

IN THE FAMILY COURT at BIRMINGHAM

Before DISTRICT JUDGE CHLOË PHILLIPS

WH v HB and RF (Financial Remedies: treatment of soft loan; offer from 2nd Respondent)

Between :

WH	<u>Applicant</u>
and	
HB	<u>1st Respondent</u>
and	
RF	<u>2nd Respondent</u>

Aimee Fox (instructed by **Brindley Twist Tafft and James LLP**) for the **Applicant**
Andrzej Bojarski (instructed by Godiva Law) for the **1st Respondent**
Lucy Owens (instructed by Band Hatton Button LLP) for the **2nd Respondent**

Hearing dates: 16 and 17 November 2023
Judgment handed down: 12 January 2024

JUDGMENT

This judgment was given in private. The judge gives permission 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 this 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. The parties have not objected to publication of the judgment in this form.

DISTRICT JUDGE CHLOË PHILLIPS :

1. This matter concerns financial remedy proceedings between WH, the applicant wife, and HB, the respondent husband. This is the court's judgement in respect of the applicant's application for financial remedies on divorce. The court previously dealt with a preliminary issue to determine whether an amount of £900,000 provided to the respondent by his Father, RF, the 2nd Respondent, was a gift or a loan. For ease of reference in this judgement, and with no disrespect intended to the parties, I shall refer to the Applicant wife, as "W", the First Respondent as "H" and the second respondent as "F".

Background

2. W and H cohabitated from 2007. They had an Islamic marriage ceremony in 2011, and a civil ceremony in May 2012. The marriage broke down in 2018, but both parties remained living in the former family home until 2021. The parties have one child, C, aged 12, who has a diagnosis of ASD and has some additional needs. He attends a mainstream state secondary school with an EHCP in place.
3. W commenced financial remedy proceedings on 23 December 2020. The first appointment took place on 30 April 2021. F was joined to the proceedings on 2 June 2021. An FDR listed for 23 September 2021 was adjourned by consent. In December 2021 F issued civil proceedings against H for recovery of the £900,000 allegedly loaned. W's applications for maintenance pending suit and a legal services payments order were heard on 22 March 2022, and an FDR took place on 5 April 2022.
4. W had made an application to consolidate and stay the civil claim issued by F against H for return of the loan monies on 4 April 2022. A further hearing took place on 8 November 2022 of W's application for a legal services payment order and for the stay

of the civil proceedings. F gave an undertaking not to take steps to enforce the loan against H until the conclusion of the preliminary issue hearing or other agreement. A legal services payment order was made in respect of the applicant's costs.

5. The preliminary issue was heard over two days from Monday 30th January 2023. Judgment was handed down on 12 May 2023 (a draft judgment having been provided to the parties much sooner than that). The findings, so far as relevant, are referred to below.
6. At the final hearing all parties were represented by counsel: Ms Fox for W, Mr Bojarski for H and Mrs Owens for F.

Costs

7. The costs information from the parties in their Form Hs reveal the staggering level of costs incurred in this matter. As at the preliminary issue hearing W's costs were £73,535.40, H's costs were £142,810 and F's costs were £121,917. As at the final hearing the parties' costs were stated to be: W - £102,284; H - £305,794; F- £139,264 – a total between the parties of £547,342.

Assets, Liabilities, Income and Pensions

8. **Assets:** The parties' main asset is the former family home, which is registered in H's sole name. It is valued at £950,000 and after costs of sale the agreed net equity is £931,000. W owns a property jointly with her mother in Manchester, which is let to tenants. Recent valuations provide an average value of £124,166. H disputes the value contended for by W.

9. The parties have modest amounts of cash at the bank: £6964 for H and £2300 for W. In addition, H accepts that he has money in a bank account in Australia worth around £8300.
10. In terms of chattels, H owns cars which he values at £26,990 and W values at £29,900. W has no chattels of value.
11. **Liabilities:** W's liabilities comprise a NatWest loan of £11,248, NatWest credit card with a balance of £2467, outstanding legal fees of £14,256 and a family loan of £17,200. In addition W has costs orders against her arising from the preliminary issue proceedings totalling £14,850 (being 30% of H's costs, summarily assessed at £4950 and 30% of F's costs, summarily assessed at £9,900).
12. H's liabilities comprise credit card debts of £19,979, outstanding legal fees of £40,166, a loan from his new wife of £36,000, a loan due to F in respect of legal fees of £112,499, and a loan due to F of £900,000.
13. At the conclusion of the preliminary issue hearing concerning the loan I found:

“95. It is a substantial amount of money, but it is an amount of money which F does not currently need and appears unlikely to need in the foreseeable future. His intention is for it to be part of the assets of the discretionary trust he has set up and his responses make it clear that in reality he is not expecting repayment other than on a long term basis whereby the loan remains an asset of his estate and the discretionary trust which is intended to protect his assets for future generations.

96. Considering all of these factors including F's love for and ongoing financial support for both his son and grandson, I conclude that the loan is very much a soft loan for the purposes of these financial remedy proceedings.”

14. **Pensions:** H has NHS pensions worth a total of £375,479. W's pensions (which largely comprise NHS pensions) total £168,203.
15. **Income:** W sets out her current monthly income in her S.25 statement as an average monthly total of £3,603.49.
16. This amounts to a net income of around £43,000 p.a.
17. H's income as a consultant surgeon is £61921.84 per annum net (according to his statement of 3 November 2023).

The parties' open proposals

18. W proposes that she should receive a lump sum of £475,000, representing 50% of the value of the former family home with a default order for sale and net proceeds to be divided equally. She seeks periodical payments of £600 per month until C is 18 or finishes secondary education, whichever is later; otherwise, a clean break, and no order as to costs, including the costs relating to the preliminary issue hearing.
19. H's position is that the former family home must be sold and from the proceeds of sale the £900,000 loan to F should be repaid. His position is that there should be a clean break and no periodical payments as W receives child maintenance of £512.20 per month.
20. F has remained a party to the proceedings and in the week before the hearing he put forward an open offer to W to provide a sum of £400,000 through a discretionary trust in order to settle the property for W and C on trust for life. A previous offer of £450,000 through a trust was put forward in October 2022 and subsequently withdrawn some 5 months later.

Agreements

21. On the first day of the hearing, the parties reached agreement in relation to pensions: H will transfer 71.21% of his NHS 2015 pension to W.

The Issues before the Court

22. The court must determine:

- a) Division of capital and
- b) Periodical payments for W

Evidence of the Parties

23. W currently lives in a rented apartment in Warwickshire. C lives with W from Sunday afternoon until Thursday evening and otherwise stays with H. W says she needs a suitable house for herself and C so he has his own space, a garden to use and a similar property to that of H. W says she has historically been C's main carer and generally is the one who takes responsibility when he is off school sick, receives calls from the school and arranges his medical and dental appointments. She also arranges the bulk of his extra-curricular and social activities. She wants to stay in her Warwickshire town because C knows the area and she has a support network there.
24. W said that the landlord of the flat she is renting wants to sell it, but he had agreed not to do so yet as she had told him that the outcome of the hearing would be known soon. W put forward property particulars suitable for herself and H ranging from £400,000 to £415,000.

25. With regards to the property particulars in the court bundle put forward as suitable for her by H, W accepted that the first and second properties proposed would be suitable. The first was for new build houses in the Warwickshire town priced at £355,000 with three bedrooms and two bathrooms, a garden and parking. The second property is a 3-bedroom semi-detached house on the market for £375,000. She considered that a semi-detached property priced at £255,000 with three bedrooms was not suitable as it appeared to require quite a lot of work and was further from school. W said in evidence that she had tried to buddy up C with some school friends so that he could walk to school with them, but he had got lost and forgot to meet up with them and she had been called at work.
26. In cross examination, Mr Bojarski, on behalf of H asked repeatedly why W did not find F's proposal for the provision of a house for her and C acceptable. W said that she had spent all of her life savings and H and F went behind her back in relation to what she thought was her home, and she has no confidence or trust in what they say, and she cannot understand why she cannot have a home of her own. She said she had been fighting from day one to be in a situation where H had his own home and she had her own home with her son in order to provide him with a nice environment. W said that she had not known about the arrangements between H and F and had she known, then she would not have moved into that property, and she would have got a smaller property with a mortgage because she wanted to own her own home. She said that the big problem with the offer from F is that it would not be her own home.
27. With regard to the property in Manchester, W said she lived there for 10 years. It is now rented and she receives all the rental income even though her mother's name is on the property. W said that this was because she had been paying for her mother's

private care. If the property was sold, she said her mother would take half and she would get half. W said that the rental income was the most consistent income that she has. The rental income is £580.95 per month net after agent's fees and a retention for maintenance costs.

28. W's evidence included a long list of jobs that she had applied for – all part-time roles. She said that this was because she is C's main carer and because of his additional needs. She said that the school had been told that he was at year two level, even though he was in year seven, and he had a lot of anxiety problems. It was put to W by H's counsel that she could have applied for a position as a Band 7 Advanced health practitioner which had been recently advertised with a salary of £43,742 to £50,056 a year. W said that she made enquiries, but she did not meet the essential requirements for the job, and therefore there was no point putting in an application. W said she was registered with agencies for jobs, and when her savings ran out due to legal fees she applied for all sorts of jobs, for example, where she could use her mentoring skills, management experience, teaching experience and professional experience. She said she was not shy of working, but wanted to meet C's needs.
29. In relation to her future budget which estimated outgoings of £7600 plus another £1666 for C, W said that this was probably a lot less than when the parties were together. She accepted that it was a lot and she thought some things could be curtailed.
30. H's section 25 witness statement was provided late, on 3 November 2023. His statement says he has no property in his sole name or jointly with another, but in cross examination he accepted that the former family home is in his sole name. His evidence is that his debt totals £1,006,000 including the amount of £900,000 owed to

his father. H failed to provide any bank statements for the bank account in Australia, which, according to his form E has a balance of £8300.

31. In relation to C, he states that he and W have 50/50 shared care and he arranges his working week so that he can offer childcare support in the afternoons in order to allow W to work. He exhibited to his witness statement what he considered to be an appropriate Band 7 experienced practitioner job suitable for W, suggesting that her minimum reasonable income would be £42,000 on the basis that the experienced band 7 job is advertised with minimum pay of £43,742.
32. H stated in his witness statement that he entered into an Islamic marriage on 1 August 2023 to a woman who lives in a City in the North of England and who has two children aged seven and three. His evidence is that they intend to live together as a family as soon as possible once his wife has reached a settlement with the children's father allowing her to relocate. H says that they will need a four-bedroom house with a garden and they plan to have children together. He said that his wife offered to lend him £36,000 in order for him to pay his legal fees and the legal services payment order. His evidence in the witness box was that he has not discussed with his wife how much she earns, but when questioned he confirmed that she is a consultant doctor and he estimated that as she had been a consultant for about two years, her salary could be around £80,000, and as she works on an 80% basis he estimated it was in the high £60,000s.
33. H says that he believes W's property in Manchester is worth £174,709 because that is what it is insured for. In cross examination he explained that he opened a letter in error which contained this valuation, and gave it to his solicitor. He accepted that he

and his solicitor had not engaged with the court direction in relation to obtaining a valuation of the property.

34. H was cross examined about his procedural delays and failures. His response was to the effect that he was trying to get the legal issues resolved, and he thought it would be unnecessary to prepare fully for the final hearing because a home for W and C for life would be arranged. He said he had made several approaches to W to make an offer that she might accept, and in relation to F's offer he said that "*she would get security because he [meaning F] wants C to have it*".
35. When asked why he had not provided his mortgage capacity evidence, H responded that he had given his solicitor a number of screenshots of online applications, and he had made applications by telephone. H said that when he put down the value of the house and the loan "*it*" said that as he had not paid back more than 10% of the property value the application could go no further. H said that he tried an application on the telephone and said that he would probably have a CCJ and they said they could not help him.
36. When first asked about his bank account in Australia, he denied having an account in Australia. On further questioning, he clarified that he had money in an account when he left Australia and as he had not used the account it had been closed by the bank. He said he had tried to repatriate it, but so far without success. H accepted there was no evidence of this.
37. In respect of W seeking ongoing periodical payments, H is currently paying £600 per month, and in cross-examination he accepted that the payments should not stop immediately if W could not get a job straight away but should not continue until C

reaches 18. He suggested around 3 to 6 months would be reasonable for her to obtain more income from work.

38. In relation to his monthly expenditure H said that he has reduced the amount spent on domestic help from £1008 per month for a cleaner and gardener to less than £400 for the cleaner, and he does not have a gardener, other than a friend who helps out. He said he has also considerably reduced his costs on the gym and child expenses.
39. About his own earning capacity, H says he works 40 hours per week. He has considered private practice, but in order to get this going it is necessary to pay private insurance which he said is around £35,000 per annum and to have practice rights at the local hospital. He explained that due to the situation in his locality, it is unlikely that he will have this opportunity.
40. On his father's litigation, it was put to H by W's counsel that he was not planning to pay back the loan and he intended to stay in the property. H denied this, saying he had taken the loan in good faith, and there was no suggestion that it would be turned into a gift – H said it would go back to F or into a trust in the event that he passed away. When asked whether he had tried to pay any of it back, H said that given the amount of debt he owed he had put his father in a situation where the asset was in jeopardy and he was unable to protect it, and he said he had had to ask his new wife for money to protect it. H said that if he borrowed money from his father for this litigation and then gave some of it back, it did not make sense.
41. When asked by W's counsel whether he was suggesting that the court should order sale of the family home and then H would pay back his father, he responded: "*If necessary – he trusted me, it is his money*". He also said:

"I took a loan to buy the house and my father expects to have either the asset preserved or to have his money back. I took the loan honourably – with an honest intent to repay and to preserve the asset for him, or for the trust in the event of his passing. So if it were possible we could minimise the disruption for C, so the home he has known for the bulk of his life... to reduce that and not sell, and still preserve my father's assets, that would be preferable to me; that is congruent with what I persuaded Father to offer; it is just that W's opinion is the principle of ownership which is important. "

42. H went on to say that his son needs a stable environment, and if possible, he would like to stay in the property.
43. F was directed to provide a statement for the final hearing dealing with enforcement of the loan against H, and his statement is dated 4 October 2023. F says that as H and W had been unable to resolve matters he instructed solicitors to file a request for a county court judgement against H in order that he could enforce payment of the loan. H did not file a defence or admission. During these proceedings F gave an undertaking not to take any steps to enforce pending the outcome of the preliminary issue hearing. The undertaking was discharged following the decision of the court and the order of 12 May 2023. F then issued his application for judgement in default on 29 June 2023. On 10 August 2023 the court notified his solicitors that the action had been stayed. On 31st October his solicitors filed an application asking for the stay to be lifted so that judgement could be applied for. There has been no response from the court in relation to that application.
44. In cross-examination by W's counsel, asked why he was pursuing judgement in default, F responded that he wanted his money back, either paid back, or to have a charge so that the money was secured. He said he had not discussed with H other ways to repay. When asked whether he would be happy if the court ordered sale of the

property, F responded that *"if it has to be, the court can make that order"*. On the issue of the offer F put forward to W, F said that he had made an offer to do his best for W and C, who was his principal concern.

45. H's counsel, Mr Bojarski asked F whether he would press for a sale of the property for repayment. F responded: *"I don't know; it's all at sea at the moment. If it has to be sold, it must; if there's an alternative route in the interests of my son and grandson, so be it, but I need to be given advice on that. But I do want the thing confirmed, the loan and the charge confirmed. It is my money and I want it back."*

Findings of fact and assessment of Evidence

46. W's evidence was consistent and she gave her evidence in the witness box in a measured way. She has clearly made efforts to obtain additional work to increase her income, which is shown by the variety of work she is currently undertaking, but has not applied for full time roles. Understandably, she is mindful of C's additional needs, which mean that he is not quite as independent as other children of his age. I accept her evidence that she is not currently suitably qualified for the particular Band 7 job which H said she ought to have applied for and could have obtained.
47. I accept her evidence that she would rather have purchased a smaller house with a mortgage so that she could have been an owner of the family home, and that she did not know the terms of the loan arrangement between H and father at the time this took place - her evidence has been consistent in this regard throughout.
48. H has been somewhat reticent and evasive in providing evidence by not fully engaging with the directions ordered (- producing documents late on multiple occasions) and not voluntarily providing full and frank disclosure. For example, he

has failed to provide updates in relation to his Australian bank account money, failed to provide any details in relation to his new wife's financial position until asked in the witness box, failed to engage with the valuation of the Manchester property partly owned by W and failed to provide appropriate mortgage capacity information which had been ordered. This is in circumstances where he is legally represented and has incurred a large amount of legal costs. It was clear from his responses in cross-examination that his intention was to show that he had no mortgage capacity by stating to potential lenders that he was likely to have a county court judgement against him. His evidence and attitude to the proceedings have been coloured by his position that his highest obligation is to repay his father's loans which he says is the reason for making no offer other than a clean break. At the same time, he and F indicate a wish that H should remain in the former family home, which is, of course, only possible on the basis that W receives no substantial payment funded from a sale of the property and H relies on the goodwill of his father not to require repayment of the loan.

49. F gave his evidence in court in a straightforward manner, accepting that he had not given W 72 hours' notice of his application for judgement in default against H, as recorded in a recital to the order dated 5 April 2022, but saying that he did not realise he had to do that, and he was advised by the people who help him, which I accept. It was clear from the general tone of his evidence that his actions have at all times been guided by his legal advisors.
50. In relation to enforcement of the loan, whilst F repeatedly said that he wanted the money back, he did not ever say that he expected immediate repayment, using phrases such as *"I want it back, be it either paid back or have a charge, so the money is therefore allocated to me"*, and *"I want the charge and my money back or my money*

secured". F stated again that "As long as the loan note remains the property of the trust when I die, it remains an asset of the trust".

51. This shows his true intention remains to preserve the loan as a long-term asset of his estate, with no genuine intention to enforce it by way of seeking a sale of the former family home even if he were to obtain a charging order over that property at some point in the future. Further, with regard to the prospect of the house being sold it was clear that this is not an option which F really wants, since his responses were: "*if it has to be...*"

Consideration of the MCA 1973 Section 25 factors

52. **(A) The income, earning capacity, property and 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;**
53. H works as a surgeon for the NHS with a net income of £61,921.84 per annum. I accept his evidence that it is not likely that he will be able to obtain more lucrative private work in the near future, and therefore his income is likely to remain in this region for the foreseeable future. H has now remarried in an Islamic ceremony and he estimates that his new wife has income somewhere in the region of the £60,000s (gross) taking into account that she works 80% of full time hours. Once she has settled her financial arrangements on her divorce they will live together in the same household and therefore H and his new wife will benefit from a combined earned income likely to be in excess of at least £100,000 net.

54. W is a qualified healthcare practitioner and currently works carrying out a range of additional roles including as a medical tutor, HCPC assessor, administrative work for a parish council, and as a masseuse. She also receives additional income by way of rent from the Manchester property, child benefit, child maintenance and interim periodical payments of £7200 pa from H making her total net income around £43,000.
55. As a qualified health practitioner W could work full-time or part-time within the NHS to increase her earned income. She currently works only 4 or 5 shifts per month but says that she hopes that this number may increase. W is perfectly capable of obtaining additional qualifications to increase her earning capacity and I find it is reasonable to expect her to be able to obtain work at Band 7 level which would give her a salary of £43,000-£50,000 per annum - a net income of between £33,000 per annum and £37,000 per annum. In her Form E and witness statements W has stated that had she continued working she anticipated having a salary of around £46,000 as an Advanced practitioner. W has continued to work but on a part time basis. It is expected that parties should maximise their earning potential, and I find it is reasonable to expect W to obtain full-time work within the next year given C's age and the available assistance with child care, and it is reasonable to assess that this would provide W with a net earned income of around £33,000 per annum. H has made it clear that he arranges his schedule so that he can assist with arrangements for C and the parties can arrange to co-parent alongside their working arrangements.
56. W owns property in Manchester together with her mother which has net equity of £56,278. H contended that this is an undervaluation, however, he did not engage in the valuation process directed by the court, and the valuations provided by W are the most appropriate values to rely on rather than an insurance valuation referred to by H

in evidence which he said he saw when he opened W's post accidentally. On the basis of the average valuation and after taking into account CGT, the value of W's half share of the property is £56,278.

57. This asset also provides W with rental income of £6960 per annum. She has cash at the bank and savings totalling £2300 and £7 in an ISA.
58. W has submitted evidence that she currently has a mortgage capacity of around £32,000 to £37,200. This capacity I find is very likely to increase if she takes the reasonable step of maximising her income by obtaining additional employed work in her field, but for the purposes of dealing with capital needs I take the figure of £37,000 as a reasonable assessment of her current mortgage capacity.
59. H owns the former family home, which has net equity of £931,000. He has £6964 in bank accounts in this country and an estimated £8300 in a bank account in Australia. H also owns various vehicles worth £26,990 on his figures or £29,990 using W's figures. Given the lack of evidence in this regard I will take the midpoint figure of £28,500 for the purpose of calculations.
60. In terms of other financial resources, it cannot be ignored that H's father has historically been financially generous to H and C – he paid C's school fees whilst he attended a private school and has paid for a private tutor. He has continued to financially support H to a very significant extent: in addition to the £900,000 loaned on very generous terms, F has lent to H £112,499 for legal fees and bought him a new Subaru in 2017 for £30,000. F has set up a discretionary trust and the assets in his estate will pass to the discretionary trust, and the primary beneficiaries will be H and C.

(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;

61. Each party needs a property to live in for themselves and C. Now that H intends to live with his new wife who has two young children, he will require a property to accommodate his new family.
62. Both parties have responsibility for looking after C's needs. Given that C is settled in year 7 of his secondary school it is reasonable that the parties should have a property in an area near to his school. Each party needs sufficient income to meet their monthly outgoings, and each party needs a car. W puts her current outgoings at £3482 per month, and with an additional £372 per month for C, the total is £3854 per month. This includes current rent payments at £1200 per month. H's budget was set out in his form E, and he has not provided an updated budget.
63. W's liabilities total £60,021 and comprise a NatWest loan of £11,248; a NatWest credit card of £2467; a family loan of £17,200, outstanding legal fees of £14,256 and costs orders from the preliminary issue hearing of £14,850.
64. H's liabilities total £1,108,644, which includes the loan of £900,000 due to his father; an additional loan from F of £112,499 in respect of legal fees; a loan from his new wife of £36,000; a NatWest credit card balance of £8716, Bank of Scotland credit card of £11,247, American Express card balance of £16; in addition, he has outstanding legal fees of £40,166.

(C) the standard of living enjoyed by the family before the breakdown of the marriage

65. Prior to the breakdown of the marriage the parties enjoyed a very good standard of living, having the benefit of significant domestic help at the large property in which they lived with room for keeping free range chickens. They had a gardener 3 times a week and a housekeeper twice a week. They enjoyed regular family holidays abroad, went to the cinema and theatre and ate out regularly.

(D) The age of each party to the marriage and the duration of the marriage.

66. W is 50 and H is 53. The relationship lasted for some 11 years which was the period of cohabitation from 2007 until the end of the relationship in October 2018. The marriage lasted 7 1/2 years. The parties remained living in the former family home until January 2021.

(E) Any physical or mental disability of either of the parties to the marriage.

67. Neither party has a physical or mental disability. H sets out in his form E some health issues he experiences. These do not impact on his ability to work.

(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;

68. Both parties have contributed to the welfare of the family and looking after C. During the marriage H was the primary breadwinner and W was the main homemaker, as well as working part time. The parties now have a shared care arrangement with C staying with W from Sunday to Thursday each week, half of the school holidays and for four additional full weekends per year.

(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;

69. Both parties in their statements refer to conduct issues which are not of the kind to normally be considered under this heading. W raises the issue of H's litigation conduct, including his having applied for decree absolute straightaway, which meant her solicitors incurred the cost of registering a notice at the land registry, and withholding an amount of £1175 in respect of a costs order in her favour of £4500 made on 22 March 2022 (– however, this is an amount of costs due from W to H on the divorce). W also raises the fact that following the conclusion of the Children Act proceedings H stopped paying child maintenance and she had to obtain an assessment from the child maintenance service which caused some delay in receipt of payments and meant that she had to sell items of jewellery and borrow money from family to meet living costs. In addition, H was late in filing his evidence for the second LSPO application, which should have been by 31 May 2022 and was provided on 8 November 2022.
70. A costs order was made at the preliminary issue which reflected litigation conduct in relation to that hearing.
71. In his section 25 statement H includes in the conduct section reference to W's email dated 15 May 2023, which indicated that she wanted to settle matters (written at a time when her mother was very unwell) and then changing her mind. He also refers to Children Act proceedings and the effect that these proceedings have had on his relationship with his father. These are not things that affect the appropriate distribution of the parties' assets in this matter.

(H) the value to each of the parties to the marriage of any benefits... which, by reason of the dissolution of the marriage, that party will lose the chance of acquiring;

72. The parties have reached agreement in relation to pension arrangements so as to provide for equality of income.

Law

73. In the case of WC v HC [2022] EWFC 22, Peel J at paragraph 21 succinctly sets out a summary of the relevant law to be applied:

“The general law which I apply is as follows:

i) As a matter of practice, the court will usually embark on a two-stage exercise, (i) computation and (ii) distribution; Charman v Charman [2007] EWCA Civ 503.

ii) The objective of the court is to achieve an outcome which ought to be "as fair as possible in all the circumstances"; per Lord Nicholls at 983H in White v White [2000] 2 FLR 981.

iii) There is no place for discrimination between H and W and their respective roles; White v White at 989C.

iv) In an evaluation of fairness, the court is required to have regard to the s25 criteria, first consideration being given to any child of the family.

v) S25A is a powerful encouragement towards a clean break, as explained by Baroness Hale at [133] of Miller v Miller; McFarlane v McFarlane [2006] 1 FLR 1186.

vi) The three essential principles at play are needs, compensation and sharing; Miller; McFarlane.

vii) *In practice, compensation is a very rare creature indeed. Since Miller; McFarlane it has only been applied in one first instance reported case at a final hearing of financial remedies, a decision of Moor J in RC v JC [2020] EWHC 466 (although there are one or two examples of its use on variation applications).*

viii) *Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail; Charman v Charman.*

ix) *In the vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those cases where there is a surplus of assets over needs that the sharing principle is engaged.*

x) *Pursuant to the sharing principle, (i) the parties ordinarily are entitled to an equal division of the marital assets and (ii) non-marital assets are ordinarily to be retained by the party to whom they belong absent good reason to the contrary; Scatliffe v Scatliffe [2017] 2 FLR 933 at [25]. In practice, needs will generally be the only justification for a spouse pursuing a claim against non-marital assets. As was famously pointed out by Wilson LJ in K v L [2011] 2 FLR 980 at [22] there was at that time no reported case in which the applicant had secured an award against non-matrimonial assets in excess of her needs. As far as I am aware, that holds true to this day.*

xi) *The evaluation by the court of the demarcation between marital and non-marital assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case; Hart v Hart [2018] 1 FLR 1283. Usually, non-marital wealth has one or more of 3 origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult*

questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended.

xii) Needs are an elastic concept. They cannot be looked at in isolation. In Charman (supra) at [70] the court said:

"The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e))."

xiii) The Family Justice Council in its Guidance on Financial Needs has stated that:

"In an appropriate case, typically a long marriage, and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (i.e "standard of living") the couple had together should be reflected, as far as possible, in the sort of level of income and housing each should have as a single person afterwards. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties' lifestyle."

xiv) In Miller/McFarlane Baroness Hale referred to setting needs "at a level as close as possible to the standard of living which they enjoyed during the marriage". A number of other cases have endorsed the utility of setting the standard of living as a benchmark which is relevant to the assessment of needs: for example, G v G [2012] 2 FLR 48 and BD v FD [2017] 1 FLR 1420.

xv) That said, standard of living is not an immutable guide. Each case is fact-specific. As Mostyn J said in FF v KF [2017] EWHC 1093 at [18];

"The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise".

xvi) I would add that the source of the wealth is also relevant to needs. If it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in N v F [2011] 2 FLR 533 at [17-19]."

Analysis and Distribution of assets

74. Section 25 MCA 1973 provides that it is the duty of the court in deciding whether to exercise its powers under the Act, and if so in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18. C's welfare requires suitable housing with both parties.
75. In this case the court has to meet the needs of C and both parties against a backdrop whereby on paper the liabilities outweigh the parties' assets. In this regard, it is significant that the loan of £900,000 is an agreement between H and F only which is very much a soft loan. W is not a party to that agreement. The equity in the property which legally is solely owned by H is a matrimonial asset. There is no charge against the former family home in relation to the personal loan from F to H.
76. It is a case in which H and F have held all the financial cards: the former family home is in the name of H but he says he is obligated to repay his father's loan of £900,000, which enabled the purchase of the property, and as a result he says he is unable to

make any substantive offers to W. W wanted to buy a more modest property which the parties could afford with a mortgage, and which they would own in joint names. That never happened, and is clearly very much a sore point with W.

77. The loan of £900,000 from F to H is in my view a classic example of a technically enforceable debt which the court may, as an exercise of its discretion decide to exclude from an asset schedule as being a soft debt. HHJ Edward Hess in *P v Q (Financial Remedies)* [2022] EWFC B9 states at para 19(x):

(a) Once a judge has decided that a contractually binding obligation by a party to the marriage towards a third party exists, the court may properly wish to go on to consider whether the obligation is in the category of a hard obligation or loan, in which case it should appear on the judges' computation table, or it is in the category of a soft obligation or loan, in which case the judge may decide as an exercise of discretion to leave it out of the computation table.

(b) There is not in the authorities any hard or fast test as to when an obligation or loan will fall into one category or another, and the cases reveal a wide variety of circumstances which cause a particular obligation or loan to fall on one side or other of the line.

(c) A common feature of these cases is that the analysis targets whether or not it is likely in reality that the obligation will be enforced.

78. I concluded at the preliminary issue hearing that F does not currently need the money due to him from H and that his intention is that it will form part of the assets of the discretionary trust he has set up. The court has the discretion in these circumstances to exclude the loan from the asset schedule. My decision does not ignore the loan but takes into account the fact of its softness.

79. This is a needs case. Considering all of the evidence and the section 25 factors, I find that it is appropriate for W to receive a lump to enable her to purchase a suitable property for herself and C. H and F invite the court to take the view that F has made a generous offer to provide housing which it is unreasonable of W to reject. I do not agree. The details of the proposed trust arrangements are not settled and this would provide W with no capital amount of her own over which she would have ultimate control and be able to deal with as she chooses in the future. This would not, in my view, be a fair division of the available assets between the parties.
80. In terms of her housing needs, W proposed for both parties properties from £400,000 to £415,000, but in cross-examination accepted that three bedroom properties proposed by H on the market for £355,000 and £375,000 would be suitable, as they were in the right location. Taking into account all the factors including the parties' standard of living I find that it is appropriate to allow £375,000 for a suitable property. In addition it is appropriate to allow an amount of £12,000 for stamp duty, moving costs, essential white goods and furniture, and I consider that an amount of £387,000 is reasonable in respect of W's housing needs.
81. In addition, W needs a car, for which I will allow £10,000 for a reasonably reliable second hand car. She also needs to be able to pay her outstanding legal costs of £14,256, costs orders of £14,850 and repay her NatWest loan and credit card and the family loan of £17,200. No repayment term details have been provided in respect of the family loan and therefore it is reasonable to assume that this is in the nature of a soft loan and can be repaid over time out of income. It is reasonable for the Natwest loan and credit card debts also to be paid over time out of income.

82. In terms of capital needs, therefore, I find W requires £387,000 in respect of her reasonable housing fund, £10,000 for a car, £14,256 for outstanding legal fees and £14,850 for costs orders arising from the preliminary issue hearing which are payable within 14 days from the handing down of judgment in this matter. I consider that it is fair to make provision for these by way of a capital lump sum given that W has succeeded in being awarded a capital sum and H and F have not succeeded in persuading the court that the court should award no capital as a result of the existence of the loan by F to H.
83. The total capital need is therefore £427,000. With a mortgage capacity assessed at £37,000 I consider that the appropriate lump sum which W requires is an amount of £390,000. In order to provide that capital sum the former family home will have to be sold. The balance after payment of the costs of sale and that lump sum to W shall be paid to H.
84. When W purchases her own property she will no longer need to pay rent of £1200 per month, and any mortgage payments are likely to be very significantly less than that amount, which will then allow W to repay her other liabilities out of income, which I have found she can reasonably be expected to increase to a net earned amount of around £33,000 within around a year, and together with rental income of £6,969, CMS of £6,151 and child benefit of £1,248 gives a total of £47,368, not including any maintenance.
85. In terms of periodical payments, pursuant to section 25A MCA, 1973 the court has a duty to consider whether it would be appropriate to exercise its powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable, and in the case of

periodical payments, the court must consider whether it would be appropriate to require the payments to be made only for such term as would 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 their financial dependence on the other party.

86. W has been receiving payments of £600 per month from H. I have found that W can reasonably increase her income by obtaining full-time employment within the next year, and I do not consider that it is reasonable for the periodical payments to continue until C is 18, as suggested by W. I find that it is reasonable for the periodical payments to continue at the current rate of £600 per month for six months from the date of the final Order and thereafter at a rate of £300 per month for a further six months as this will allow W to adjust to the cessation of payments at the end of a 1 year period without undue hardship - she will be able to purchase her own property and therefore not be paying the high level of rent she currently pays, and she can take steps to increase her earned income during that time.
87. In respect of H, he is currently over-housed by remaining in the large, former family home. He needs a 4-bedroom property for himself, C and his new wife and her children. His own property particulars put forward properties in the range of £290,000 to £395,000. After sale of the former family home H will receive the balance of around £541,000. Whilst H's position is that he must repay the entire amount of the loan to his father, the repayment of that soft personal family loan is not the court's primary concern and it does not take priority over meeting the needs of C to have a suitable home with both parents. H can repay the loan over time to F or his estate.

88. It is clear from F's evidence that his highest priority is to provide for his grandson and son, and I have no doubt that he will not take steps to enforce the loans to H to any extent which would prejudice H's ability to have suitable housing for himself and C. H has professed his wish to repay his father in full, and that is something which he may do over time. If he were to use £387,000 of the net proceeds of sale for a housing fund (as I have allowed for W, and not even giving consideration for H's mortgage capacity or any contribution from his new wife) he would have a balance of £154,000 in order to make lump sum repayments to F and in respect of his other debts. He has a well-paid job and in the more distant future may be able to obtain more lucrative private work. In addition, his household income will be increased in the near future by his new wife's earnings. Further, and importantly, H will ultimately benefit from the discretionary trust into which F intends to place the assets in his estate which include the loan and this provides significant security for H in the future, despite the current extent of his debts.
89. H's income, particularly when taking into account the additional contribution which will be made in the near future by his new wife, is sufficient to meet his reasonable needs. He has chosen to incur very significant legal costs. Whilst H said he could not propose anything other than a clean break due to the loan amount he owes to his father I cannot fail to note that H has incurred costs of over £305,000. F has incurred costs of over £139,000 during the course of these proceedings: had an amount in the region of those combined costs been offered to W, a settlement would most likely have been achieved. Instead, all that has ever been on the table for W is an offer of the provision of housing through a discretionary trust to be set up by F whilst H and F's legal advisers have received sums of over £400,000.

90. I set out below a summary of the net effect of my decision which I consider represents a fair outcome as between the parties.

District Judge Chloë Phillips

Financial Summary of Outcome – Net Effect

	Total	Applicant W	Respondent H
Net Proceeds of FFH: Lump sum to W, balance to H	£931,000	£390,000	£541,000
Net proceeds apportioned		41.9%	58.1%
W's interest in Manchester property	£56,278	£56,278	
Bank accounts		£2,300	£6,964
Australian account	-		£8,300
Capital sub-total	£1,004,842	£448,578 44.6%	£556,264 55.4%
Liabilities: *Soft loans H's loans due to F*			£1,012,499
H's loan due to W*			£36,000
W's family loan*		£17,200	
W NatWest loan		£11,248	
Credit cards		£2,467	£19,979
Costs outstanding		£14,256	£40,166
Costs orders		£14,850	

Total hard liabilities		£42,821	£60,145
Total All liabilities		£60,021	£1,108,644
Capital balance after hard liabilities		£405,757	£496,119
Capital Balance after all listed liabilities		£388,557	-£552,380
Chattels		0	£28,500
Net capital after hard liabilities	£940,376	£405,757	£534,619
Agreed pension share - equality of income		£256,627	£287,055
Total without soft liabilities	£1,484,058	£662,384	£821,674

Income	Applicant	Respondent
Current, with PPs at £600 pm and CMS £6151	£43,000	£48,570 (£61,921 less PPs and CMS)
After PPs stop - with W's future earning capacity, rental income, CMS paid at £6,151 and child benefit	£47,000	£55,770 (£61,921 less CMS) Plus new wife's income