

BETWEEN:

SP

Applicant

-and-

AL

Respondent

-and-

PL

CL

Intervenors

(by their litigation friend FL)

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published, but no other.

All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr James Finch (Counsel instructed on a Direct access basis) appeared on behalf of the Applicant wife.

Ms Laura Moys (Counsel instructed by Jones Nickolds, Solicitors) appeared on behalf of the First Respondent husband.

Ms Victoria Francis (Counsel instructed by Keystone Law, Solicitors) appeared on behalf of the Intervenors.

Written Judgment of His Honour Judge Edward Hess dated 8th March 2024

1. This case concerns the financial remedies proceedings arising out of the divorce between SP (to whom I shall refer as “the wife”) and AL (to whom I shall refer as “the husband”).
2. For reasons explained below, the husband’s two minor children by an earlier marriage, namely PL (now aged 17) and CL (now aged 15), to whom I shall refer collectively as “the intervenors”, have become parties to these proceedings. Because they are minor children, they act through their litigation friend and mother, FL.
3. The case proceeded to a final hearing over 3 days on 6th, 7th and 8th March 2024.
4. The representation before me has been as follows:-
 - (i) Mr James Finch (Counsel instructed on a Direct Access basis) appeared on behalf of the wife.
 - (ii) Ms Laura Moys (Counsel instructed by Jones Nickolds, Solicitors) appeared on behalf of the husband.
 - (iii) Ms Victoria Francis (Counsel instructed by Keystone Law, Solicitors) appeared on behalf of the intervenors.
5. I am grateful to all Counsel (and the wider legal teams) for the excellent, helpful and clear way they have respectively conducted their cases. It has, of course, come at a cost. The wife has incurred a total of £52,138 in legal costs, the husband a total of £165,103 and the intervenors a total of £61,808 (which has in fact been paid by the husband). This represents an overall total of £279,049 lost to the family as a result of this dispute. It is disappointing to me that these intelligent and likeable parties, both involved at a high level in responsible caring professions, found it impossible to find an acceptable compromise to their disagreements.
6. The court was presented with an electronic bundle running to 582 pages and a number of other documents have been referred to during the final hearing. I have considered all 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 9th November 2022, her answers to questionnaire dated February 2023, her pleadings dated 13th

December 2023 and 5th February 2024 and her statements dated 17th March 2023, 24th January 2024 and 21st February 2024.

- (iii) Material from the husband including his Form E dated 15th November 2022, his answers to questionnaire dated 5th March 2023, his replies to a schedule of deficiencies dated 30th October 2023, his pleadings dated 4th December 2023 and his statements dated 21st April 2023, 21st January 2024 and 22nd February 2024.
 - (iv) Material filed on behalf of the intervenors including FL's statements dated 23rd January 2024 and 23rd February 2024 and her pleadings dated 21st November 2023.
 - (v) Material from various SJE's on valuation and pension issues.
 - (vi) Properly completed ES1 and ES2 documents.
 - (vii) Selected correspondence and disclosure material.
7. I have also heard oral evidence from the wife, the husband and from FL, all subjected to appropriate cross-examination.
8. I have also had the benefit of full submissions from each Counsel in their respective opening notes and their closing oral submissions.
9. The history of the marriage is as follows:-
- (i) The husband is aged 57 (d.o.b. 3rd March 1967). He is a Consultant Doctor, currently working in a Hospital in London. He was previously married to FL in 2003, but separated from her in 2012 and was formally divorced from her in 2014. The intervenors are children of that marriage. He is currently living in rented accommodation in South West London, where he has been since Summer 2023.
 - (ii) The wife is aged 50 (d.o.b. 1st July 1973). She is a Consultant Clinical Psychologist, currently working for an NHS Trust. She has a now adult child from an earlier relationship, namely WP (now in her mid-twenties). She is currently occupying the family home in London W4, but will need to move somewhere else when its proposed sale completes, probably in late April 2024.
 - (iii) The husband and wife met via an online dating website in February 2013. At this time the wife was living in rented accommodation (although she owned and rented out a flat in London) and WP (then aged in her early teens) was at school in Buckinghamshire; whilst the husband was living and working in London and PL and CL (then aged 6 and 4 respectively) were at a private school in London.

- (iv) The parties have different perceptions of what happened between 2013 and 2019. The wife says that the relationship quickly (by April 2013) developed into a settled and committed relationship of quasi-marriage, albeit that for quite a while they had to juggle their lives between London and Buckinghamshire to ensure their respective children's schooling was not interrupted and albeit that the relationship was volatile and involved occasional short periods of breakdown followed by reconciliation. The husband says that, whilst there was a relationship for most of this time, they deliberately kept independent lives and the relationship did not become one of quasi-marriage until much later, possibly not even until 2019. I will need to resolve this issue, which I shall do below.
- (v) In any event they became engaged in July 2018 and they married on 31st May 2019.
- (vi) In the course of the period between 2013 and 2019 there were a number of real property transactions:-
- (a) In December 2013 the husband and FL sold their family home in London W4 and consensually divided the net proceeds £1,027,334 to her and £358,058 to him.
 - (b) On 17th January 2014 the husband purchased a property in South West London (hereinafter referred to as 'Property One'). This was purchased in the husband's sole legal name with his money, and subject to a mortgage in his sole name. On 31st January 2014 he executed a deed of trust under which the intervenors gained an interest of 36% in the property (of which more below).
 - (c) On 6th December 2019 Property One was sold and simultaneously a property was purchased in the joint names of the wife and the husband, also in London W4 (hereinafter referred to as 'Property Two'). Property Two is in the process of being sold now.
 - (d) In May 2017 (having sold her London flat) the wife purchased a property in Amersham ["the Amersham Property"] in her sole name and subject to a mortgage in her sole name. This was later sold in June 2021.
- (vii) The relationship between the wife and the husband did not produce any children. This is a source of unhappiness for the wife, who had miscarriages in 2014 and 2015 in what she says were intended and wished for pregnancies. The husband says that he never wanted more children and that the wife told him she was taking the contraceptive pill and that the pregnancies caused great tension in the relationship because he thought she had lied to him. It is common ground, however, that the husband's two

children (the intervenors) fall into the category of ‘children of the family’ within the meaning of Matrimonial Causes Act 1973.

- (viii) Unfortunately, just as the pre-marital relationship had proved volatile, so did the marriage, and in 2022 (February according to the husband or June according to the wife) the marriage broke down. For a time the husband lived in the outbuilding on the premises at Property Two; but eventually this arrangement became too tense and he rented alternative accommodation elsewhere from Summer 2023. Sadly, these events have caused a rift between the two sides of the family and the previously good relations between the three children and between the wife and the husband’s two children have fractured, possibly irrecoverably (though the wife would wish otherwise).
- (ix) Divorce proceedings were commenced on 15th July 2022. Decree Nisi was ordered on 24th January 2023. Decree Absolute awaits the outcome of the financial order proceedings and is not, in itself, controversial.

10. The financial remedies proceedings chronology is as follows:-

- (i) The wife issued Form A on 5th September 2022.
- (ii) Forms E were exchanged in November 2022.
- (iii) A First Appointment was heard by Recorder Castle on 15th December 2022.
- (iv) Questionnaires were answered in February and March 2023.
- (v) A private FDR hearing took place on 25th May 2023 before Mr Geoffrey Kingscote KC; but sadly no settlement was reached.
- (vi) A post-pFDR directions hearing took place before HHJ Lewis on 11th September 2023. On this occasion the intervenors were joined as parties.
- (vii) I made a ‘paper’ directions order on 27th October 2023 and held a Pre-Trial Review on 8th February 2024.
- (viii) Narrative section 25 statements were exchanged in February 2024.
- (ix) A final hearing has taken place before me on 6th, 7th and 8th March 2024.

11. In dealing with the claim I must, of course, consider the factors set out in **Matrimonial Causes Act 1973, sections 25 and 25A** together with any relevant case law. It is common ground that neither party is seeking any periodical payments orders and all income claims should be dismissed, so I shall focus on section 25.

12. Matrimonial Causes Act 1973, section 25 reads as follows:-

- (1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
- (2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24, 24A or 24B above in relation to a party to the marriage, 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;
 - (h) in the case of proceedings for divorce or nullity of marriage, 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.

13. Accordingly, I bear in mind that I must give **first consideration to the welfare while a minor of any child of the family** who has not attained the age of eighteen. In this case this applies to both the intervenors, although for reasons obvious from what I set out below (involving large transfers of money to these children) this does not feature as a matter of great significance on the facts of this case.

14. Because it has a bearing on some other matters, I shall next **consider the duration of the marriage** and I have the following comments on this:-

- (i) The relevant law on this subject is (in characteristically clear and pithy terms) captured in the judgment of Peel J in *VV v VV* [EWFC] 41 when he said:-

“40. The origin of the cohabitation jurisprudence (so far as relevant to the sharing principle) lies in the decision of Deputy High Court Judge Nicholas Mostyn QC (as he then was) in GW v RW [2003] EWHC 611 at para 33 where he said: "Thus in my judgment where a relationship moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently." Those dicta have stood the test of time. Of course, the purpose is to ensure that (i) there is no discrimination between the home maker and the earner during that period of cohabitation, just as there is no room for discrimination between the spousal roles during marriage and (ii) to avoid alighting upon an artificially short period of marriage.

41. In IX v IY [2018] [2018] EWHC 3053 at para 68, Williams J described cohabitation as where "prior to the formal commencement of marriage, the parties had entered into the sort of partnership involving the mutual support, working together, rights and obligations which may be indistinguishable from those which arise when parties begin to live together after marriage". In the same paragraph he said: "The mere fact that parties begin to spend time in each other's homes does not of itself, it seems to me, equate to marriage. In situations such as this, the court must look to an accumulation of markers of marriage which eventually will take the relationship over the threshold into a quasi-marital relationship."

42. In McCartney v Mills McCartney [2008] EWHC 401 at para 55, Bennett J said: "Cohabitation, moving seamlessly into and beyond marriage, normally involves in my judgment a mutual commitment by two parties to make their lives together both in emotional and practical terms. Cohabitation is normally but not necessarily in one location. There is often a pooling of resources, both in money and property terms." At para 62, Bennett J added: "I am prepared to accept that the wife and the husband from 1999 to the date of their marriage spent many, many nights together, holidayed together and became engaged. They had a very close relationship. But that does not, in my judgment, in the circumstances of this case, equate with a settled, committed relationship moving seamlessly into marriage."

43. In E v L [2021] EWFC 60, a case which W submits is similar to this one, Mostyn J added 18 months of cohabitation to the length of the marriage, saying: "It may not have been traditional in its functioning in that there was not conventional cohabitation; the wife did not move in lock, stock and barrel to F House. But it was, as Mr Glaser QC rightly

says, from that point a committed sexual, emotional, physical and psychological, if somewhat itinerant, relationship."

44. I agree with Mostyn J at para 28 of E v L that it is dangerous for the court to evaluate the quality of a marriage, although it seems to me that where cohabitation is in dispute, the court may need to inquire to an extent into the state of the relationship when evaluating the durability and permanence of the alleged cohabitation.

45. To the above jurisprudence I would add that the court should also look at the parties' respective intentions when inquiring into cohabitation. Where one or both parties do not think they are in a quasi-marital arrangement, or are equivocal about it, that may weaken the cohabitation case. Where, by contrast, they both consider themselves to be in a quasi-marital arrangement, that is likely to strengthen the cohabitation case.

46. In the end, it is a fact specific inquiry. Human relationships are varied and complex; they do not easily lend themselves to pigeon holing. The essential inquiry is whether the pre-marital relationship is of such a nature as to be treated as akin to marriage."

- (ii) I have read the parties' respective statements and heard their oral evidence on this subject. As is sometimes the case with these arguments, there are pointers in each direction; but on balance overall I prefer the evidence of the wife on this subject and have reached the conclusion that (in the context of calculating the duration of the marriage, including the pre-marital relationship akin to marriage, against the legal tests referred to above) I should regard the period between April 2013 and the first half of 2022 as the relevant period – that is to say that the duration of the marriage is approximately nine years.
- (iii) I have reached this conclusion by assessing all the factual matters put before me, but amongst the factors I found most persuasive were the following:-
 - (a) I found the wife's evidence over what happened during this period to be more reliable and credible. In a number of ways (on this subject and overall) I found the husband's evidence to be unreliable, self-serving and contrived in parts.
 - (b) I have the clear impression that the couple were emotionally and sexually committed to each other from an early stage and remained so throughout. The fact that there was volatility and that there were perhaps two or three periods of breakdown over the years measuring a few weeks or perhaps a little longer each does not, in my view, prevent that being the case.
 - (c) I believed the wife's evidence that the husband knew that the wife was not taking the contraceptive pill and wished to have another baby in 2014 and 2015 and I did not believe his

account that he was deceived by her in this respect (twice). At very least he went along with, perhaps with a lack of enthusiasm, the possibility that another baby might be added to their already blended family.

- (d) My clear impression was that this became a ‘blended’ family quite quickly into the relationship and that the wife (with the husband’s consent and blessing) took a quasi-maternal role with the husband’s children. Indeed, that fact appears to have caused some tension between the husband and FL.
- (e) I note that in the context of a mediation meeting between the husband and FL in February 2017, the husband wrote to the mediator referring to the wife as his “partner of 4 years” and the mediator appears to have gained the impression that the husband and wife were living together.
- (f) The husband appears to have told his car insurers in 2016 that the wife was his cohabiting partner, as is recorded in the contemporaneous documentation.
- (g) The wife appears to have been heavily involved with Property One household management issues from an early stage, for example being operative in commissioning works to the Property One kitchen in 2016.
- (h) The fact that the blended family had homes in London and Amersham for a long period was, in my view, largely motivated by the fact that it was thought that WP’s continued education at her existing school was an important priority. Many families have more than one home and still remain families, including of course people who are married. I do not take the view that the existence of two homes overrides the other factors in the context of this analysis.

15. In relation 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**” I make the following comments.
16. The parties have accepted an offer for the family home at Property Two of £1,835,000 and this (everybody hopes) is proceeding towards a sale, probably in late April 2024. After deduction of the sale costs (estimated at 3%) and the mortgage redemption figure on the NatWest mortgage of £786,764 (including an Early Redemption Charge of £30,209) the net equity will be c. £993,186.
17. On the face of the TR1 executed on 6th December 2019 the property is held in clear terms – that is the wife and the husband are joint legal owners holding the property on trust for themselves as tenants in common in equal shares. On this basis I should

properly place in my asset schedule one half of this figure for the wife and one half for the husband, i.e. £496,593 each.

18. The complication here is that the intervenors have asserted an interest in Property Two, essentially based on resulting/constructive trust principles (there is an alternative possibility of pursuing a claim for an equitable lien, but my view is that this is an unnecessary complication to a relatively straightforward claim and I propose to deal with this issue on resulting/constructive trust principles – the outcome would not in my view be materially different anyway). This claim arises from the fact that on 31st January 2014 the husband executed a deed of trust under which the intervenors gained an interest of 36% in Property One (the mortgage was to be taken from the husband's remaining 64%). Their interest was under a bare trust, not contingent on any life interest to the husband. Whatever the wisdom of this step by the husband, and whether or not the HMRC might (if alerted) be interested in the transaction, it is common ground that this was a valid and binding execution of trust and that the intervenors can properly rely upon it. As a consequence of this, the intervenors (it is common ground) had an interest in 36% of the sale proceeds of Property One (deducting the sale costs, but not the mortgage). The mathematics of this claim work, in my view (which marginally differs from that of Ms Francis), as follows. The intervenor's interest in the Property One sale proceeds was 36% of £(1,023,000 – sale costs) = 36% x £1,003,632 = £361,307. It is common ground that all of this money was used to contribute to the purchase price of Property Two. The purchase costs of Property Two were £1,440,000 (the purchase price) plus purchase costs, including SDLT, such that the total was £1,529,757, i.e. the intervenors contributed £361,307 out of £1,529,757 = 23.62% of the purchase costs. Based on a Property Two sale price of £1,835,000 (subject to estimated 3% sale costs, but not deducting the mortgage) that would prima facie entitle the intervenors to 23.62% x £1,779,950 = £420,424 from the sale proceeds of Property Two.
19. The wife has argued that the husband's obligation in this respect should be treated as having been discharged by the later execution on 6th April 2020 of a different trust (also a bare trust) in favour of the intervenors by the husband over his interest in real property at 91, 93 & 95, MD Road, London SE1 which, when these properties were sold in 2022, gave the intervenors c. £985,000 (after CGT), which sum is still held for them in cash under the terms of that trust. The difficulty with the wife's argument in this respect is that there is no evidence that the execution of the later trust was intended by the husband to be in discharge of, or in any way related to, the obligations the husband had under the Property One trust (and he has expressly and clearly denied the linkage). Mr Finch has argued that I should somehow infer this intention from all the circumstances, but I have not been persuaded that I could properly do this. Whether it was wise for the husband in 2020 to give his already fairly wealthy children large amounts more money at his own expense, leaving himself potentially impecunious, and whatever I should make of this in the context of his already existing marriage and later divorce from the wife, he was legally entitled to do what he did and I cannot properly infer an intention which there is no evidence that he had. I note in passing at this stage that, in the weeks leading up to the final hearing and at the outset of the final hearing the wife sought to develop the argument that, in fact, the April 2020 trust was executed much later, possibly in 2022, and that the document had been

fraudulently backdated by the husband, possibly working with his father and his father's accountant (who was the witness on the 2020 declaration of trust). At the outset of the hearing on 6th March 2024, I noted that this line of argument had not been previously pleaded or even referred to at the Pre-Trial Review hearing on 8th February 2024 and, if it was to be pursued at all, needed to be properly set up by pleadings so that the husband could be given a proper opportunity to respond to a potentially very serious allegation. I contemplated out loud that it might be possible for the wife still to issue an application under Matrimonial Causes Act 1973, section 37, to set aside the April 2020 transaction, and that the fraud allegations might properly be explored in that context, but that she really needed to make clear her position in this respect and, if she did issue such an application, that this might prevent the final hearing proceeding which might in turn have costs consequences. After having an opportunity to discuss the matter with Mr Finch outside the court room, the wife decided not to go down this route and, this decision having been taken, I determined that the fraud allegation could not properly be pursued at this hearing.

20. The other argument pursued by Mr Finch in relation to the intervenors' claim was, in my view, on much more solid ground. Mr Finch argued that the obligation to account to the intervenors in the sum of £420,424 was not a top slice from the proceeds of sale of Property Two, after which the wife and husband received their respective half shares; but was instead an obligation to be met out of the husband's half share (subject, of course, to any redistributive property adjustment order I might make). Having considered the detail of the evidence, in particular the communications which took place in the period immediately before the purchase of Property Two in December 2019, I have reached the conclusion that Mr Finch is correct about this. My view is that the husband's half share of the proceeds of sale of Property Two is held on resulting/constructive trust for the intervenors in the figure of £420,424 (or whatever the precise figure is when the actual sale costs are calculated rather than the 3% estimate). My view is that the wife's half share is held free of the intervenors' claim. Amongst the facts and matters which cause me to reach these conclusions are the following:-

- (i) I accept the wife's evidence that the husband never showed her a copy of the Property One Trust document until it was disclosed in these financial remedies proceedings. Further, I accept her evidence that he did not tell her about it from 2013 to 2019 and the first time she was aware of its existence was in the context of the December 2019 conveyancing process for the purchase of Property Two. Further, I accept her evidence that she was unaware of the size of the interest (36%) until it had to be disclosed within these proceedings (although the October 2020 document '*my property interests for your lawyers*', apparently produced in anger after a marital row, hints at a bigger size, it is vague and unclear and was not followed with any detailed explanation). Further, the evidence suggests that the husband deliberately misled both FL and the conveyancing solicitor about the size of the intervenors' potential share, expressly saying to both of them that their interest was 10% (rather than 36%). I reject as a lie the husband's explanation that when he sent an email to the conveyancing solicitor on 31st October 2019 to the effect that "*I transferred 10% of Property One into trust for PL and CL*" this was the

result of a typo and that it was meant to read “*I transferred 18% of Property One into trust for PL and another 18% for CL*”. I accept the wife’s evidence that when she raised the issue with the husband in the context of the 2019 conveyancing process he told her it was nothing to worry about. I accept her evidence that she took this to mean, and reasonably took it to mean, that any such obligation was modest and would be met from his share, and would not affect her half share (which she would be free to leave to her daughter in the event that she died).

- (ii) These findings are bolstered by the contemporaneous correspondence between the conveyancing solicitors and the wife and the husband. The conveyancing solicitor’s attendance note dated 26th November 2019 and his letters dated 26th November 2019 and 29th November 2019 are consistent with the wife’s understanding of the position. They are also bolstered by the contents of the TR1. If the husband wished the Property One Trust obligations to be a top slice on the proceeds of sale of Property Two (which would have meant that the wife did not have the unencumbered half share which she was led to believe, and did believe, that she had) then it was for him to say so before Property Two was purchased and ensure that the wife knew the position. I accept the wife’s evidence that, for whatever reason, he did not do so and first raised this possibility in the current proceedings.
- (iii) During argument my attention was drawn to the decision of MacDonald J in *HRH Tessa Princess of Luxembourg v HRH Louis Prince of Luxembourg* [2018] EWFC 77 in support of the argument that the TR1 should be disregarded on the basis that “*you cannot declare an express trust in a beneficial interest that is not yours...nemo dat quod non habet*”. In my view that case can be distinguished from the present case and the conclusion is different here because the husband could validly declare the TR1 on the basis that his obligations to the intervenors were imposed upon and could be met from his half share.
- (iv) During argument Ms Francis suggested that the fact that the wife did not give valuable consideration for her interest in Property Two may be relevant here in terms of trust law. I do not agree that it is relevant because the 2019 TR1 was a gift by the husband to the wife from his own assets which he was entitled to make. In any event I agree with Mr Finch that some consideration was given, i.e. the fact of the wife being on the mortgage and the fact of her making significant contributions to the mortgage.

21. Accordingly, I will include in my asset schedule for each of the husband and the wife a one half share of the proceeds of sale of Property Two, i.e. £496,593 each. In the husband’s column I shall record the obligation he has to the intervenors, i.e. £420,424.

22. I now turn to the other real property assets and I have the following comments:-

- (i) The husband has a 1/6th share in the freehold and two leasehold flats at **88 DF Road, London SW1**. Their combined value is £895,916. After deduction of 3% sale costs the net equity is £869,038 of which the husband's 1/6th share is £144,839. From this has to be deducted CGT of £30,937, leaving the value of the husband's share at £113,902.
- (ii) The simplicity of this proposition has been challenged in two directions. First, the wife has asserted that the husband's share is not 1/6th but is instead 1/3rd. The difficulty with her asserting this is that the 1/6th portion was clearly asserted in the husband's Form E as long ago as November 2022 and the challenge to that assertion was not made until the very last minute. There was no challenge pursued at First Appointment, post-FDR directions appointment or Pre-Trial Review. Neither the wife nor her lawyers made an entry to this effect on the ES2 until just before the start of the final hearing. At the outset of the case I made a determination that it was really too late for the wife to make this challenge since the husband would not have an adequate opportunity to respond to the challenge and gathering evidence to deal with the challenge might take time and involve quite a number of other people who were not necessarily available. I shall therefore use the 1/6th portion for my schedule. Secondly, the husband asserted that there should be a 40% 'minority discount' from the figure because of the difficulty (or impossibility as he put it) of realising the asset. No mathematical or evidential basis was put forward for this 40% reduction and, whilst I recognise that minority discounts are sometimes appropriate in, for example, company valuations, my conclusion is that it is unusual and inappropriate to think about applying such a discount to a simple interest in real property. In determining the outcome of the case I shall be cognisant that this interest is not necessarily immediately available, but I do not propose to make any mathematical discount. Accordingly, I shall use the above figure in my schedule.
- (iii) The husband has a 1/6th share in real property at **38 EV Close, Beckenham**. Its value is £286,667. After deduction of 3% sale costs the net equity is £278,066 of which the husband's 1/6th share is £46,344. From this has to be deducted CGT of £10,382, leaving the value of the husband's share at £35,962.
- (iv) All my comments in paragraph (ii) above apply equally to 38 EV Close and the conclusion is the same and I will use the above figure in my schedule.
- (v) The wife did own **the Amersham Property**; but this was sold in June 2021 for £550,000. After the deduction of sale costs plus a mortgage redemption figure of £301,912, the wife received £247,253. She invested this money in various bank accounts and used some of it to pay for her legal costs in these proceedings and has £183,849 left. This figure should appear in her column in my schedule.
- (vi) I raise the fact that this money came from her property sale because it was part of the husband's case that the wife had agreed, as a *qui pro quo* of his

agreeing to give the wife a half share in Property Two, that when she sold her property she would pay the proceeds into the mortgage account on Property Two, thus increasing the equity in Property Two commensurately. He has complained that when she did sell her property she reneged on this promise and that this is not fair. The wife denied the existence of such a promise. On this subject I preferred the evidence of the husband. I accept his evidence that she had led him to believe that she would do this. Even if I am wrong about this, it would in my view meet the test of objective fairness to deal with the case on the basis that she should have done this and fair for me to exercise my redistributive property adjustment powers with this thought in mind.

23. At the outset of the case I was told by one party that the joint First Direct account had been closed and by the other party that this was not so. Counsel were going to seek a definitive answer, but never came back on the subject. It is a relatively trivial sum of money so I propose to ignore it for these purposes, save to say that if the account is open and there is any money in the account then it should be divided equally and the account now closed.
24. The husband asserts a debt in favour of his father in the sum of £200,544 and the wife asserts a debt in favour of her father in the sum of £6,000. Mr Finch stated that if I was persuaded that the debt to the husband's father was a soft debt then he would accept the same for the debt to the wife's father, so I focus on the debt to the husband's father. I have the following comments:-

- (i) In analysing this I remind myself of my own judgment in *P v Q* [2022] EWFC B9, where I said:-

"I derive the following summary of principles from this reading:-

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.

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.

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.

Features which have fallen for consideration to take the case on one side of the line or another include the following and I make it clear that this is not intended to be an exhaustive list.

Factors which on their own or in combination point the judge towards the conclusion that an obligation is in the category of a hard obligation include (1) the fact that it is an obligation to a finance company; (2) that the terms of the obligation have the feel of a normal commercial arrangement; (3) that the obligation arises out of a written agreement; (4) that there is a written demand for payment, a threat of litigation or actual litigation or actual or consequent intervention in the financial remedies proceedings; (5) that there has not been a delay in enforcing the obligation; and (6) that the amount of money is such that it would be less likely for a creditor to be likely to waive the obligation either wholly or partly.

Factors which may on their own or in combination point the judge towards the conclusion that an obligation is in the category of soft include: (1) it is an obligation to a friend or family member with whom the debtor remains on good terms and who is unlikely to want the debtor to suffer hardship; (2) the obligation arose informally and the terms of the obligation do not have the feel of a normal commercial arrangement; (3) there has been no written demand for payment despite the due date having passed; (4) there has been a delay in enforcing the obligation; or (5) the amount of money is such that it would be more likely for the creditor to be likely to waive the obligation either wholly or partly, albeit that the amount of money involved is not necessarily decisive, and there are examples in the authorities of large amounts of money being treated as being soft obligations.

It may be that there are some factors in a particular case which fall on one side of the line and other factors which fall on the other side of the line, and it is for the judge to determine, looking at all of these factors, and maybe other matters, what the appropriate determinations to make in a (ii) particular case in the promotion of a fair outcome.”

- (ii) In the context of the above legal tests I note that there is a written loan agreement and some record of the accounting between the husband and his father, but I also note that they are very close indeed and there is no evidence of a demand for repayment or even any timescale for repayment. Further, I note that in the unusual context of this case the husband's father has been heavily involved in the transfer of large amounts of monies from the husband to his own children with a strong culture of passing assets down the generations so a demand for payment up a generation might be surprising. I note also that the husband's father is aged 86, may be suffering some level of dementia and that the husband holds an enduring power of attorney. Whilst I note that the husband was clear that his father would be likely to want to treat his children equally, the possibility that this debt might be left over to be reconciled from the father's estate after

his death seemed to be a strong possibility. As ever, there are no guarantees of this, but my overall impression is that it is unlikely that the husband's father will ever pursue him for the debt, notwithstanding its size. Overall, I have been persuaded that I should treat this debt as a soft debt and not include it in the asset schedule and (in view of Mr Finch's thoughts on this) I propose to treat the wife's much smaller debt to her father as being in the same category.

25. For all other items, I propose to adopt the figures in the ES2, and propose to make only the following comments:-
- (i) I am not minded to accept the 60% minority discount figures for the husband's various business interests and instead propose to include them at full value whilst recognising that they may be difficult to realise immediately.
 - (ii) I have heard what was said about the various discretionary trusts operated by the husband's father, and the possibility that the husband might benefit from them, but am not minded to include any figure in my schedule. I have not been persuaded on a balance of probabilities that the husband can rely on these as a resource.
 - (iii) Although I propose to include in my schedule the husband's ISA account containing £77,389, I am cognisant that certainly in the husband's mind and, possibly, under the terms of the consent order in his first divorce, this account is earmarked to pay the children's school fees and I am minded to respect this, despite the uncertainty about whether this is a formal obligation.
 - (iv) I propose to omit any references in my schedule to chattels and anticipate, as discussed at court, that the parties will be able to agree a division without the court's input.
26. I shall include in my asset schedule the agreed current CEs of the parties' pensions. I shall discuss the division of these pensions, and the PODE report on them, in the context of how they should be divided, below.
27. Having made these determinations I am now able to set out my assessment of the assets and debts for distribution in this case.

28. The situation can be summarised as follows:-

REALISABLE ASSETS/DEBTS

Wife

50% share of Property Two, London W4 ¹	496,59
Bank accounts in sole name	4,816
Investments (including ISA)	183,849
Debt to her father ²	0
Outstanding Legal Costs ³	0
Other debts	-11,579
TOTAL	177086

Husband

50% share of Property Two, London W4 ⁴	496,593
The intervenors' claim against the husband ⁵	-420,424
1/6 th share in 88 DF Road, London SW1 ⁶	113,902
1/6 th share in 38, EV Close, Beckenham ⁷	35,962
Bank accounts in sole name	7,257
Investments (including ISA)	83,875
Business interests	108,812
Debt to his father ⁸	0
Outstanding Legal Costs ⁹	-51,910
Other debts	-14,596
TOTAL	359471

PENSION ASSETS

Wife

NHS pension CE	345,900
TOTAL	345,900

Husband

Prudential Assurance pension CE	20,515
NHS pension CE	1,513,000

¹ The parties have accepted an offer (which is proceeding) of £1,835,000. After deduction of the outstanding NatWest mortgage of £786,764 and estimate sale costs at 3% the net equity is £993,186. The wife's 50% of this is £496,593.

² This debt is omitted on the basis that it is a soft debt.

³ This figure is based on a total of incurred fees of £52,138, all of which have been paid.

⁴ See footnote 1. The husband also has a 50% share.

⁵ This figure is calculated at 23.62% x (£1,835,000 – 3%) = £420,424

⁶ The combined value of the freehold and two leasehold flats at 88 DF Road is £895,916. After deduction of 3% sale costs the net equity is £869,038 of which H's 1/6th share is £144,839. From this has to be deducted CGT of £30,937, leaving £113,902.

⁷ The value of this property is £286,667. After deduction of 3% sale costs the net equity is £278,066 of which H's 1/6th share is £46,344. From this has to be deducted CGT of £10,382, leaving £35,962.

⁸ This debt is omitted on the basis that it is a soft debt.

⁹ This figure is based on a total of incurred fees of £165,103 less a total of fees paid of £113,193 = £51,910 outstanding debt

TOTAL	1533515
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29. In relation to “**the income, 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 or secured 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 his or her financial dependence on the other party**” the following picture emerged:-

- (i) The husband is an NHS Consultant earning c. £157,000 per annum gross or c. £8,000 pcm net.
- (ii) The wife is also an NHS Consultant earning c. £75,000 per annum gross or c. £4,800 pcm net.
- (iii) Both parties are in reasonable health and have approached the case on the basis that they can reasonably be expected to work until state pension age, i.e. 67. The wife is aged 50 and the husband is aged 57, so (starting from now) the wife is likely to be working for seven years longer than the husband.
- (iv) It is common ground that this case is suitable for an immediate clean break.

30. In relation to the “**financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future**” I have the following observations:-

- (i) Both parties have a need for reasonably suitable housing in the context of the **standard of living** that the parties jointly enjoyed during the marriage, the **ages of the parties**, the **duration of the marriage**, the respective **contributions** of the parties.
- (ii) The housing needs of the wife were considered in more detail at the hearing than those of the husband. The husband’s case was that a reasonably suitable two bedroom property could be purchased by her for c. £650,000, requiring a housing fund of c. £700,000 (including purchase costs). Ms Moys on his behalf drew my attention to the fact that she was now single with no dependents (WP being an adult in work) and that she had sold her own property in Amersham for £550,000 in 2021 and never had a more expensive property than that until the purchase of Property Two (in which she had lived for a relatively short time – December 2019 until now). Further, that her financial contributions were limited. The wife’s case was that such a figure did not properly reflect the standard of living enjoyed during the marriage (in both Property One and Property

Two) and that a purchase price of c. £1,100,000, requiring a housing fund of c. £1,200,000, was more reasonable.

- (iii) In my view the fair answer lies somewhere between these two propositions and that a housing fund of c. £850,000 is a reasonable figure for the wife to seek. In particular I would not attach as much weight to the standard of living during the marriage as the wife was inclined to do.
- (iv) I have seen mortgage capacity evidence relating to the wife which suggests that a mortgage of up to £400,000 (or perhaps a little more) would be achievable for her. It does not follow that it would be reasonable to expect her to have to take such a mortgage, in particular if the calculations are done on the basis of her repaying that mortgage over 17 years, the remaining period of her working life. In my view a repayment mortgage of £300,000 is a more reasonable proposition for her and this might cost her c £2,250 pcm, which is affordable on her salary. In the end, of course, it is open to her to buy a better home with a bigger mortgage or a less good home with a smaller mortgage, but it is reasonable for me to work with these figures. If I use a mortgage figure of £300,000 and a reasonable housing fund of £850,000 then I can conclude that she has a reasonable need for capital of c. £550,000 if that is achievable in the context of a fair division of assets.
- (v) The housing needs of the husband, at least for as long as he has two dependent children, can properly be put at higher than those of the wife because of the children. It can also be said that he has made greater financial contributions than has the wife to the remaining assets. I would not particularly disagree with his own assessment of a reasonable need to purchase at a price of c. £1,000,000, requiring a housing fund of c. £1,100,000.
- (vi) Assessing his need for a capital fund now to meet this housing need is rather more complicated. His share of the sale of Property Two, once the children's claim is deducted, is modest. He has some other assets, but they may be difficult to realise quickly or fully, as he only has a portion of the assets and the other owners may not be ready to assist his wish to realise the assets straight away. He has a mortgage capacity, but this must be limited by his need to pay off any borrowings over the next ten years.
- (vii) A big question here is what to make of the husband's giving away to his children some £1,405,424 of his own assets, the major cause of his current and immediate future impecuniosity. I think there is strength in the argument put by Mr Finch that, by doing what he did, the husband has not done anything in the category of section 25(2)(g) conduct, but he been the author of his own misfortune and that it would be unfair to disadvantage the wife unduly heavily to relieve the husband from the consequence of his actions. In the course of his evidence he said to me in a poignant moment of distress: "*I have screwed it up completely*". It may be the case that a dominant part of his motivation for giving away so much was an admirable wish to assist the next generation, but it is hard not to think that

(in relation to the 2020 transaction at least) the motivation did not also involve in part a wish to favour his children over a wife with whom he had a volatile marriage – I note that he did not tell the wife about it at the time, indeed not until these proceedings started. It was not perhaps sufficiently obvious to cause the wife to feel confident in making a section 37 application, but to an extent the metaphor that he must now ‘*lie on the bed he has made for himself*’ seems apposite. Another aspect of this question is whether or not the court should assume that the use of all of this money is necessarily lost to him. He is the trustee of both trusts and therefore the effective controller of the destiny of all the money in question, at least for a period, and there is nothing to prevent him using the money (or some of it and presumably subject to a clear recognition of the trust portion of the ownership) to purchase a home for himself and the children. Indeed, he told me that he was already thinking of doing this. Whilst the intervenors might wish not to let their father have a penny of their money once they cease to be minors, it may be more likely that they will take a more humane view to their father (who voluntarily gave them all the money in the first place) and be content to permit him to retain the use of a home purchased by the trust money, or a portion of it, for a much longer period, perhaps even during his lifetime. It may be that he will not need any mortgage at all to meet his housing need, depending on all these imponderables. There are of course uncertainties in all of this, but in so far as there are, they are the product of what the husband has done of his own choice.

31. Taking all these circumstances into account, I have considered what the outcome would be if I left all things as they are in the above asset schedule, save to require the wife to account to the husband for a half share of the net proceeds of sale of the Amersham Property for the reasons set out above, that would involve the transfer of one half of £247,253. This approach would be achieved by my seeking to transfer £123,627 across from the wife to the husband from the above asset schedule. This could most conveniently be done by amending the percentage divisions on the sale proceeds of Property Two by a commensurate amount, which would be to give the husband 62.45% and the wife 37.55%. With this amendment the realisable asset schedule would appear as follows:-

REALISABLE ASSETS/DEBTS

Wife

37.55% share of Property Two sale proceeds	372,941
Bank accounts in sole name	4,816
Investments (including ISA)	183,849
Debt to her father	0
Outstanding Legal Costs	0
Other debts	-11,579
TOTAL	550027

Husband

62.45% share of Property Two	620,245
The intervenors' claim against the husband	-420,424

1/6 th share in 88, DF Road, London SW1	113,902
1/6 th share in 38, EV Close, Beckenham	35,962
Bank accounts in sole name	7,257
Investments (including ISA)	83,875
Business interests	108,812
Debt to his father	0
Outstanding Legal Costs	-51,910
Other debts	-14,596
TOTAL	483123

32. In my view this outcome respects all the matters I have discussed above. It leaves the wife able to proceed to purchase a home at the budget I have identified. It reflects what I consider the agreed arrangement was at the time of the purchase of Property Two. It leaves the husband, with a degree of uncertainty, but probably, able to put together a package whereby suitable housing will be available to him. Accordingly, I have decided to make an order to this effect.

33. There was an additional issue before me as to which of the parties should have the ability to port the existing NatWest mortgage (or part of it) to the purchase of a new home, this being desirable as it has a lower than current market interest rate for the next few years. Research carried out by the wife established that only one of the parties could have access to the porting arrangement (i.e. it couldn't be split) and that person could take all or part of the mortgage to a new property. If porting occurred then there would be a commensurate reduction in the Early Redemption Penalty. Both parties wished to have the benefit of the port themselves, but undertook to abide my decision on the question and cooperate with the other having the port if required, lest I concluded that the court had no power to order one party to have the port. Having considered both sides' arguments I have reached the conclusion that the wife should have the benefit of the port. She is more likely to need the port and has a significantly lower income. The husband may not need to have a mortgage at all if he uses the trust money to purchase a home. If there is any reimbursement of the Early Redemption Penalty arising out of this it should be split equally.

34. I now turn to the issue of **pensions**, in particular **the value to each of the parties to the marriage of any benefit which, by reason of the dissolution of the marriage, that party will lose the chance of acquiring**,

35. The parties have received a PODE report from Mr Ian Conlon of IWC Actuarial Ltd dated 28th April 2023. He was instructed to give alternative views based on the wife's assessment of the duration of the marriage (c. 9 years) or the husband's assessment of the duration of the marriage (c. 3 years). In view of my finding of 9 years for the duration of the marriage, I shall obviously concentrate on the former. He was also instructed to give alternative views based on income equality or capital equality. His conclusion was that, looking only at the pensions accrued over the 9 years of the marriage, a 9.2% pension sharing order (of all the husband's NHS pension schemes) would produce equal incomes on retirement, but a 10.2% pension sharing order

(again, of all the husband's NHS pension schemes) would produce capital equality, whilst at the same time leaving the wife with a higher income from those pensions.

36. I have reached the clear conclusion that the fair figure for a pension sharing order is the 9.2% figure and that is what I shall order. In reaching that conclusion I have placed weight on the following matters.
37. In my judgment in *W v H* [2020] EWFC B10 I drew attention to the document known as the PAG 1 Report, or more formally "*A Guide to the Treatment of Pensions on Divorce: The Pension Advisory Group Report*" (July 2019) and suggested that it had the support of the Family Justice Council and the President of the Family Division and should be treated as being "*prima facie persuasive in the areas it has analysed, although of course susceptible to judicial oversight and criticism*".¹⁰ I am not aware of any subsequent judicial departure from this proposition and I would suggest that it stands as the proper approach, now applying to the second edition of the PAG Report, published in January 2024, often known as the PAG 2 Report.¹¹
38. A number of the issues arising in this case can be assisted by the guidance in the PAG Report (second edition) – the PAG 2 Report.
39. **In seeking fairness in relation to the division of pensions should the court, if possible, disaggregate the pensions in the case and promote a discrete and fair division of the pensions as opposed to attempting to execute an offset against other assets?** The orthodox view, encouraged by Thorpe LJ in *Martin-Dye v Martin-Dye* [2006] 2 FLR 901, is that pensions should be dealt with separately and discretely from other capital assets. The PAG 2 Report offers a similar view: "*try, if possible, to deal with each asset class in isolation and avoid offsetting - a discrete solution which equalises pensions by pension sharing orders and which equalises non-pension assets by lump sum or property adjustment orders*" (page 42). Sometimes the facts of a case mean that an off-setting solution has to be followed, but if it can be avoided, as in the present case, that is generally desirable.
40. **In seeking fairness in relation to the division of pensions, to what extent should the court exclude a portion of the member spouse's pension accrued other than in the span of the marriage's duration?** The answer to this question will depend on the extent to which the case is a 'needs case' or a 'sharing case'. The PAG 2 Report suggests that "*Generally in a 'needs case' it would be wrong to apportion pensions so as to exclude the non-cohabitation/marriage element. By contrast, in a 'sharing case', where the assets and future pension benefits exceed the parties' needs, such apportionment may be appropriate*" (page 24); but the report goes on to suggest that the categorisation of a case will depend on other section 25 factors, most obviously the duration of the marriage: "*Thus, the court will have regard to the length of seamless cohabitation/marriage when determining the extent to which it is fair and*

¹⁰ I declared an interest as Co-Chair with Francis J.

¹¹ This can be found online at www.nuffieldfoundation.org/pensions-divorce-interdisciplinary-working-group.

reasonable to divide the ‘non-matrimonial’ element of any capital or any pension. All cases will be determined upon their own facts. The ‘marital’ element of any pension will usually be shared equally. For the reasons set out above, in needs-based cases, the timing and source of the pension saving is not necessarily relevant, but the Court will nevertheless have regard to the length (or shortness) of the seamless cohabitation/marriage in determining the extent to which the needs of the claiming party will justify a division of the pre-cohabitation/marriage element of the pension...The requirement of a nexus between the relationship and a financial need to be met by a matrimonial claim has long been recognised by the case law” (page 26).

In the present case, involving a medium length marriage in more mature years, where the parties have entered the marriage with significant assets acquired earlier in their adult lives, and where the case in terms of pension income sits more easily in the category of a ‘sharing case’ (the wife has not argued that she should have more based on a need claim), the fair answer is likely to be provided by focusing on a division of the pensions accrued in the span of the marriage’s duration, that is to exclude the sharing of pensions outside this category on the basis that they represent non-matrimonial property. The report by Mr Conlon in this case has been targeted towards identifying the mathematical consequences of this principle and its conclusions should therefore be followed in the search for fairness.

41. In seeking fairness in relation to the division of pensions, to what extent should the court seek an answer based on an equal income solution as opposed to an equal capital solution? I make the following comments on this question:-

- (i) In my judgment in *W v H* (supra) I sought to answer that question by saying:-

“There is no ‘one size fits all’ answer to this question. There are undoubtedly scenarios where the fair solution is probably to divide pensions by CE value. For example, where the CEs are relatively small in themselves or as a portion of the assets overall. For example, where the parties are relatively young and any projections about the future income-producing qualities of the pensions are likely to be speculative or unreliable. For example, where all the pensions are simple defined contribution funds so that the CE values can be regarded as reasonably reliable and simple predictor of future income streams...There are, however, scenarios where a simple division of CEs may well not represent a fair solution.”

- (ii) In the present case a simple division by CE is unlikely to be fair because the pensions involved are mostly defined benefit schemes and the parties ages are seven years apart and in my view it was correct here to seek the assistance of a PODE report.
- (iii) The PAG 2 Report goes on to give a steer as to what question the PODE report should be seeking to answer:-

“Where the CE is considered to potentially be an inappropriate valuation for divorce purposes, the question then arises as to whether the pensions should be shared according to their potential income value or a capital value other than their CE... Given that the object of the pension fund is usually to provide income in retirement, it will often be fair (where the pension asset is accrued during the marriage, including cohabitation seamless to marriage) to implement a pension share that provides equal incomes from that pension asset. This is particularly the case where the parties are closer to retirement... An important practical point is that the exercise undertaken to arrive at the figures needed to divide pensions according to their likely income value in retirement will ensure that any valuation quirks inherent in the pension are properly understood and factored into the calculations.” (page 35).

- (iv) The PAG 2 Report also endorses similar sentiments expressed in the Family Justice Council’s report *“Guidance on Financial Needs on Divorce”* (2018 edition) where it is stated:-

“In bigger money cases, where needs are comfortably met, the courts are now likely to be less interested in drawing a distinction between pension and non-pension assets than hitherto. This is partly because other assets will also be deployed for income production so the distinction is less obvious, but more because the “pension freedoms” introduced by Taxation of Pensions Act 2014... In small to medium money cases, however... a more careful examination of the income producing qualities of a pension may well be required” (page 25).

- (v) In my view it is clear in the present case, following the steer from the PAG 2 Report (which does not differ in this respect from the PAG 1 Report) that the fair division of the pensions was provided by the answer that produced an equal level of income on retirement from the relevant pensions, that is a pension sharing order at 9.2%.
- (vi) I have noticed that it is not uncommon for PODEs to be asked to provide an answer not only based on equal incomes, but also alternatively based on an equal capital approach. Indeed, this happened in the present case. It may be that the reason this happens is because the specimen letter of instruction in the PAG Reports (page 106) includes both approaches in its text, but it should be remembered that these are options provided in the specimen letter and it is not necessary for both of them need to be included in the actual letter sent to the PODE. In the notes accompanying the specimen letter it is stated that *“equalisation of benefits by reference to projected income will in most circumstances be the appropriate approach”*. There may be cases where, for particular reasons, equality of capital is a suitable measure; but in my view these are uncommon and thought should be given to what is the appropriate question before the PODE report is commissioned, if necessary with the judge at the First Appointment determining the issue, and that in most cases the only question which needs to be asked is what level of pension sharing order will produce an equal level of income on retirement. Asking more

questions than are necessary will certainly add to the cost of the exercise and almost inevitably lead, further on down the line, to each party advocating the figure most helpful to themselves (as happened in the present case) and making compromise less likely.

42. I indicated that in my judgment I would give a provisional view on costs, which I now do. My provisional view is that there should be no *inter partes* orders for costs. If the intervenors have a shortfall then it can properly be met from the trust monies. It follows from the fact that this is a provisional view that I am prepared to receive submissions seeking a different costs outcome, though I would discourage them.
43. This is my decision and I invite counsel to produce a draft order which matches these conclusions.
44. I would be pleased to receive an agreed order – or less pleased to receive an explanation as to why the order is not agreed, which may be drafting issues or costs issues or something else – by 22nd March 2024. If necessary, I shall convene a hearing, but plainly it would save the parties from incurring more costs if there was no need for a hearing.
45. I wish to have a discussion with counsel and the parties about the publication of this judgment on TNA and, if so, what anonymisations/redactions are to be sought. If there is to be a hearing then the discussion can take place at that hearing. If not, I am content to receive any submissions by way of email on this subject.

LATER

46. The parties later agreed the content of an order based on the above judgment, agreed that there should be no order as to costs and agreed the anonymisations/redactions in the published version of this judgment as set out above.

HHJ Edward Hess
Central Family Court
8th March 2024