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No. FD03D01986

IN THE CENTRAL FAMILY COURT

First Avenue House  
42-49 High Holborn  
London, WC1V 6NP

Friday, 28 April 2023

Before:

HIS HONOUR JUDGE HESS

**(In Private)**

B E T W E E N :

WK

Applicant/Respondent

- and -

GC

Respondent/Applicant

\_\_\_\_\_

MR W TYZACK (instructed by Payne Hicks Beach LLP) appeared on behalf of the Applicant Wife

MISS K COOK (instructed by Ribet Myles LLP) appeared on behalf of the Respondent Husband.

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**J U D G M E N T**

JUDGE HESS:

- 1 This case concerns competing applications for the variation / capitalisation / discharge of a spousal periodical payments order, all within the financial remedies proceedings arising out of the divorce between WK (to whom I shall refer in this judgment as “the wife”) and GC (who I shall refer as “the husband”). I am obviously well aware that their marriage ended a long time ago, and I hope they will forgive me for using the nomenclature “husband” and “wife” as it is convenient for delivering the judgment.
- 2 The case proceeded to a final hearing over two days on 27<sup>th</sup> and 28<sup>th</sup> April 2023. Both parties appeared before me by counsel. For the wife, Mr Will Tyzack, instructed by Payne Hicks Beach, solicitors. For the husband, Miss Katherine Cook, instructed by Ribet Myles, solicitors. I am grateful to both counsel for the extremely helpful and clear way that they have respectively conducted their cases. Both parties have been represented before me at a first class level, but it has of course come at a significant cost. The wife has incurred a total of £135,143 in legal costs and the husband a total of 92,395 in legal costs.
- 3 Of course, I do not know, and cannot know, what happened at the FDR nor what Without Prejudice offers have been made; but I express my surprise and sadness that two such sensible and pleasant people as this husband and wife have been so unable to compromise their differences that they have felt the need to spend £227,538 in total fighting each other. I am afraid this is one of these cases where, sadly, the costs probably outweigh the real parameters of the dispute.
- 4 The court was presented with an electronic bundle running to 585 pages, and a number of other documents have been exchanged during the final hearing. I have considered the documents presented to me, in particular I have considered:-
  - (i) A collection of applications and court orders.
  - (ii) Material from the wife including her form E dated 4<sup>th</sup> October 2022, and her two statements dated 7<sup>th</sup> March 2023 and 20<sup>th</sup> April 2023.
  - (iii) Material from the husband including his form E dated 7<sup>th</sup> November 2022, his answers to questionnaire and his two statements dated 10<sup>th</sup> March 2023 and 11<sup>th</sup> April 2023.
  - (iv) A letter from Mr David Lockett, a pensions on divorce expert (PODE), dated 26<sup>th</sup> April 2023, which I decided to admit into evidence for reasons I shall discuss below.
  - (v) Some text messages between the parties in the course of June 2022.
  - (vi) Some properly completed ES1, ES2 forms.
  - (vii) Some selective correspondence and disclosure material.
  - (viii) The note of judgment of Senior District Judge Waller, dated 9<sup>th</sup> June 2004. I do not think that it has been formally approved by the

judge, but nobody has challenged its authenticity in the case before me.

- 5 I have also heard oral evidence from the wife and the husband subjected to appropriate cross-examination, and I have had the benefit of very full submissions from each counsel in their respective excellent opening notes and closing oral submissions.

### **History**

- 6 The history of the marriage is as follows. The wife is aged 60, having been born on 30<sup>th</sup> November 1962. She has devoted much of her life in the last 30 years or so in bringing up and caring for her children and very much sees herself still in that role despite the ages of the children, who are now adults.
- 7 The husband is aged 67, having been born on 25<sup>th</sup> November 1955. He has had a career in investment finance in the oil industry and retired aged 60 in 2015 and has not worked since then.
- 8 The parties started a relationship in 1992 and fairly quickly married, on 31<sup>st</sup> July 1992. The marriage produced three children all of whom are in their mid to late twenties. The younger two are twins.
- 9 All the children were educated at a fee paying GDST school and all now work in the world of arts and are substantially independent, though no doubt welcoming any financial and other support from either or both of their parents. One happy feature of this case is that all three children appear to have a good relationship with both of their parents, albeit that they have plainly spent more time with their mother than with their father over the years and decades which have passed since the separation.
- 10 Sadly, the marriage broke down in 2002 and the parties went their separate ways. Divorce proceedings were commenced in March 2003. Decree Nisi was ordered in June 2003 and Decree Absolute was ordered on 2<sup>nd</sup> July 2004 after the financial remedies proceedings were completed. They were completed by an order made on 9<sup>th</sup> June 2004 which was sealed on 26<sup>th</sup> July 2004 and the judgment was given and the order made by Senior District Judge Waller (as he was then).
- 11 The financial remedies proceedings in 2004, rather like the current variation proceedings, went through all the processes and the stages of the process to a final hearing over two days on 8<sup>th</sup> and 9<sup>th</sup> June 2004 before Senior District Judge Waller. Like now, they both instructed counsel. Philip Marshall and Alexander Thorpe were instructed then, and the case was fully and robustly argued. The judge ordered the sale of the then family home in Hammersmith, and he divided the proceeds marginally in the wife's favour. He also made a spousal periodical payments order in the sum of £17,500 per annum or £1458.33 per calendar month on a joint lives basis. He did not attach any inflation linking to that order, neither RPI nor CPI.
- 12 He made child periodical payments orders but those have long since expired. He directed that the children's school fees should be paid equally between the parties not actually till the end of their school days but for a short period; but I do not think that very much turns on that. As it happens, whatever that order says, by the time the school fees came to be paid the husband paid all of them, and that was in part because he had had an inheritance of £140,000 from his mother, I think, at that time; and the wife saying she was unable to pay he

preferred to pay that rather than insist on the strict wording of the order, and I want to give him credit for that because the children plainly have benefited from that decision.

- 13 In relation to pensions, Senior District Judge Waller took a view (which was perhaps not uncommon of the judges' views at that time, but would now, I think, be surprising) of making no pension sharing order and leaving the potential of spousal periodical payments to continue indefinitely. In explaining that decision he said as follows:

*“It needs to be recognised that if the wife does not receive a pension sharing order, she will receive less than half the overall assets. Equality is a cross-check to ensure fairness is achieved. Pension assets may be treated differently to non-pension assets. If the result of not making a pension sharing order is that the wife receives less than equality, this is justified by the fact that over half the Smith New Court pension was acquired before the marriage. It would not be fair or just to divide that pension equally. Furthermore, the husband’s financial contribution from monies acquired before the marriage was significantly greater.*

*On the capital division so far, the wife has received over half of the assets. The husband’s previous contribution should be recognised. If there is to be continuing maintenance, the possibility of a pension sharing order still remains in the future. If a pension sharing order is made now and it turns out to be wrong, it may not be possible to set it aside or make further provision. It could result in much expensive litigation. It would be better to leave the situation open to consider at a time when income positions are clearer.*

*If in the future the wife achieves a position where she is largely self-sufficient for her income needs, the prospect of termination of her maintenance in the form of a pension sharing order may then be appropriate. The parties’ position is currently so unsure that it would be unfair and dangerous to make a pension sharing order. It would be more appropriate for the wife to benefit from the income side of the husband’s pensions through the periodical payments.*

*The position is fortified by undertakings the husband is prepared to give. If there is a continuing maintenance order, the husband needs to provide substantial death benefit cover. One must be cautious about not making a pension attachment order since the pension sharing order will not be available until a later date. There is the possibility of a future pension sharing order along with a variation of the level of periodical payments”.*

- 14 The current law might be said to be represented by the contents of the 2019 report of the Pensions Advisory Group and I sought to set that out in my own judgment in the case of *W v H* [2020] EWFC B10. If the same facts had occurred now, a more likely order, I suggest, would have been a pension sharing order which equalised income at the state pension age of the parties. The fact that a fair portion of the husband’s pension had accrued prior to the marriage would have been unlikely to change this outcome in what was obviously a needs case.

- 15 That is not to criticise Senior District Judge Waller, because his judgment was of course delivered many years before the Pensions Advisory Group existed, but the steer which it seems Senior District Judge Waller appears to be giving in his judgment is that the joint lives order would continue until there was a little more certainty over the income – the husband was out of work at the precise time of the 2004 hearing – and then at some stage a pension sharing order would be made to capitalise the wife’s income claims at a suitable level. The capital position of the parties had an imbalance at that stage in favour of the husband and the reason for that is the fact that he did not make a pension sharing order. All of these facts seem to be quite significant in the context of what I am proposing to do now.
- 16 The capital position as described in 2004 was as it appears in Table A below. The position of the parties in 2004 upon the implementation of the order made by District Judge Waller, as set out in Table A, and it can readily be seen there is a slight imbalance of realisable assets in favour of the wife, but when the pensions are factored in, the husband has rather more of the assets as they were valued at that time, something like 60.7 % to 39.3 %.

**TABLE A**

**CAPITAL POSITION UPON IMPLEMENTATION OF 2004 ORDER**

	<b>Wife</b>	<b>Husband</b>
Own realisable assets	686,718	627,272
<b>% REALISABLE ASSETS</b>	<b>52.2%</b>	<b>47.7%</b>
Own pension assets	22,500	470,000
<b>TOTAL OVERALL ASSETS</b>	<b>709,218</b>	<b>1,097,272</b>
<b>% OVERALL ASSETS</b>	<b>39.3%</b>	<b>60.7%</b>

- 17 After that order was made and implemented, the following things happened. The wife did not, to any significant extent, find paid work. She has worked in a charity shop, but only in a very part time and a modest job. This I see as a lifestyle choice by her. She is perfectly entitled to make that lifestyle choice, but the fact is that she could at any stage have sought work and could still now seek work, and that must be something that I factor into this.
- 18 The husband did get a well paid job and paid the maintenance. From 2004 to 2015 he voluntarily added on to the base line figure of £17,500, and notwithstanding the absence of an inflation clause in that order, inflation-proofing (I assume by RPI) so that by 2015 the amount of the payment that he was making was £2,050 per month or £24,600 per year.
- 19 In 2015 the husband retired. He told the wife that he was now proposing to reduce the payments by taking out the voluntary inflationary increase and reduce the amount he was going to pay back to the 2004 levels which he calculated to be £1,450 per month. In fact, it was £1,458.33 per month and so he was paying, on the headline figure, £100 less per year than he should have done, but it seems to me it is common ground that he more than made up for that by paying other things as well, such as club memberships and for a number of years for both the wife and the daughters, and I am not going to criticise him for this modest mathematical defect.
- 20 He also took the tax-free lump sum on both his pensions and started receiving his pension income. With the benefit of hindsight, that might have been a moment to consider capitalising the maintenance either by way of pension sharing or otherwise, but nobody suggested it at that time; the wife did not complain about the reduction or not in any kind of

open way anyway; and the husband did not do anything about cutting off payments altogether – the matter just simply carried on.

- 21 In 2022 two events occurred which threw this couple back into litigation. They occurred at about the same time, but I do not propose to make any findings on or attach any significance or weight to which happened first nor whether one was the trigger for the other.
- 22 The two things were these. First, the wife began to feel that she needed more than the £17,400 which she was receiving from the husband to live on, and she felt the time perhaps had come to capitalise and/or to upwardly vary and possibly capitalise that order. Secondly, at a similar time, the husband decided to sell the home that he had owned since the divorce. He had not actually been using it because he had become re-married, in 2016, and had moved into his new wife's property in Earl's Court/South Kensington.
- 23 In relation to the monies that he thought he was going to receive from the sale of his property, he indicated to the children informally in June 2022 that he was minded to make substantial gifts to them, and he suggested to them that the figures might be in the region of £250,000 each. He also decided at the same time that he would stop paying maintenance to his wife or that he should be entitled to stop paying maintenance to his wife – although he did in fact continue to pay it. But the result of those thoughts by both parties was that in late August 2022, both of them made an application by way of Form A to the court and under those applications the wife sought an increase in the maintenance and its capitalisation and the husband sought a decrease or a discharge of the maintenance order.
- 24 Forms E were duly exchanged in October and November 2022 and the first appointment was heard by District Judge Hudd on 12<sup>th</sup> December 2022. She turned the hearing into an FDR and no doubt gave some indications as to the way forward in the case, but sadly no settlement was reached. As a result of that she, District Judge Hudd, listed the matter for trial on 27<sup>th</sup> and 28<sup>th</sup> April 2023 and made some timetable directions to get the case there, one of which was for the production of narrative statements, and those were produced, two on each side, as it turned out in March and April 2023 and, as I have said, a final hearing has taken place before me on 27<sup>th</sup> and 28<sup>th</sup> April 2023.

### **The law**

- 25 In dealing with these claims, I need to bear in mind in particular s.31 of the Matrimonial Causes Act 1973, and in particular I need to remind myself of s.31(7) of the Act which says this:

*“In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen”*,

In this case all the children are way above 18, so, it does not really take the matter any further forward; but the section goes on:

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

- (a) *In the case of a periodical payments or secured payments order made on or after the making of a divorce (...) the court shall consider whether in all the circumstances and after*

*having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made or secured (...) for such further period as will in the opinion of the court be sufficient (in the light of any proposed exercise by the court, where the marriage has been dissolved, of its powers under subsection (7B) below) to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments”.*

26 The matters referred to as being the matters which the court was required to have regard to when making the order are of course the matters to be found in s.25(2) of the Matrimonial Causes Act 1973 and that reads as follows:

- (2) *As regards the exercise of the powers of the court (...) the court shall in particular have regard to the following matters—*
- (a) *the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;*
  - (b) *the financial needs obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
  - (c) *the standard of living enjoyed by the family before the breakdown of the marriage;*
  - (d) *the age of each party to the marriage and the duration of the marriage;*
  - (e) *any physical or mental disability of either of the parties to the marriage;*
  - (f) *the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;*
  - (g) *the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; [and]*
  - (h) *in the case of proceedings for divorce (...) the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.*

27 There is a good deal of case law which gives guidance on how those provisions should be interpreted. In delivering my judgment I have considered all of the cases to which I was referred by counsel and one or two more.

28 The following cases throw some light on how I should deal with this case:

*Pearce v Pearce* [2003] 2 FLR 1144;  
*Waggott v Waggott* [2018] EWCA Civ 727;  
*O'Dwyer v O'Dwyer* [2019] EWHC 1838;  
*CB v KB* [2020] 1 FLR 795;  
*Lauder v Lauder* [2007] 2 FLR 802;  
*Vaughan v Vaughan* [2010] 2 FLR 242;  
*Wright v Wright* [2015] EWCA Civ 201;  
*Clarke v Clarke* [2022] EWHC 2698;  
*Cummings v Fawn* [2023] EWHC 830.

29 From those cases I derive the following propositions which are pertinent to the exercise upon which I am embarked:-

- (i) In varying or discharging an income related order the court may make a capital order such as a lump sum order, property adjustment order or a pension sharing order.
- (ii) This power should not be used to re-open capital claims as such and the court should restrict itself to considering whether there should be any notional variation in the level of periodical payments, whether the provision can and should be capitalised, and the mathematics of the capitalisation.
- (iii) In considering the notional variation of the level of periodical payments, the assessment is a needs-based assessment, and the burden is on the payee to justify the need for ongoing dependency and the continuation of financial provision in the context of the statutory question about adjusting without undue hardship.
- (iv) In deciding whether to take into account capital which the payee has at the time of the variation application, the court has a wide discretion as to whether to include such capital in the capitalisation amortisation figures. There is no definitive guideline on this save a duty to promote fairness and all results are possible from amortising all of the capital to amortising none of it to any point between those points.
- (v) The court can attach weight to comments made by the judge at the time of the original order.



## Property and other financial resources

- 30 Dealing with those factors, there being no minor children here, I turn to the property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future. Many of the figures are not controversial at all and I just need to record them rather than determine them; but I need to say one or two things first.
- 31 In this case the husband was obliged under the rules to provide the cash equivalent value (CEV) of his Bank of America pension. No CEV has been provided. It is not easy to understand why, but the difficulty with this it seems – and I accept – comes not from the husband himself but from the pension provider. I do not understand why they have taken the view they have, but it is certainly not the case that a CEV cannot be produced for a pension which is already in payment.
- 32 Absent any formal cash equivalent from the pension providers themselves, what am I to do? I was presented at the outset of the trial with a letter from a David Lockett, dated 26<sup>th</sup> April 2023. Mr Lockett was not instructed as a single joint expert and I need to have in my mind that *caveat*, and he does not have access to the internal documentation of the Bank of America pension fund, so, he does not know exactly how a CEV would be produced. But he has done what he can to provide a value of what it would cost for the husband to provide similar rights that he has against Bank of America pension fund if he had to purchase those rights on the open market, and he has come up with a figure of a value of £1,074,000 for the husband's Bank of America pension.
- 33 Whilst this of course is not a CEV, and the husband has made it clear he thinks the actual CEV should be lower than that, the CEV should be a broad calculation designed to value the rights that exist under the pension fund, and so it is an anomaly of this work that the CEVs quite often do not actually match that value. In this case we have the odd situation where we do not have the CEV, but we do have an independent valuation of what those rights would cost.
- 34 In the absence of any other figure, and knowing Mr Lockett to be a very experienced and competent professional in this area who would have done his best to provide a mathematically correct figure, it seems to me that I should attach weight to what he has said, and nobody has put forward any theory as to why his figure is wrong. As well as that, the pension at the moment produces an income for the husband of £49,565 inflation proofed for life and I am not surprised to find that the value of such a thing for a 67 year old man is c.£1,074,000. It seems about right. In any event, lest the husband should feel aggrieved by the admission of that document, since no pension sharing order is sought by either party as the answer to this case and since I am not making an order which is based on any particular value of the husband's pension as it is now, I do not think that he has been in any way affected by my using that figure, but it is helpful and interesting for me to see that figure in the context of a table to illustrate what now appears to be the capital position as it is now, which is Table B, which I set out below.

**TABLE B**  
**CAPITAL POSITION NOW**

	<b>Wife</b>	<b>Husband</b>
Real Property <sup>1</sup>	1,290,000	0
Savings and Investments in sole name <sup>2</sup>	362,921	1,933,403
Outstanding Legal Costs <sup>3</sup>	-32,573	-28,575
<b>Own realisable assets</b>	<b>1,620,348</b>	<b>1,904,828</b>
% REALISABLE ASSETS	46.0%	54.0%
<b>Own pension assets</b>	<b>97,345</b>	<b>1,136,546</b>
<b>TOTAL OVERALL ASSETS</b>	<b>1,717,693</b>	<b>3,041,374</b>
% OVERALL ASSETS	36.1%	63.9%

- 35 Within the husband's pension assets, assessed at £1,136,546 is of course the figure of the Bank of America pension which I have just come up with at £1,074,000 which Mr David Lockett produced; and that going in the table illustrates that as we are now including the pensions, the total overall assets now are 36.1% to the wife and 63.9% to the husband. And I note that that imbalance in pension provision which exists now is not dissimilar (although the figures are higher) to the differentials in the pensions at the time of the 2004 order.
- 36 In my view what Senior District Judge Waller was steering us to do in 2004, and to which I should attach weight, is to say that at some point in the future there should be a capitalisation at a reasonable amount, and he anticipated that that would be by way of a pension sharing order, though of course it does not have to be. But the steer is that the wife has not in the original settlement had her full capital entitlement because of the structure which Senior District Judge Waller chose to adopt.

#### **Income and earning capacity**

- 37 I turn to the income and earning capacity which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire, and whether it would be appropriate to require periodical payments to be made for only such term as will in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.
- 38 In that context the following picture emerged. As far as the husband's income is concerned, he is of course retired and not in receipt of an earned income, but he does have the Bank of America pension which produces £49,565 per annum gross for him and the Canada Life pension which produces £4,925 per annum gross for him.

<sup>1</sup> The wife owns her home in East Sheen valued at £1,325,000 gross or £1,290,000 after sale costs (it is mortgage free). In November 2022 the husband sold the only property he owned in Fulham (which was before that rented out) for a gross sale price of £1,471,000 or £1,398,255 after sale costs and CGT (it was mortgage free).

<sup>2</sup> The wife's figure includes money received from her parents of c.£225,000 received in c 2014, partly an inheritance from her father and partly a lifetime gift from her mother. The husband's figure includes the net sale proceeds of the Fulham property and also includes c £225,000 which he holds on behalf of his current wife.

<sup>3</sup> The wife has incurred £135,143 in legal costs of which £32,573 is outstanding. The husband has incurred £92,395 in legal costs of which £28,575 is outstanding.

- 39 As well as that, the husband is able to be relieved from paying certain bills which he would otherwise have to pay because his current wife is earning £75,000 per annum gross – although I do note that she has been ill and there is no guarantee that that will continue indefinitely or even for a long time. He also has the simple fact that the charge on his income from the normal costs of housing do not arise because he is living in a house owned by his current wife.
- 40 I turn to the wife. She is aged 60, which is of course significantly younger than the state pension age. She is in reasonable health, I have not heard any details of any significant health issues, and the husband suggests that it should be appropriate to suggest that she has an earning capacity. I agree with that. I think she does have an earning capacity. It is a matter for her whether she utilises it, but I think she does have an earning capacity and that fact must go into the mathematics.
- 41 But at the same time, it seems to me that is limited both in time and in magnitude. It is a matter for her what she does, but she is obviously intelligent and personable, and I do not accept that obligations to children of 27 and 29 should have any effect on her ability to work at some level or another. And it is a matter for her what she does, whether it is in retail or something else.
- 42 It seems to me that I should assess this case on the basis that she could work if she so chose and could earn, I am going to say, about £10,000 per annum for the next six or seven years in some capacity or another, after which her state pension entitlement will take over at roughly the same sort of level.
- 43 She also receives £3,649 per annum gross from her own pension. At the moment she receives £10,400 per annum, or £200 per week, from her mother, and there has been a dispute as to where that should fit in to my analysis. I accept the wife’s evidence on this, that this is being given to her because she is short of income and if she had a reasonable amount of income from somebody who should be supporting her rather than from someone who had no obligation to support her (of course her mother is in that category) then she would not be getting that money.
- 44 I also note that at any time her mother could stop paying her that for whatever reason she likes, or one of those reasons might be that her mother loses capacity, and in that scenario it would probably be inappropriate for those payments to continue. So, for all of those reasons, my conclusion about that is that I should not factor that into the mathematics of my analysis.
- 45 The wife has a fund of money and I have totalled it at £362,921. There is an obligation to pay some legal costs which would bring that down to about £330,000; and the extent to which this should be included as a source of income for the purposes of my analysis depends on what view I take as to the amortisation question.
- 46 I note that a good part of that money is inherited and that there is some authority for the proposition that money that is inherited should be disregarded for these purposes, but some of it comes from what she had at the time of the original split. And it is also right that some of the case law, for example *Mostyn J in KB & CB*, suggests that money is there for spending, and in all circumstances such money should be taken into account. She currently draws £12,000 per annum from that but Miss Cook has done some capitalisation *Duxbury*-ised figures which suggest that on a *Duxbury* basis the figure from that fund would be round about £19,935 per annum net, and rather more gross figure. I have a discretion as to the

extent to which I should include that. In the end, weighing up all of these factors, it seems to me that it is reasonable for me to suggest that a figure of £18,000 per annum gross should be taken as the income available from that fund, and that is what I shall take into account in my mathematics.

- 47 So, from those sources the wife's income before she has any support from the husband is £10,000 pag from earnings, £3,649 pag from her pension, and £18,000 pag by way of *Duxbury*-ised capitalised amortised income from the fund of cash which she has. If I add those figures, it totals £31,649. There will be some tax to pay on that which will take it down to something like £25,000 per annum net.

### **Downsizing**

- 48 What other factors have been argued as to what should weigh in the equation? Well, the next one is the downsizing issue. The husband has suggested that the wife should move out of her current house, should buy a rather cheaper house and use the surplus cash as effectively a *Duxbury* fund to replace his maintenance. The wife strongly objects to that proposition; and having heard the evidence I have reached the conclusion overall that I do not think it is fair or reasonable that I should take into account money released from a notional sale for the purposes of my calculation. I reach that conclusion for *inter alia* the following reasons.

- 49 It seems to me that the house was always intended to be a house for her for life. Although it has a number of bedrooms, it is a modest house in size and not at all unsuitable for her living on her own with some regular visits from her children. Certainly, there is no reference in Senior District Judge Waller's judgment to the effect that he was expecting her to downsize at some future date.

- 50 It is also true that the husband had a property which is worth more than that, which he has just sold; and also, that he lives in a property which is worth approaching £2m, perhaps £1,750,000, which of course is owned by his wife. So, for him to live in a £1,750,000 house, possibly a bit more than that, and suggest that the wife should sell her £1,350,000 house and buy something yet smaller, perhaps £900,000 or even less than that, does not seem to me to meet the test of fairness, and I have not been satisfied that I should therefore do my calculations on the basis that the wife should be forced to sell that house or even that she could sell that house. Overall, I do not think that proposition is a fair one and I am not going to include any figures on that basis.

### **Inheritance**

- 51 I turn to the other matter, which is inheritance. It is of course possible that the wife will receive inheritance from her mother at some point in the future, but she has not received it yet and her mother is alive and well, albeit at an advanced age of 94. Although we have not carried out an in-depth analysis of the mother's finances, she certainly seems to be a lady of some means. But the difficulty of including this in any analysis now is that we do not know what will happen. We do not know whether the wife will fall out with her mother, but perhaps more likely her mother may go into a home, may lose capacity and stay there for quite a number of years at huge cost eating up the capital which is hers, and undoubtedly her house would have to be sold on that scenario and the capital might disappear. The wife has a brother as well so it would only be half what her mother got in any event and there may be inheritance taxes as well, there are all sorts of complications and I bear all those in mind, and I bear in mind also some of the case law on this, for example, *Michael v Michael* [1986] 2 FLR 389.

52 And whilst understanding that the husband, having spent his own inheritance on school fees, might regard this as a little rough for him, it seems to me that in terms of balancing between the two parties it is difficult for me to treat this inheritance as though it was there whilst it remains speculative and contingent, and I am not minded to include anything for that in my mathematics. Of course if the wife's mother did die in a year or so's time and left the wife a lot of money, then the fact that I have capitalised the maintenance now might seem unfair to the husband and there would be no way I do not think of re-opening the matter at that stage; but this sort of dilemma often occurs in these cases; and the balance of fairness usually – and I think in this case – comes down in favour of my not including this in the mathematical calculations.

### Needs

53 I turn to the question of needs. I heard quite a lot of evidence about the husband's spending and it is quite clear that he has enjoyed quite a number of big ticket spending items which, all of us perhaps, envy the fun which he would have had at all of them: dinner for 40 at a members' club; a box of 12 at the Albert Hall; a private jet to Venice; or £3,800 Rolex watch purchased on a whim; trips to the Oval in private boxes, etcetera. In the end, I do not feel it is appropriate for me to criticise him for doing that or to attach any weight to the fact that he has done that or think that that is significant in the context of this case. He is entitled to spend his own money in whatever way he wishes, provided that he is not at the same time saying that that means that he cannot afford to meet what is reasonably due to the wife. In fairness to the husband, he has not suggested that for a moment and he has not argued that there are greater priorities than paying his wife what she is reasonably due. He has just argued that she is not reasonably due anything.

54 He, and this is as I mentioned earlier, in the context of the beginning of this case, had thought about giving £250,000 each to each of his children from the proceeds of sale of his house. If he feels that he can do that at the end of this case, all well and good, that is a very generous and loving thing to do and no doubt there are some tax advantages in doing it as well. Whilst I certainly would not criticise him for doing that, I certainly would not ask him for an undertaking either not to do that or to do that, it is entirely a matter for him. But it seems to me that he cannot come to this court and say that that is a greater priority than paying his wife what she is due, and in fairness to him he never has said that and it has been no part of his case to say that that is a priority or because that came first that should be a priority and the issue of affordability should be assessed against that. It is part of the background, and he will have to decide whether he wants to go ahead with it. No doubt his daughters will be delighted if he does do that, but it is not something which he is obliged to do.

55 None of that for me really has much bearing on what are the wife's needs, and it is upon them that I need to focus. As ever, we had the "battle of budgets" here, and the Form E budget seemed to pitch things a little on the high side at £59,834, just a little shy of £60,000 per annum, and it is clear that she had never lived at that level although she said, "*Well, had I had a reasonable amount of money I would have lived at that level and I've just been, just had to cut my cloth*". But in the presentation before me that figure was reduced to £50,000 per annum and that is the one that I need to address my mind to.

56 Having heard what the wife said about that, having heard what the husband said when some of those figures were put to him, knowing what he lives off, I do not think I could properly criticise a budget of £50,000 per annum or £4,166 per month. In reaching that conclusion I take into account the standard of living that the parties had when they were together. I take

into account the duration of the marriage, which was not very long, although the duration of the obligation to the children was quite a bit longer and that really came out of the marriage.

- 57 But, factoring in all of those things, it seems to me that it is reasonable in all of the circumstances for the wife to aspire to live at that level, I think that is a fair figure, and I note the cross-check that if the original order had included an RPI updating figure the current figure would be £33,665 per annum which would very broadly have been meeting her needs at the sort of figures that I have just been talking about and that perhaps is a cross-check on the fairness and the intentions of Senior District Judge Waller.
- 58 For all of those reasons it seems to me, and this is a broad analysis, but I think it is a fair one, I hope it is a fair one, that she needs about £50,000 a year to live on and she can provide, as I have explained, £25,000 a year from her own resources. And it seems to me to follow from that that she has established for me that she has ongoing income needs which need to be met at £25,000 per annum for life. That is the first of the questions that I should address in the analysis which I have described above, much of which comes from the case of *Pearce v Pearce*, as I have mentioned.
- 59 So, can that be capitalised? The answer is it can be, either by way of a pension sharing order or by way of a cash sum, and both parties would prefer me to do it by way of a cash sum on the facts of this particular case. That can be capitalised, and so what are the mathematics of that? And I have looked at the At a Glance *Duxbury* tables for a 60 year old female to secure £25,000 a year for life would cost £321,000, a 61 year old would cost £308,000 and the wife is roughly halfway between the two, and therefore it seems to me that she is entitled to receive a lump sum of £314,500 and that is the lump sum which I am going to order the husband to pay. It is available as cash and that should be paid straightaway. There is no question but that that can be afforded whether or not the husband downsizes what he would have given to the children or downsizes something else in his life, it is a matter entirely for him, but certainly the wife's entitlements come first, and it seems to be reasonable that she should have that figure.
- 60 Senior District Judge Waller anticipated that there would be a pension sharing order but I daresay that having addressed his mind to it he would have reached the conclusion also that both parties were looking for a cash sum rather than a pension sharing order, that was an equally fair way of dealing with the case.
- 61 Stepping back, looking at what effect that has on the total assets of the parties, it seems to me to be a perfectly fair and affordable way of doing things; so, my order will say that the husband shall (it has been suggested 14 days, but I will hear submissions if that is impractical) pay to the wife a lump sum of £314,500. And that – as soon as he pays that sum his obligation to pay spousal maintenance, will immediately come to an end and there will be a clean break imposed. That is my judgment.

## LATER

- 62 I delivered a judgment a few minutes ago in this case and that will be fresh in the minds of the parties, and I have made an order that the husband should pay the wife a lump sum of £314,500 to discharge the maintenance order. Certainly, it would be fair to say looking at the sequence of open offers, on 8<sup>th</sup> December 2022 the wife offered to accept £425,000, the husband responded on 11<sup>th</sup> January with an offer of £100,000 but that was to be reduced by any costs he incurred after that pound for pound; and indeed on 18 April he withdrew that altogether and said she should have nothing; and the wife on 9<sup>th</sup> January 2023 suggested a figure of £333,482 which is not very far away from what I have ordered. It is a little higher,

but not so very much higher than what I have ordered; and so from the point of view of the open offers certainly, I have ended up much closer to what the wife was saying than what the husband was saying.

63 So, how does that translate into costs? Mr Tyzack on behalf of the wife asks me to make a costs order against the husband, and I have to make the decision on that against the background first of all of what FPR Part 28 says, which is that the starting point is that the court will not make an order requiring one party to pay the costs of the other party; but that starting position can be departed from on one or more of a number of bases which are:

- “(a) any failure by a party to comply with these rules (...);*
- (b) any open offer to settle made by a party;*
- (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
- (d) the manner in which [it has been pursued];*
- (e) any other aspect of a party’s conduct (...);*
- (f) the financial effect on the parties of any costs order;*

64 And perhaps importantly here, Practice Direction 28A of the Family Procedure Rules steers the court in this direction:

*“The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a ‘needs’ case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court”.*

65 So, the basis really of Mr Tyzack’s suggestion is that this case falls within that wording and that the wife’s open position was reasonable and the husband’s open position was not and since the best he has offered is £100,000 and that with *caveats* attached to it and I have ordered a much higher figure, it could be said that his opening position was unreasonable.

66 Against that, the offer which is closer to mine of £333,000 came in on 9 January 2023, so at a late stage in the litigation. As well as that – although the husband has taken some points which I did not agree with which might have led to a different result if I had agreed with them – the fact that I do not agree with them does not mean it was unreasonable for him to take those points. I think the inheritance point and the downsizing point - one can understand why those points were taken perfectly reasonably and competently, even if I have not agreed with them at the end of the day.

67 So, how does this all bear down? I should say since 9<sup>th</sup> January 2023 the wife has spent something like £60,000-worth of costs but also, I note that the wife has been spending more heavily on costs than the husband and his costs since roughly 9<sup>th</sup> January 2023 have been more like £40,000-45,000, so I need to factor that in as well.

- 68 Weighing all of that up I reach the conclusion that I should make a costs order against the husband to mark the fact that he should have made an open offer which was closer to the mark but bearing in mind the relative lateness of the offer which has come close to my offer, also the fact that the note of judgment of Senior District Judge Waller, to which I have attached importance, was disclosed fairly late in the day, although against that the husband might have remembered that District Judge Waller had said that all those years ago, he being there.
- 69 Taking into account all of those matters, I propose to make an order that the husband should pay to the wife costs of £15,000 and that that should be paid in the same sort of timetable as the order.
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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**\*\* This transcript has been approved by the Judge \*\***