James v Seymour formula when it is said that this is a case where arguments of need and lifestyle emerge. M says that where the case is anything more than a simple analysis of the children's direct and indirect costs, the formula is not applied, and a more careful analysis is needed.
29. The leading case on Schedule 1 claims, is **Re P (A Child: Financial Provision) [2003] EWCA Civ 837** and the analytical framework set out is summarised in the Red book as follows:
- (i) the starting point is the decision, at least generically, on the home to be provided by the respondent in value, size, and location.
 - (ii) That choice bears upon and frames the reasonable capital costs of furnishing and equipping the house as well as future income needs both directly in the case of outgoings and indirectly in the case of external expenditure such as travel, education, and holidays.
 - (iii) A lump sum appropriate within that determination will provide for the cost of furnishing, equipping the home and a car.
 - (iv) The next step is to determine the budget the mother reasonably requires to fund her expenditure on maintaining the home, content and meeting other expenditure external to the home including school fees, holidays, routine travel expenses, entertainments, presents etc.
 - (v) The assessment is broad but will include the mother's allowance which is checked but not diminished by the absence of any entitlement in her own right. While there is to be no slack or margin for saving, the court must recognise the sacrifice of the unmarried parents, generally the mother as primary and usually exclusive carer, with a budget that reflects both her position and the position of the father, both social and financial. She is to be free from anxiety or resort to parsimony where the other parent chooses to live lavishly.
 - (vi) The Court is required to navigate between rival budgets produced by specialist family lawyers on a broad common-sense assessment. In addition, on both sides this is a calculation of a household not formed and election between an aspirational budget and a critique of proposed alleged extravagance quite different from the factual task performed by a court under s.25, forming an evidential view as to the standard of living enjoyed and the accuracy of recollection by the parties. (vii) Bodey J in a helpful and succinct supporting judgement proposed that in big money cases the mother's budget should "be painted with a broad brush without being bogged down in a detailed analysis and categorisation of specific issues making up opposing budgetary presentations. The better approach is to seek to

achieve a fair and realistic outcome by the application of a broad common sense to the overall circumstances of the particular case.”

The evidence

30. I heard evidence from both parties. They were both doing their best to assist the court although the entrenchment in the respective positions was clear.
31. Both were credible, though M became defensive and could not explain the difficulties that arose in respect of any forensic analysis of her spending and her budget. The main difficulties she faced were the holidays she had been having, given what she says are sparse times, and her earning capacity.
32. The simple fact is that seeing M give evidence it is clear that she is very able to earn far more than she is currently earning.
33. On other matters she also struggled. In respect of the orthopaedic treatment for C1 it was clear that rather than the picture M painted in her statement, both M and F have approached the issue with the same goal in mind but with completely different but equally valid parenting methodology.
34. Her assertions in respect of F seeking to influence C2 to attend a state school made in her statement vanished almost as soon as it was put to the test.
35. It was also noteworthy that she was able to fund first class flights for her and her new partner to the US, though she was paid back for her expenditure. There is also regular eating and going out, which of course M is entitled to do, but does show a reasonable standard of living.
36. At the end of her evidence M indicated her wish to simply be able to provide the life for her children that they had with F.
37. In respect of F there was a genuine engagement with the questions. There was a defensiveness in respect of his likely earnings. It may be that this is because F appreciates what the earnings look like on paper and was overanxious to ensure that the context was properly understood.
38. As a side point, it was galling when assertions were made by F, or on his behalf, that F was anything other than affluent.
39. F has though clearly struggled with the need to create a home for his new family whilst meeting his ongoing obligations. This caused some difficulties and unfortunate choices to be made. He became visibly upset when attempting to justify the decision in continuing with the renovations on the new house whilst consequently not being able to keep the school fees up to date.
40. His evidence in respect of the company set up by him and his new partner was also unconvincing in respect of the filings at companies' house. He is clearly most able, and it is simply not credible that fundamental misunderstandings occurred, and incorrect filings should have been undertaken. I considered that to be carelessness when seeking to satisfy the inevitable examination at this hearing rather than any grand attempt to deceive.

The Offers

41. There was some confusion in respect of the offer made by M in this matter. I am told that there was not an open offer from her until 25 May 2023 which needed further clarification which was provided on 08 June 2023. F made an offer shortly before the hearing, and again on the morning of the hearing, and had made several offers during the proceedings.
42. In respect of the parties' final positions these are most conveniently set out in tabular form and are as follows:

	<u>F's offer</u>	<u>M's offer</u>
1. School Uniform	F says that he will pay for uniform and technology for C2 at whatever school he attends, and the same for C3. F offers to pay for whatever technology C1 required. F will not provide M with a lump sum to pay for the above.	Lump Sum of £800 for uniform Lump Sum of £1,099 for IT equipment for C2
2. Orthodontic treatment	F offers to pay " <i>reasonable and medically advisable dental and/or orthodontic treatment for the children upon production of a treatment plan</i> ". F will not provide M with a lump sum up front to pay for the above.	Lump Sum of £4,075 x2 (£8,150) for braces for C1 and C2 and payment in the future for braces for C3, if required.
3. Car	£10,000 towards replacement car in September 2027.	£22,500 to purchase replacement car and £22,000 in May 2029 increased by change in RPI.
4. Moving and furniture costs	Lump sum of £7,586	Lump Sum of £12,604.90
5. HMRC CGT penalty following	No offer.	Lump Sum of £1,389.21

The sale of Property A (as at 14 September 2023)	F proposes that each party is responsible for their CGT liability generally and they should indemnify the other against such liability.	
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<p>6. Liabilities</p>	<p>Lump Sum of £18,181.42 to clear M's credit card debt, loan to friends LL and CRB</p> <p>F says that he does not accept that there is a loan to TA and is not prepared to pay that liability</p>	<p>Lump Sum of £31,450.42 to pay off M's liabilities in full. These liabilities comprise:</p> <p>Credit card balance as at 28 July 2023 (£7,100.42).</p> <p>Loan from LL for M/children's rent (£2750.00)</p> <p>Loan from CRB for M/children's rent (£13,600)</p> <p>Loan from M's partner, TA, for rent and living costs (£8,000).</p>
<p>7. Reimbursement of rental costs postseparation</p>	<p>No offer.</p> <p>F says that <i>'the current position is that the escrow account (and F's personal funds) has been used to fund the rental payments to date [...] it is not appropriate to backdate rental payments already made from escrow, nor to claim these under Schedule 1, this is clearly not for the benefit of the children'</i>.</p>	<p>Lump Sum of £33,000 + £15,600 + £18,000 (total: £66,600) to reimburse for rent spent on housing M and the children since separation. These monies were withdrawn from the escrow account and from M's share of the Property C net sale proceeds in the TOLATA 1996 claim. Accordingly, the children's rent since separation has been paid by spending down M's own money. M seeks to be reimbursed those sums on the basis that it is F's responsibility to house the children.</p>
<p>8. Legal fee reimbursement</p>	<p>No offer.</p>	<p>Lump Sum of £8,000 + £76,008.67 + £144,634.34 (total: £228,643.01) to reimburse for legal fees.</p>
<p>9. Backdated Child maintenance</p>	<p>No offer.</p>	<p>£87,000. Child maintenance backdated to the date of M's application (9 June 2020).</p>
<p>10. Future rental costs (while M and the children secure a property)</p>	<p>No offer.</p>	<p>Lump Sum of £36,000, based on up to 12 months of rent at £3,000/pcm from August 2023).</p>
<p>11. Housing "top up" lump sum</p>	<p>F offers a "top up" of £335,319, less any fund held on account with Family Law in Partnership, with the amount to be secured by way of charge.</p>	<p>M's offer contemplates a sale price of up to £800,000 and separately costs of purchase (£8,000 – survey, conveyancer etc at 1%) and</p>

	<p>F will also pay stamp duty up to £21,500.</p> <p>The legal charge will be realisable on the youngest surviving child reaching the age of 18 or ceasing full-time secondary education, whichever is later.</p> <p><i>N.B.</i> Pursuant to the Tomlin Order, M receives £402,855.17. She is due to receive £17,211.66 from ‘surplus’ funds held by Family Law in Partnership. Accordingly, F’s offer on housing equates to £722,962.51.</p>	<p>SDLT £27,500 (total: £835,500).</p> <p>The repayment date for the charge shall be the first to occur of: (i) the date which is 6 months after the youngest surviving child of the family ends tertiary education (to include a preuniversity gap year, if the child wishes to take one); and (ii) M’s death.</p> <p>M to have the option to buy-out F’s interest in the property. There shall also be rollover provisions in the charge document to enable M to move if she wishes.</p> <p>F to pay for the drafting and execution of the charge recording the parties’ rights and obligations under the charge and the registration of the charge with the Land Registry.</p> <p>F to pay for registration at LR and legal costs involved in charge.</p>
<p>12. Child maintenance - quantum</p>	<p>£6,951 per annum per child. <i>I.e.</i> for all 3 children £1,737.75/pcm (£20,853/pa), or £434.43/week Maintenance to reduce at an equal rate, per annum, per child (<i>i.e.</i> £6,951 each year).</p>	<p>£5,000/pcm. Payments to start forthwith and be payable in advance, by way of standing order. linked to CPI. The payments shall reduce at a rate of £1,000 on the month after each of the children end their tertiary education (to include a pre university gap year) and shall end completely on the youngest surviving child of the family ending tertiary education (to include a pre-university gap year). <i>I.e.</i>, £60,000/pa.</p>
<p>13. Child maintenance – term</p>	<p>The final amount will be paid until the youngest surviving child reaches the age of 18 and</p>	<p>End completely on youngest child ending tertiary (incl. gap year)</p>

	concludes their secondary education.	
14. School fees and associated school expenses	F to pay school fees and extras up to a maximum of £500 per child per term.	F to pay school fees and all extras
15. Medical insurance	F to ensure that the children are covered by such medical insurance scheme as his employer shall arrange, until they are no longer eligible post their tertiary education.	F to ensure that the children are covered by such medical insurance scheme as his employer shall arrange, for as long as the order for CM shall subsist. If any of the children cannot be covered by a medical insurance scheme through his current or future employer, then F shall pay for separate medical insurance cover with a reputable UK insurance company.
16. Insurance policy	No offer.	F to take out and fund an insurance policy to secure his CM and school fees obligations in the event of his premature death.

Assets

43. In respect of assets the position appears relatively clear.
44. Property B – M and F are to receive £260,688.
45. Property G – this is owned by Company A. The relevant value is the loan by F to his partner, H, in the sum of £120,000. It is accepted that that sum is not liquid. It was suggested that this is an investment vehicle for H but there was no satisfactory evidence on this.
46. In respect of savings and investments, F says that he has no capital balances.
47. Escrow account - £93,188 is due to M from Escrow account 1.
48. There are no relevant chattels.
49. Legal fees on account – it is said that M has £35,000 legal fees on account.
50. It is also said that M has a £3k deposit on the rental property which it is assumed she will recover.
51. Liabilities – each party has a CGT liability following the sale of the properties, M's is now £27,740 and F's is £30,046.

52. M's loans including that to her partner TA. This loan, which is not agreed to be met by F is said to be in the sum of £8,000.
53. It is calculated on the schedule of assets that there are net total capital assets of £1,230,167 (of which £120,000, is not liquid).

Statutory Considerations

54. In considering this case the Court must consider all the circumstances of the case and in particular the following factors set out within Schedule 1 Para 4 (1).

The income, earning capacity and other financial resources each party has or is likely to have in the foreseeable future-

55. M says that one of the key factual issues in this case is the true extent of F's income. F's current monthly drawings are £13,875 net. The final distribution of profit share depends on several factors and the evidence before the court is that in this year there will be a profit share of £111,000 as per the letter of 11 November 2022 provided by F's employer. M suspects it will be more than that and is suspicious that F is not able to provide an updated or more precise figure.
56. F has provided full details of his earnings going back to 2018-2019 and has provided the estimates provided by Y Firm.
57. Given the evidence before the court it seems to me that it is appropriate to accept F's evidence as to his income. The important point is that this puts F within the band for the applicability of the *James v Seymour* calculation.
58. I accept F's evidence that there is a ceiling to his earnings at his pay grade without promotion. F referenced the commitment for levels of seniority above his current role require significant time commitments in London and travelling overseas which he is unable to fulfil given he is looking after the children half the time. He also explained that the seniority of his role could in fact reduce, but that is speculation and I do not find that I need to consider that further.
59. In respect of M's earning capacity, I accept the figures she provides for her current earnings being £4800 per annum. She also received child benefit and interim child maintenance. As I have trailed it is clearly the case that M is not maximising her earning capacity.
60. It is accepted that M took a step back from the work environment to care for the children when they were small, but there is no reason why she should not be working full time now considering the children's ages and given that they spend half their time with F.
61. I do accept the difficulty in finding work during the pandemic, particularly given that M was home schooling the children. In her evidence M said that it had not been easy for her to find work following the pandemic. She has now shifted her focus, with treatments/beautician work being a side job to supplement her income from the charity work she is undertaking. Nevertheless, the apparent lackadaisical attitude to her beauty website and booking system was very stark.
62. It was clear from the evidence that M is capable and competent. She has a good degree and would be attractive to many employers. M accepts that she should be working more

and in cross examination accepted that she could earn £25k per annum. That would seem to be a reasonable figure given that M is returning to the workplace fulltime but given her clear abilities. It would seem to me that this figure should be achieved in the short term.

63. I also accept that going forward M will be entitled to Universal Credit. It appears that if M earned £25k she would be entitled to £848 per month. She will not fall foul of the capital cap as she will be utilising her capital for housing. I accept F's position that M's income moving forward should be viewed as being £2599pm.
64. In respect of other resources F has the property he has renovated, and which is valued at £845,000. He does not have other resources having utilised his savings in the costs of renovating the property. He does have the funds in escrow.
65. In addition, there is the loan to F's girlfriend in the sum of £120,000. These are not liquid funds.
66. M criticises the dissipation in F's resources. As at the time of the Form E on 06/12/19 he had savings of £479,641. By the time of the FDR this had been reduced to £195,893, by the time of the updating disclosure this had reduced further to £115,158, and by the PTR on 05/06/23 there were no savings left. It is clear that the capital sums were used to renovate his property.
67. M has no other resources save for the money held in escrow.
68. In respect of mortgage capacity there was dispute in respect of F's capacity. There was a report filed which showed F's capacity as being £1,462,000 with a further report filed which showed a capacity of £600,000. The lower report was filed as a consequence it was said of errors in the original report. It does seem strange that apparently trusted brokers would provide a report that was strewn with errors, but I do not consider that much turns on it.
69. M says she has no mortgage capacity. F produced a report from his brokers which showed that M has a capacity, though it is highly unlikely that she would, be able to service the mortgage.

The financial needs obligations that each party has or is likely to have in the future and the financial needs of the children.

70. It seems sensible to consider these heads together. As *Re P* makes clear the starting point is to consider the housing need. F's need is met with the property worth £845,000. This provides housing for H, his partner and 5 children. The 3 children of the family and the 2 children of his partner. In evidence F said that he did not consider that he had a financial obligation towards his partner's 2 children, but he does obviously need to provide housing for them.
71. M hinted that F was likely to sell this property and move again having now renovated the property. There was no evidence before the court to support that suspicion.
72. M's housing need was subject to substantial dispute. F's position is that her housing need can be met by the provision of £335,319 which will provide a housing fund of £722,962.

73. M appears to accept that F needs a 6-bedroom property to accommodate 7 people. M's case appears to be that she should have a similar property to F. Yet that cannot be the case given that M has 3 children living with her.
74. There is inevitably a reduction in the standard of living when 2 homes need to be created out of 1.
75. M seeks a top-up to facilitate housing at a purchase price of £800,000. M says that Re P requires the court to consider the previous standard of living and that housing at £800k would be a lower standard than the properties previously lived in by the couple. Doubtless that is true having regard to the London home, and the family home that was proposed in Sussex. But H too has had to lower the standard of his home, and on no analysis could it be said that the proposed and actual housing of either party is anything other than affluent and very comfortable.
76. The properties put forward by M are what she might aspire to but are not what is fair in all the circumstances of the case.
77. The properties put forward by H meet M's housing need. Whilst they may not be on a par with the current rented property she is in, they are of a sufficiently good standard to meet her housing need. I am satisfied that the properties put forward bear some sort of relationship to F's standard of living. This is particularly having regard to need for more bedrooms in F's property. On no analysis could it be said that such a property would lead to a chasm in the standard of living.
78. Accordingly, M's needs can be met by a property costing £650,000 to £680,000.
79. The buffer of £700,000 that F provides for M adequately provides for the housing need of M and the children.
80. In respect of income needs, M has provided a budget which puts her total budgeted costs referable to the children at £8906.50 pcm and personal expenses at £1,765.65.
81. It was said that this was a substantial increase in the budget from Form E, but the increase was relatively modest. M says that her budget is modest, and that she will have to cut her cloth accordingly.
82. H says that an income need of £3k is a generous given M will be in mortgage free accommodation with equal care of the children. The focus is M's needs and F asks the court to find that at its highest this is £3000 pcm.
83. F's revised budget puts his own total projected outgoings at £13,853.50 per month including £7520 for the children.
84. In respect of other matters M says that she has a need for back dated maintenance, which is in part, dependent on what award the court makes; the reimbursement of legal fees which M refers to as having been incurred on the children's behalf; rent both past and future, and this is put on the basis that the housing provided by M is clearly for the children's benefit and to meet their need; payments in respect of a car both now and a designated point in the future; moving costs and furniture costs; sums in respect of the CGT liability which it is said arose as a consequence of the housing need for the children; also lump sums in respect of uniform and dental care, the basis of which is the

delay there is in H providing the necessary funds; also seeks sums in respect of her outstanding liabilities in respect of both credit cards and loans she has had.

The income, earning capacity (if any) and other financial resources of the child

85. There are none.

Any Physical or mental disability of the child

86. There are none. Whilst in no way amounting to disabilities, I do note that the children have needed counselling to process the separation and ongoing issues.

The manner in which the child was being or was expected to be educated or trained.

87. There are no issues worthy of note separately under this heading.

Analysis

88. I have indicated above my decision in respect of the housing required.

89. In respect of the Schedule 1 claim, F has approached the matter on a strict utilisation of the formula in *James v Seymour*. M criticises F for reducing his offer on maintenance, from the interim level and then even on the day of the hearing. H's response is that there was a change in the law.

90. F's position is that unless there is a valid Household Expenditure Child Support Award (HESCA) argument the starting point and end point should be the calculation in *James v Seymour*, and this is what has been offered.

91. In the *Seymour* case, Mr Justice Mostyn said, "*In Collardeau v Fuchs [2022] EWFC 135 at [120]-[121] I qualified that view to make clear that the formula would be irrelevant where the claim was for the type of CSM award which I described as a Household Expenditure Child Support Award or HESCA.*"

92. In *Collardeau v Fuchs* at [129] b it was said that

"A child maintenance award can extend beyond the direct expenses of the children. It can additionally meet the expenses of the mother's household, to the extent that the mother cannot cover, or contribute to, those expenses from her own means. Such an award might be referred to a Household Expenditure Child Support Award (a "HESCA"). The essential principle is that it is permissible to support the child by supporting the mother.

But a HESCA cannot meet the expenses of the mother which are directly personal to her and have no reference to her role as carer of the child. An example is a subscription to a nightclub. However, the award can meet the expenses of the mother which are personal to her provided that they are connected to her role as carer examples are the provision of a car or designer clothing."

93. So, is M entitled to a HESCA award in this case? F says not, principally for two reasons. The first is that M is not the sole carer of the children as of course there is an equal shared care arrangement.

94. H refers to HESCA originating in *Re P* which suggested that a more generous approach to maintenance "*reflecting the day-to-day care provided by a party who is the primary carer of the child*". In this case M is not the primary carer.

95. In fact, in **Re P** Thorpe LJ referred to the mother “*as primary and usually exclusive carer*”. This gives scope for non-exclusivity.
96. In **Collardeau** the party’s role as A carer rather than THE carer are clearly referred to.
97. In any event it seems to me that logically a co-sharing arrangement should not extinguish a HESCA claim. A need may exist for whatever length of time children spend in the claiming parent’s care.
98. Mr Justice Mostyn does not reference co-sharing in his recent judgements. In **James v Seymour** of those cases where HESCA cannot be claimed no mention is made of where there is a co-sharing arrangement. Further it would seem to be counter intuitive that nights in care are a factor in the formula applied but extinguish the right to a claim for an exception to the formula.
99. F goes on to say that the HESCA jurisdiction can only be involved if M can demonstrate the children and her outgoings relating to the children are not met by the **James v Seymour** calculation. F says that this cannot be done.
100. In submissions F says that HESCA cannot apply as:
 - 1) M has accepted that, like F, she is more than able to manage working full time (or almost full time) due to her reduced childcare responsibilities and in view of the children’s ages.
 - 2) It is unpalatable to suggest that M should get a HESCA when F has proved he can manage caring for the children without assistance since separation working in an extremely stressful job.
 - 3) In any event, even if the court considered it could in principle make a HESCA in a situation of exactly equal shared care, it is clear that M is able to meet her, and the children’s needs on her current income and so the court does not get into HESCA territory.
101. There is not much in any of these submissions, save that point 3 requires consideration of the budget. Neither of the first 2 points mean that there should not be a HESCA allowance.
102. Given my view that a HESCA award is allowable, it is necessary to look at the offers and consider whether the outgoings would be met.
103. On F’s offer M would get £4435 pcm. This is based on income assumed to be £25k, universal credit, and the award.
104. F says that on M’s position she would get £7500 pcm. This is based on the increase in income and the award. M will be living in a mortgage free property.
105. Analysing then whether M would be able to meet her outgoings relating to the children I remind myself of the guidance in **Re P (A Child: Financial Provision** [2003] EWCA Civ 837 “... the court should discourage undue bickering over budgets.

What is required is a broad common-sense assessment. “and yet also Mr Justice Mostyn identifying the budgets as the” principle litigation battleground.” It has to be said that there was little in the way of an in-depth budget analysis during the course of the hearing.

106. M has provided a budget which puts her total budgeted costs referable to the children at £8906.50 pcm and personal expenses at £1,765.65.
107. In cross examination it was explored as to how there could be an increase in her budget from the Form E, which it was said was effectively £3276 pm (given the deductions from the budget of items that were not being paid by her, school fees and Nanny costs which totalled £4959) to £8906.5 in her final budget. This was calculated as being over 270% of her original schedule. M said that this was due to an increase in costs of living. But the increase was modest as the school fees were not included in the calculation in the Form E budget schedule. M went onto say that her budget is modest, and that she will have to cut her cloth accordingly.
108. If the court were to accept M's budget in full, then would she be able to meet the needs from her income and the offer? On the basis that she received £2600 in respect of income and benefits she would face a fair deficit even with the maintenance offered.
109. There are though elements of double counting in the budget and sums that undoubtedly could be reduced, and sums that are not properly claimable. For example, there are double entries for holidays, it is not clear why there should be allowance for a cleaner, and sundry items relating to school items are claimed that F will be paying in any event. Further it is far from clear that all the personal expense items are directly attributable to the needs of the children. Some items must be taken out for example, taxis, gifts, and a pension contribution.
110. In short, the budget requires cutting. F says that as since separation M and the children have lived on £3450 there is no deficit.
111. Whilst it is the case that M has managed without a substantial debt ensuing, I have regard to the fact that the court has a wide discretion as to maintenance and the overall result achieved by orders under Schedule 1 should be fair just and reasonable considering all the circumstances.
112. I have also considered the point that it is not fair or reasonable that given F earns £555000, and with a spread across 12 months of the additional profit share this amounts to £22125pcm, should only contribute £1737.75 pcm as maintenance for his three children. Whether or not it is fair or reasonable is not the point if the formula applied. But given that I have found it does not so I need to consider what is fair, just and reasonable.
113. M reminds the court that F will have greater assets at this disposal in the coming months. For example, he will no longer need to pay the £10-15000 for renovation works he has been paying each month (although this has been coming from capital), the school fees bill is substantially reduced, and he will not have rental costs of £3500-£5000 per month as he has moved into the renovated property.
114. I also have regard to the fact that there should bear some relation to the relevant pre-separation standard of living. I also have in mind the point that F's ascension of the corporate ladder has been achieved in large part as M was at home, and that it cannot be right that F benefits from that.

115. In my judgement I consider that the current level of £3000 is appropriate. I note that M will be increasing her earnings in the short term and should receive benefits. This will provide M with a monthly budget of £5599.
116. It is affordable by F given his level of income and the fact that to come out of his monthly salary, is the maintenance, the mortgage, household expenses and one set of school fees.
117. I then move on to consider the other elements of the claim. In respect of Term – what is proposed by F must be right. He proposes to pay maintenance until C3 turns 18 or finishes secondary education. The term to be specified for periodical payments made under CA1989 schedule 1 para 1(2) in favour of a child should not extend beyond a child's 17th birthday unless the court thinks it right to specify a later date and must not in any event extend beyond a child's 18th birthday unless the child attends an educational establishment. In circumstances where F is fully committed to supporting the children once in tertiary education by paying their tuition fees and living costs as appropriate there is no reason to pay these funds to M when the parties share care.
118. M claims backdated maintenance, but the court did not order this when ordering the interim maintenance. Further M had access to F's credit card during the period prior to the first award. I do not consider it appropriate to order backdated maintenance.
119. M says that she should be paid the sum of £228,463.01 as reimbursement for her legal fees. It is said that M has pursued the litigation in the face of protraction, inadequate disclosure, and consistently aggressive litigation tactics solely to seek remedies on behalf of the children.
120. M says that the order for reimbursement of her costs is appropriate given that she has been acting in a representative capacity on behalf of the children. It is said that she has not at any stage acted unreasonably in the litigation. It is said that the welfare of the children is central to the Court's analysis of a Schedule 1 claim and any consequences that would lead to the financial impoverishment of the child's carer would not be in the best interests of the children. That would be the effect of leaving M to bear her own costs.
121. F maintains that M's applications for costs on an interim basis have been dealt with and compromised on the basis that M pay her own costs from her funds.
122. Further he says that:
- 1) M has paid all her costs and cannot demonstrate a need for F to pay them.
 - 2) M has not exhausted her funds she has £36, 000 in her own name and will have more than sufficient funds to meet her housing need.
 - 3) If F made a payment rather than benefit the children, the only person served by an order will be M who will benefit by retaining capital in the property, which is contrary to the intention of such claims.
123. I do not make an order for costs. These have been paid and there is not a shown need for H to pay them.

124. In respect of rent this is subdivided into 2 parts firstly for reimbursement of £66k – but this does not relate to need relating to the children as rent has been paid from the escrow account and F’s personal funds. There is no debt or liability in respect of the rent. M refers to the fact that she has been spending down on her own capital to meet the children’s rental needs. But both parties have an obligation to house their children. This is not a need to be satisfied under this order.
125. In respect of future rent, F says that this is a maintenance need and not a capital need. M says that she has to pay 12 months in advance. In fact, F says that this is more likely to be 3-6 months before a house is purchased.
126. It is said that F cannot be required to pay rental costs and outright housing costs given his limited financial resources as it would mean F is stripped of all his capital and forced to borrow. F says that it cannot be fair given his post separation contribution to the assets and the court’s duty to safeguard F’s assets generally. F says that M can either pay out of her own funds (the additional £10k above her housing need) or by raising an extremely modest mortgage) both of which are resources available to her.
127. Future rent costs can be allowed and indeed were by Moor J in *Stacey v McNicholas* [2022] EWHC 278 (Fam) where he permitted an award to cover rent before the capital sum was paid by a series of lump sums on the basis that the court clearly has jurisdiction to provide capital funds for housing.
128. In my judgement F should be responsible for the interim rental costs going forward as this is a need for the children, while the house is secured, and the conveyancing completed. It is most unattractive for it to be suggested that F cannot fund this given his income. It would seem appropriate that this be monthly with a cut off of 6 months Of course the obligation will cease as soon as a purchase completes.
129. In respect of a car, M was provided with a Nissan in 2020 for £10k. M says it now needs replacing but the evidence on this was not helpful. M accepted in evidence that she had not taken the car to the garage, and indeed the court was told that the car had passed its MOT.
130. M wants £22,500 to purchase a second-hand car to replace her current car. The vehicle has done 77k miles and is falling into disrepair.
131. F offers a replacement in 2027 costing £10k providing M with a perfectly reasonable car. That seems to me to be too late and too little. But I do have in mind that F drives a modest vehicle. It seems to me that given the vehicle has passed its MOT it is reasonable for the car to last a further year, and then the sum of £15k seems appropriate to be provided for a second-hand vehicle.
132. There is no reason why F should pay M the money for uniform. F has agreed to pay this. M says that the court can make a lump sum in respect of these outgoings, and that given F’s history of failing to make payments in good time this should be paid to M for her to ensure payments are made as required. That is not needed, and F will just have to make sure the purchases are made on time.

133. In respect of Orthodontic treatment, there was disappointing evidence in respect of the parents' different approaches to the treatment for C1. I agree with F's submissions that it showed poor co-parenting and that the issue is not a financial one but an issue concerning the parties' exercise of parental responsibility and not one for the courts to interfere with. Accordingly, I make no award in respect of this claim.
134. In respect of Moving Costs and Furniture, H says that M's claims are exaggerated, whereas M says that the costs are not arbitrary, and that evidence of the breakdown was provided which was not meaningfully challenged. It seems to me that the costs of the furniture are steep given M has furnished the rented property. In respect of the moving costs this is evidenced and there is no reason to assume that this is exaggerated. Accordingly, I make an award of £10,000 for this.
135. M's outstanding liabilities – F agrees to pay a lump sum of £18,181.42 to clear M's credit cards and debts to LL and CRB F does not accept there is a loan to M's boyfriend and does not agree to pay that liability. There is no transparency about what the funds paid to M were for, and she has not provided the relevant bank statements.
136. I am not clear why the figures in the respective offers differ, but I prefer the amounts quantified by M. In respect of the loan said to be provided by M's partner, this is at best a soft loan, and the court cannot be satisfied that these monies have been applied to the children who live with M half the time. Accordingly, I make no order in respect of that but do make an order for the sum of £23,450.42 to be paid.
136. M seeks the sum of £1389.21 in respect of CGT on the sale of Property A. As it is a liability that arises in respect of housing for the children, M says F should meet it. It seems to me though that CGT liability does not arise because of housing for the children but rather as a consequence of a joint investment and each party should bear their own CGT liability.

Conclusion

137. I have strived to make an order that is fair just and reasonable, considering all the circumstances and utilising a discretionary element as to the degree to which a child should be brought up in circumstances which bear some relationship to the paying parent. Given the numerous claims the court has been asked to decide I provide my decision as follows:

<u>Court's decision</u>	
1. School Uniform	No provision for a lump sum in respect of school uniform.
2. Orthodontic treatment	No provision for F to provide a lump sum to M.
3. Car	£15,000 towards replacement car in September 2024.
4. Moving and furniture costs	Lump Sum of £10,000
5. HMRC CGT penalty following	No award.

The sale of Property A (as at 14 September 2023)	
6. Liabilities	Lump Sum of £23,450.42 to clear M’s credit card debts and loans.
7. Reimbursement of rental costs postseparation	No award.
8. Legal fee reimbursement	No reimbursement.
9. Backdated Child maintenance	No award.
10. Future rental costs (while M and the children secure a property)	£18,000 based on 6 months of rent at £3000/pcm from August 2023. This is to be paid on a monthly basis.
11. Housing “top up” lump sum	<p>The sum of £335,319. To allow for a housing fund of up to £700,000.</p> <p>F to also pay stamp duty up to £21,500.</p> <p>The legal charge will be realisable on the youngest surviving child reaching the age of 18 or ceasing full-time secondary education, whichever is later.</p> <p>M to have the option to buy-out F’s interest in the property. There shall also be rollover provisions in the charge document to enable M to move if she wishes.</p> <p>Both parties to equally pay for the drafting and execution of the charge recording the parties’ rights and obligations under the charge and the registration of the charge with the Land Registry. Both parties to pay for registration at LR and legal costs involved in charge.</p>
12. Child maintenance - quantum	£3000/pcm. Payments to start forthwith and be payable in advance by way of standing order linked to CPI. The payments shall reduce at a rate of £1000 on the month after each of the children are 18, or completes their secondary education, and shall end completely on the youngest child of the family becoming 18 and concludes their secondary education.
13. Child maintenance – term	The final amount to be paid until the youngest surviving child reaches the age of 18 and concludes their secondary education.
14. School fees and associated school expenses	F to pay school fees and extras up to a maximum of £500 per child per term.

15. Medical insurance	F to ensure that the children are covered by such medical insurance scheme as his employer shall arrange, until they are no longer eligible post their tertiary education.
16. Insurance policy	F to take out and fund an insurance policy to secure his CM and school fees obligations in the event of his premature death.

138. I will arrange a time for judgement to be handed down though anticipate that there will be very limited available time for this. I would ask that counsel settle an order for approval as soon as possible.

DJ Spanton: 25 September 2023