Neutral Citation Number: [2024] EWFC 71

Case No: XX 22 P 00066

IN THE FAMILY COURT

Date: 2 April 2024

Before:

MR. NICHOLAS ALLEN KC

(Sitting as a Deputy High Court Judge)

B E T W E E N

TK

Applicant

and

LK

Respondent

Miss Sassa-Ann Amaouche (instructed by Raydens) for the **Applicant**
The Respondent appeared in person

Hearing dates: 4th – 6th December 2023 and 13th – 14th February 2024 and 5th March 2024

Judgment

This judgment was handed down on 2nd April 2024 by circulation to the parties or their representatives by e-mail.

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

Nicholas Allen KC:

Introduction

1) I am concerned with the final hearing of an application under CA 1989 Schedule 1 ('Schedule 1') dated 8th June 2022 brought by TK against LK in respect of their son, Child A.

2) In this judgment I shall refer to the parties as 'F' and 'M' respectively. No discourtesy is intended.

3) F was represented by Miss Sassa-Ann Amaouche instructed by Rayden Solicitors. M acted in person (as she had throughout these proceedings). She was held in HM Prison X and now HM Prison Y for reasons I set out below.

4) F is English. M is a national of Country A, but speaks and writes English to a high standard.

5) Since allocation of these proceedings to me I have sought to ensure that M is not disadvantaged because (for example) it takes time for post to reach her and she has no access to either email or the internet. I required all documents to which reference was to be made to be sent to M by first class post no later than seven days in advance of each hearing and also required that F's solicitors wrote to M after each hearing summarising what I had ordered as an accompaniment to the formal order. I also required F's solicitors to send M a copy of the relevant parts of Schedule 1.

6) At the outset of the final hearing M confirmed she had received Miss Amaouche's position statement, her authorities bundle, the two hearing bundles, and F's Forms H1 and N260. M had not prepared a position statement of her own.

7) I am satisfied that as a result of these measures M (i) was able to take a full part in these proceedings; and (ii) has not been disadvantaged notwithstanding she has represented herself. I believe I have a full understanding of her case.

8) On 6th June 2023 F's solicitors wrote to the court (as I had directed on 4th May 2023) setting out the special measures they sought on F's behalf in accordance with FPR 2010 Part 3A and PD3AA. On 9th June 2023 M stated that she had no comments to make in response. I therefore put these measures in place.

9) The final hearing took place entirely remotely rather than on a hybrid basis. I directed this for two reasons namely (i) M's imprisonment; and (ii) it allowed special measures to be put in place more effectively (for example F's camera remained turned off throughout the hearing).

10) I am grateful to the staff at HM Prison X and HM Prison Y who facilitated M's attendance and provided facilities for the sending and receipt of documents.

11) In advance of the final hearing I was provided with a 313-page main bundle and a 610-page supplemental bundle. The purpose of the supplemental bundle was to ensure that M had all relevant documents to hand.

12) By way of pre-reading I read the main bundle but I only read documents in the supplemental bundle if invited by either party to do so (which on F's part was to read in full the three judgments of His Honour Judge ZA in the public law children proceedings to which I refer below). I was taken to specific documents in the supplemental bundle during the course of the hearing.

13) I acknowledge that, as M has consistently maintained and as she confirmed in her oral evidence, she does not accept the factual findings made in the public law proceedings (and has unsuccessfully sought to challenge the same on at least one occasion). However the findings stand and I consider I am bound by them for the purposes of this application.

14) The final hearing was listed on 4th December 2023 with a time-estimate of four days. F gave his evidence on the first day and M on the second day. I was due to hear submissions on the third day and give judgment on the fourth. However on the morning of the third day I acceded to an unopposed application made on F's behalf to adjourn to allow for the full probate file of M's late father to be obtained from the courts of Country A, translated into English, and disclosed into the proceedings. I will set out the relevance of this later.

15) The case therefore went part-heard to 13th February 2024 with a time-estimate of two days. The hearing on that date was ineffective as it transpired that M had not received a copy of the probate file or the SJE report (also in the language of Country A and translated into English) in relation to M's late father's will. This was as a consequence of M's move from HM Prison X to HM Prison Y. Arrangements were therefore made for these documents to be couriered to her that day. Unfortunately these documents were not handed to her by the prison staff until around 11 am on 14th February 2024. M sought a further adjournment in order for her to have a proper opportunity to consider the same and given their centrality to F's case this application was (reluctantly) not opposed on his behalf.

16) The case therefore went part-heard for a further half-day on the basis that I would then reserve judgment.

17) On 5th March 2024 I therefore heard further evidence from M in relation to the probate file and the parties' respective submissions.

18) The two adjournments were not ideal given they delayed the conclusion of the case for over three months. However they were clearly necessary in order for the case to be heard and determined fairly.

19) In this judgment I have not referred to every matter raised by the parties in evidence or in submissions. I have however borne all that I read and was said to me in mind.

20) I remind myself that the burden of proof is on the party who seeks a particular finding and that the standard of proof is the balance of probabilities; no more and no less.

21) I was conscious throughout M's evidence of her privilege against self-incrimination. I reminded her of this. In the absence of her being represented I said to Miss Amaouche I would not entertain being asked to make any findings that risked incrimination. Miss Amaouche confirmed she would not (and did not) seek findings in relation to criminal behaviour.

Background

22) F is in his early 60s and M is in her mid 50s. The parties' relationship began in 2010, they entered a pre-marital agreement in 2011, and married a few weeks later. They separated in 2013. It was therefore a short marriage of only a little over two years.

23) M issued a divorce petition. I am unaware of its date. Decree Nisi was made in 2014 and was made Absolute in 2015.

24) On 26th February 2015 District Judge Griggs made a final financial remedy order by consent (both parties being legally represented at that time). This was a simple dismissal of both parties' respective claims and a clean break. I accept F's evidence that such assets that either party had at that time were modest (which is corroborated by the schedules to the pre-marital agreement).

25) After the parties separated Child A's main home was with M but they spent time with F. I understand that there were protracted and high conflict private law children proceedings in relation to both live with' and 'spend time with' arrangements. In his judgment of 24th July 2019 (to which I refer further below) His Honour Judge ZA said at [30] that *"I do not believe that anyone*

can dispute that this is a high conflict intra-parental dispute" and that Child A has never had the solace of a lengthy 'normal' interlude in the dispute between his parents as *"[n]o sooner is one area of controversy closed before another presents itself."* At [78] he referred to an *"extreme level of animosity and hatred"* between the parties. In his judgment of 10th March 2022 (to which again I refer below) he referred at [12] to *"prolonged and bitterly contested"* private law proceedings.

26) In April 2016 His Honour Judge ZB refused M's application to relocate with Child A to Country A. About eight weeks later M unilaterally removed Child A from his school in County A where both parties were then living and moved with him to County B, a significant distance away. F received no prior notice of this removal and has confirmed that if approached he would not have so consented. The relocation led F to resign from his employment and he moved to County C in February 2017 to retrain for a different role. Thereafter in February 2018 when an opportunity to work from home arose, F moved to County B.

27) M subsequently made allegations that F had sexually assaulted Child A (the initial referral to social services about allegedly inappropriate behaviour being on 22nd May 2018). Child A underwent a child protection medical on 10th August 2018. On 20th August 2018 they were voluntarily accommodated with their childminder before returning to M's care on 21st September 2018. F's last supervised contact with Child A was on 22nd August 2018. F was arrested on 4th September 2018 (I assume because of M's allegations against him) and held on bail for over six months. He was signed off work for 16 months as medically unfit.

28) Public law children proceedings followed from November 2018 commencing with an application for an interim care order which was made with Child A remaining in M's care. Child A was the subject of two ABE interviews on 20th September 2018 and on 8th May 2019 after they had made even more serious allegations against F of sexual assault involving anal and/or oral rape.

29) On 20th June 2019 M was arrested. The reason(s) for this are not given in the public law judgments. Child A was removed from M's care by a Police Protection Order and placed in foster care. M was subject to police bail with conditions which initially prevented her contact with Child A after which there was no parental contact.

30) On 24th July 2019 at a threshold hearing His Honour Judge ZA did not find the alleged sexual abuse to be proven but found parts of the local authority's amended threshold schedule proven. The judgment records at paragraph [268]:

> This is the most sustained conduct of improper parental influence and manipulation I have seen for some time. It is an extreme example.

And at [269]:

> The conduct by Child A's mother has had very real consequences for Child A himself.

31) M sought permission to appeal the findings. Permission was refused on 30th October 2019.

32) Indirect contact between F and Child A began in December 2019 and on 21st July 2020 Child A had their first direct contact with F in two years. It was initially supervised and from 1st November 2020 was unsupervised. M sought contact which I believe was refused by His Honour Judge ZA in June 2020. M was then arrested again in September 2020 because of allegations that she was arranging a criminal offence involving Child A.

33) Thereafter M carried out a criminal offence, the victim of which was Child A. The details of the criminal offence have been redacted from this version of the judgment. Child A was subsequently diagnosed with PTSD and has required ongoing psychiatric support. The events of that day are set out in full in the judgment of 17th February 2021 to which I refer below.

34) M pleaded guilty to the criminal offence (but subsequently made an unsuccessful attempt to vacate her plea) and was thereafter sentenced to a long custodial sentence. There is no current appeal pending against conviction or sentence (I believe that M may have previously sought permission to appeal one or both) nor any application before the Criminal Cases Review Commission. Although the bundle did not contain M's certificate of conviction, she confirmed she had been so convicted and sentenced. A lifetime restraining order was also imposed to protect Child A. The Crown Court put in place reporting restrictions which remain in force.

35) On 17th February 2021 a care plan was approved by His Honour Judge ZA at the outcome/welfare hearing for Child A to remain in long-term foster care (with a view to possible parental reunification with F) and to have weekly contact with F. This began in April 2021 at one night per week and increased to two nights from October 2021. An order was also made under CA 1989 s34(4) which allowed the local authority to refuse M from having any contact with Child A.

36) In his judgment of 17th February 2021 His Honour Judge ZA stated at [76] that M "*is an intelligent, ruthless and determined individual, manipulative and, in my judgment, devious"* and described *"how potentially dangerous is the mother's capability."*

37) The stress of the criminal offence led F to resign from his employment. He started working in a different role in April 2021.

38) In August 2021 F acting in person applied to discharge the final care order under CA 1989 s39. On 10th March 2022 His Honour Judge ZA dismissed the application as being premature. At paragraph [16] of his judgment he stated that "*[t]he transcribed sentencing remarks of the Crown Court judge … reveal the full horror of [the criminal offence] …"*

39) A CA 1989 s91(14) order was made by consent on 10th March 2022 in relation to both parties to last until 31st July 2024.

40) Thereafter until 2nd June 2022 Child A spent three nights a week with F. This then increased to five nights a week and on 10th August 2022 Child A returned fully to F's care.

41) F and Child A now live in an area of the country that has not been disclosed to ensure that M is not able to locate them.

42) On 7th September 2023 on application by the local authority His Honour Judge ZA (i) discharged the care order made on 17th February 2021 with immediate effect; (ii) made a 'live with' order in favour of F; and (iii) ordered indirect contact (on a one-way basis) between M and Child A by way of F sending an annual summary of Child A's progress but in all other respects there be no contact between M and Child A.

43) Given M's imprisonment the responsibility – financial and otherwise - of raising Child A during the remainder of their minority will fall on F and him alone.

Schedule 1 proceedings

44) F initially filed an application on 9th January 2022 when acting in person. He stated at paragraph 20 of his witness statement dated 1st November 2023 that he made the application following the death of M's father. He understood M and her brother to be the sole beneficiaries of their late father's estate which included a property in Country A which was to be sold.

45) Paragraph 9 of Ms. Amaouche's Position Statement dated 26th July 2022 states *"[i]t is unclear whether that Form A was ever issued."* I note that paragraph 69 of the judgment of His Honour Judge ZA dated 10th March 2022 states this application was in fact struck out by order of a District Judge. I assume that this was because of the CA 1989 s91(14) order.

46) In May 2022 F instructed his current solicitors and this application was filed dated 8th June 2022. A case management order was made by District Judge Jones-Evans on the court's own initiative on 16th June 2022. On 27th July 2022 F applied for permission to make the application given the CA 1989 s91(14) order. Permission to pursue the application was granted by Francis J on 14th November 2022 who also gave directions pursuant to r27.11 and PD27A as to press attendance.

47) I heard Case Management Conferences on 4th May 2023 and 4th July 2023 (and at the latter hearing I directed that the case should not be referred to an FDR Appointment on the basis that pursuant to r9.15(4)(b) there were *"exceptional reasons"* which made such a referral inappropriate). I also made orders on paper on 20th June 2023 (which included a Third Party Disclosure Order against Q Bank) and on 30th October 2023.

48) At the hearing on 4th July 2023 M confirmed she did not intend to cross-examine F at the final hearing. In my order I gave her the opportunity to reconsider the same, but she did not do so. She confirmed her position remained the same at the outset of the final hearing. M also chose not to expand on her written evidence by way of evidence-in-chief or in re-examination although I gave her the opportunity to do so.

Open positions

49) F's open position was set out on 27th June 2023 (and amended in his witness statement dated 1st November 2023 and amended further in Miss Amaouche's closing submissions). He seeks the following orders:

a) a lump sum to meet Child A's housing needs calculated by reference to a capital need to purchase a house (to include all associated costs) of £348,000 to £420,500. F's capital assets were said to be £99,152 at their highest (being an inheritance from his late mother's estate). It is said there are special and/or exceptional circumstances which justify long-term capital provision that excludes any reversion of the housing fund to M;
b) a lump sum of £15,500 to purchase an approved used car. The cost will be c. £21,495 and F will part-exchange his five-year-old car with a value of c. £6,000;
c) a lump sum of £500 to buy a laptop for Child A;
d) a lump sum of £1,500 to meet Child A's mobile contract costs for the next five years;
e) a lump sum of £10,000 to meet Child A's therapeutic needs; and
f) an order M pay F's costs. F's costs have been in part funded by a loan of £48,845 borrowed from his late mother and £33,000 from her estate that (it is said) must be repaid.

50) In her closing submissions Ms. Amaouche quantified F's claim as follows – M's interest in her late father's estate should be taken to be £341,715 from which she should meet F's N260 costs of £85,284 in full. The non-housing elements as set out above total £27,500 which leaves £228,931 to be paid to F. F would then have this sum, the £85,284 paid in costs and £99,152 from his late mother's estate (i.e. a total of £413,367) from which he would have to pay £21,469 in unpaid costs leaving £391,898.

51) M's open position dated 18th May 2023 (which she maintained in evidence) was as follows:

a) no financial provision should be made by her for Child A (as her pension would be (it is said) the only funds available to her and its removal would leave her destitute); and
b) no order for costs.

52) In her closing submissions M said that if she did receive anything as a beneficiary of her late father's estate she would wish in the first instance to use the capital to repay her family and friends who had assisted her in meeting her legal costs in the *"barrage"* of court cases F had brought against her *"relentlessly"* (a figure she estimated to be in excess of €100,000) and her obligation to Child A should be limited to £210 pm being the same CMS assessed figure that F used to pay her for Child A's benefit. If there was to be a capital award M said that it should be held in trust for

Child A, administered by someone other than F alone, and should either be paid to Child A on reaching age 25 or revert to her as there was no justification for long-term provision.

Jurisdiction

53) The jurisdiction under Schedule 1 to consider a further lump sum exists after a clean break in divorce proceedings involving the same parties as the application of issue estoppel has been disapproved in cases involving children - *MB v KB* [2007] 2 FLR 586 per Baron J at [25]. In *PK v BC (Financial Remedies: Schedule 1)* [2012] 2 FLR 1426 per Moor J at [13] it was said that the circumstances have to be *"exceptional"* because:

> I accept … that the court does have jurisdiction to consider the question of whether or not to award a further lump sum pursuant to Schedule 1 even where there has been a clean break in divorce proceedings. However, I do take the view that the circumstances have to be exceptional. When two parties reach an ancillary relief clean-break order they are putting behind them their financial disputes. Normally the wife, but sometimes the husband, accepts the sum on a once-and-for-all basis. It is, in my view, a very high hurdle that has to be overcome for a mother to then bring a further application for financial provision by way of housing. If it was to occur it would of course be for a settlement of property order; it could not be an outright lump sum given the authorities.

54) In *MG v FG (Schedule 1: Application to strike out; Estoppel; Legal Costs Funding)* [2016] EWHC 1964 (Fam) after citing the above paragraph Cobb J at [28] warned of the *"danger that focusing on the particular language of a given judgment may obstruct the proper exercise of the relevant jurisdiction, and I must guard against doing so"* - and referred to what Wilson LJ (as he then was) had observed in *Currey v Currey (No. 2)* [2007] 1 FLR 946 at [19] - before stating *"[t]hat said, I do regard the cases in which a second bite would be permitted as few and far between – they will indeed, in my view, be the exception rather than the rule."*

55) I do not need to consider further whether the circumstances for the making of an order under Schedule 1 after a clean break in divorce proceedings have to be *"exceptional"* as I have no doubt that the circumstances of this case since the order on 26th February 2015 are exceptional given the criminal offence committed by M against Child A, M's subsequent lengthy imprisonment, and that Child A now lives with F. I am therefore satisfied that the Schedule 1 jurisdiction is properly engaged.

The legal framework

56) In deciding whether to exercise its powers under Schedule 1 and, if so, in what way, the court must have regard to *"all the circumstances"* including those matters set out in paragraph 4(1). I bear all of these factors in mind. There are obvious similarities between this paragraph and MCA 1973 s25. However the paragraph does not explicitly refer to *inter alia* the welfare of the child, the parties' conduct, standard of living, or the duration of the parties' relationship.

57) Under Schedule 1 the significance of these and other matters have been judicially developed as part of *"all the circumstances"*. In respect of 'welfare', this is an overarching factor notwithstanding its absence from paragraph 4(1). In *J v C (Child: Financial Provision)* [1999] 1 FLR 152 Hale J (as she then was) stated at p156 that it *"must be one of the relevant circumstances to be taken into account when assessing whether and how to order provision"*. This was amplified in *Re P (Child: Financial Provision)* per Thorpe LJ at [44] where he said that "*welfare must be not just 'one of the relevant circumstances' but, in the generality of cases, a constant influence on the discretionary outcome"*. I therefore have Child A's welfare at the forefront of my mind.

58) The extent to which the other non-statutory factors must be considered will vary from case to case.

Conduct

59) One of these other factors is conduct. It is a consequence of the court's focus on the child's needs and requirements under Schedule 1 rather than those of their parents that conduct is even less

likely to be relevant than it may be under MCA 1973 (see *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657 per Ward J (as he then was) at p664 - *"Conduct, or more accurately, misconduct, which is not a specific factor in the para 4 checklist as it is in the Matrimonial Causes Act, s 25, checklist, is therefore material only as a hazard light which will flash throughout my journey down the rest of para 4"* - and *Re S (Unmarried Parents: Financial Provision)* [2006] 2 FLR 950 where Bennett J was criticised by the Court of Appeal at [15] for having lost sight of the child's needs due to his focus on the mother's conduct).

60) However, it is clear that particularly egregious conduct can be taken into account. For example in *O v P (No 2) (Sch 1 Application: Stay: Forum Conveniens)* [2015] 2 FLR 77 Baker J (as he then was) stated as follows:

> [127] Hanging over this whole case is the fact that the father has been convicted on two occasions of inciting the mother's murder. …
>
> [128] In contrast to the list in s 25 of the Matrimonial Causes Act 1973 to which a court must have regard in deciding how to exercise its powers to make orders for financial relief in divorce proceedings, the list in Sch 1 to the Children Act of matters to which the court is to have regard in making orders for financial relief under the Schedule does not expressly include the conduct of the parties. Paragraph 4 of Sch 1 does, however, require the court to have regard *"to all the circumstances"*. In my judgment, the father's conduct in this case, in particular his convictions for two offences of inciting the mother's murder, is plainly relevant. It would be not merely inequitable but also impossible to disregard it.
>
> [129] It is the mother's case that she remains in fear of the father and that as a result her life, including her employment and earning capacity, has been very severely restricted. …
>
> [132] These quotations from the evidence illustrate just how much the father's conduct is a relevant factor in this case, not because the conduct by itself justifies a higher sum being paid in respect of S, but because it has had a profound impact on the life and lifestyle of S and her mother. If the father had not incited others to kill the mother, and not been sent to prison for most of S's childhood, he would in all probability have been able to pursue a career which would have enabled him to support S in enjoying the sort of comfortable lifestyle which the father and mother enjoyed in earlier times. Furthermore, the mother would have been able to pursue her career as a nutritionist and make some substantial contribution to S's support. Instead, he has been incarcerated for the past fourteen years, and she has been living the life of a fugitive, unable (as I find) to work in her chosen career and forced to rely on her parents, and for a period X, for financial support.

61) The authorities in relation to conduct under MCA 1973 s25(2)(g) are therefore relevant.

62) As Moor J observed in *R v B and Others* [2017] EWFC 33 at [85] *"[c]onduct features in section 25(2) without a gloss."* However as he also said at [81] "*[c]onduct is only relevant in a few cases". In AF v SF (Dynastic Trust: Needs-Based Award)* [2020] 1 FLR 121 the same judge succinctly summarised the position under MCA 1973 in the following way:

> [62] … To take [conduct] into account, I would have to be satisfied that [the husband's] conduct was such that it would be 'inequitable to disregard' it. In *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186, Baroness Hale of Richmond approved the previous categorisation of this as a requirement that the conduct be *'gross and obvious'*.

63) Conduct was considered in detail in *Tsvetkov v Khayrova* [2023] EWFC 130 per Peel J. At [43] he stated that at 'stage one' a party asserting conduct must prove:

> i) the facts relied upon;
>
> ii) if established, that those facts meet the conduct threshold, which has consistently been set at a high or exceptional level; and
>
> iii) that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a

broader evaluation. But I doubt very much that the quantification of loss can or should range beyond the financial consequences caused by the pleaded grounds.

64) At [46] ii) Peel J stated that the reason for this is:

> [a] party who seeks to rely upon the other's iniquitous behaviour must say so at the earliest opportunity, and in so doing should; (a) state with particularised specificity the allegations, (b) state how the allegations meet the threshold criteria for a conduct claim, and (c) identify the financial impact caused by the alleged conduct. The author of the alleged misconduct is entitled to know with precision what case he/she must meet.

65) In *Goddard-Watts v Goddard-Watts* [2023] 2 FLR 735 Macur LJ at [70]-[74] considered whether the frauds perpetrated by the husband might constitute conduct within the meaning of s25(2)(g), and, if so, then how, if at all, that ought to bear upon the court's consideration of the case. She listed the authorities to which the court had been referred which included *OG v AG (Financial Remedies: Conduct)* [2021] 1 FLR 1105 where Mostyn J had said at [34] that *"[t]he authorities clearly indicate that [gross and obvious personal misconduct] would only be reflected where there is a financial consequence to its impact"*. Macur LJ observed at [71] that "*the principle and accepted view to be derived from these authorities is that the misconduct envisaged by section 25(2)(g) must necessarily be quantifiable in monetary terms rather than seen as a penalty to be imposed against the errant partner, and that the 'orthodox approach' to litigation misconduct is to be met by an award of costs"*. This is why (for example) in *KA v LE* [2023] EWFC 266 (B) Deputy District Judge Harrop observed at [72] that *"However one may feel about it, the case law at present is clear that personal misconduct will only be taken into account in very rare circumstances and only where it has had financial consequences …"* and referenced *OG v AG (Financial Remedies: Conduct)*.

66) In *Goddard-Watts v Goddard-Watts* Macur LJ noted at [71] that *OG v AG (Financial Remedies: Conduct)*, decided on 29th July 2020, *"had not been reported and was not cited in the latest Court of Appeal authority on the point, TT v CDS [2021] 1 FLR 996, decided in September 2020."*

67) Macur LJ concluded at [74] as follows:

> I agree with the husband that there is no direct financial consequence to his fraudulent conduct so as to enable its monetary evaluation. However, I take the view that the husband's fraud is 'conduct' for the purpose of subsection 25(2)(g) in that it provides 'the glass' through which to address the unnecessary delay in achieving finality of the wife's overall claim, including her unanticipated contribution to the welfare of the family post 2010.

68) It is arguable that by these comments Macur LJ may have called into question the "*accepted view"* that conduct must be identifiable or quantifiable in monetary terms in order to be relevant. Her Honour Judge Reardon may have expressed similar reservations in *DP v EP (Conduct; Economic Abuse; Needs)* [2023] EWFC 6. At [34] she stated that *"[r]ecent cases where it appears that conduct without a financially measurable consequence has impacted on the distribution exercise are rare, but exist"* referring to *K v L* [2010] EWCA Civ 125 (a refusal of permission to appeal by Wilson LJ (as he then was) where the husband had pleaded guilty to counts of sexually assaulting the wife's grandchildren, of taking indecent photographs of one of them, and of related offences). Later at [153] having referred to Mostyn J's observation in *OG v AG (Financial Remedies: Conduct)* that in order to sound in the ultimate distribution, s25(2)(g) conduct must have *"financially measurable"* consequences, Her Honour Judge Reardon stated at [155] that *"too narrow an interpretation of s 25(2)(g) would render the provision nugatory"* and *"[i]t is difficult to imagine a scenario in which consequences which are truly financially measurable have not already been taken into account under either s 25(2)(a) (resources) or s 25(2)(b) (needs)"* and concluded at [156] "*there must be some scope for conduct which has had consequences to be reflected in the ultimate division of assets, even where those consequences are not financially measurable."* Deputy District Judge Harrop's choice of words "*However one may feel about it, the case law at present is clear …"* in *KA v LE* at [72] is also of note.

69) I am aware of two other cases where conduct was found to be relevant and where there was no identifiable financial impact. First, in *Al-Khatib v Masry* [2002] 1 FLR 1053 the court took into account the misconduct of the husband in abducting the children of the marriage. Munby J (as he then was) stated at [103] that *"[r]eferring to Rayden and Jackson Divorce and Family Matters (Butterworths, 17th edn), paras 21.60–21.62, Mr Mostyn asserts, and Mr Deacon does not dispute, that conduct under s 25(2)(g) of the 1973 Act does not have to have a financial consequence for it to be taken into account"* - and he agreed that *"the husband's conduct in abducting the children and depriving … them and the wife of that most basic human right, their mutual society, falls squarely within the class of case contemplated by Parliament"* when enacting the ancillary relief provisions. This case therefore also supports the proposition that conduct aimed at a child of the family might amount to conduct such that it would in the opinion of the court be inequitable to disregard. This proposition has obvious relevance to the present case.

70) Second, in *FRB v DCA (No. 2)* [2020] EWHC 754 (Fam) it was argued at [180] that conceiving *"a child by another man and keeping that secret (thus inducing the husband to commit both financially and emotionally to another man's child) was misconduct"*. Cohen J concluded at [193] that the wife's action in allowing the husband to bring up the child in the belief that he was the natural father was conduct (*"emotional damage to H of the sort inflicted by W"* at [197]) so egregious that it would be inequitable to disregard before stating that *"[h]ow I take it into account seems to me a much more difficult issue"* and at [196] that *"[t]here is no guidance in reported authority as to how this sort of conduct should be reflected."*

71) I do not have to consider further the question whether conduct – assuming it passes the high/exceptional threshold - may only be reflected where there is a measurable financial consequence. For reasons that I shall set out later I am wholly satisfied that in this case there is both conduct that passes this threshold and such a causative link.

72) At [44] of *Tsvetkov v Khayrova* Peel J stated that if 'stage one' is established, at 'stage two' the court *"will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings, undertaking the familiar s25 exercise which requires balancing all the relevant factors."*

73) In *S v S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496 – the case from which the need for a 'gasp' rather than 'gulp' factor is derived – Burton J observed (at [41]) that *"[t]here is no real guidance as to what would be the effect if I concluded that there has been such conduct by the respondent as it would be 'inequitable to disregard'"*. He recorded that it had been "*described by [counsel for the applicant] Mr Mostyn QC as a "moral test involving no particular science"*." He noted that *"[t]he exercise of such a sweeping power, which could deprive a party of all entitlement, or multiply or magnify what would otherwise be the entitlement of the other party, is of concern to me"* and that it ought to be regulated by guidance.

74) Burton J then referred to the approaches of two first instance judges with the caveat that *"they may neither of them comply with what the court is intended to do under s25 of the 1973 Act"* namely (i) *Al-Khatib v Masry* [2002] 1 FLR 1053 *where Munby J (as he then was)* stated that 'conduct' could drive him to *"the very top end of the applicable discretionary bracket applicable to the case"*; and (ii) *H v H (Financial Relief: Attempted Murder As Conduct)* [2006] 1 FLR 990 where Coleridge J stated at [44] that *"the court should not be punitive or confiscatory for its own sake"* but that the 'conduct' is *"a potentially magnifying factor when considering the wife's position under the other subsections and criteria. It is the glass through which the other factors are considered."*

75) In *S v S (Conduct: Pensions)* [2022] EWFC 176 His Honour Judge Robinson at [26] cited the above from *H v H (Financial Relief: Attempted Murder As Conduct)* – which continues *"[i]t places her needs, as I judge them, as a much higher priority to those of the husband because the*

situation the wife now finds herself in is, in a very real way, his fault" - and stated that *"I entirely accept and apply this observation. My first priority is to consider the Wife's needs, and only consider those of the Husband when I am satisfied that hers have been met."* This is consistent with *TT v CDS* per Moylan LJ at [80] (albeit in relation to litigation conduct) "*I agree with Moor J in R v B [and Others) [2017] EWFC 33] when he said that, if required to achieve a fair outcome, the court 'must be entitled to prioritise the [needs of the] party who has not been guilty of such conduct'".*

76) It may be that in *Goddard-Watts v Goddard-Watts* insofar as there is a material difference between the approaches advocated in *H v H (Financial Relief: Attempted Murder As Conduct)* to which the court was referred, and in *Al-Khatib v Masry*, to which it is not clear that the court was referred directly, Macur LJ's reference at [74] to conduct as a *"glass"* constitutes an expression of support for the former in preference to the latter and therefore provides to a degree the guidance that Burton J sought (although I observe that in *K v L* at [12] Wilson LJ stated that he did not think that the Court of Appeal *"would feel able or willing to give the sort of general guidance for which Burton J called"*). In any event I intend to adopt this approach in this case.

Lump sums

77) The court has ordered lump sums under Schedule 1 for a wide range of purposes (as a consequence of its expansive interpretation of *"for the benefit of the child"*) including:

a) the furnishing and equipping of a house (*Phillips v Peace* [1996] 2 FLR 230 and *Re P (Child: Financial Provision)*);
b) the provision of a car (now and every x years) (*Re P (Child: Financial Provision)* and *PG v TW (No. 2) (Child: Financial Provision: Legal Funding)* [2014] 1 FLR 508);
c) medical, nursing, and hospital costs (*Phillips v Peace*); and
d) payment of the applicant's debts (*Morgan v Hill* [2007] 1 FLR 1480, *Re M-M (Schedule 1 Provision)* [2014] 2 FLR 1391, and *Re A (A Child: Financial Provision)* [2015] 2 FLR 625).

78) There is therefore reported authority to support there being jurisdiction for the court to make all of the various lump sums sought by F on Child A's behalf.

Reversion of capital

Lump sum orders

79) In *Phillips v Peace* [2005] 2 FLR 1212 per Singer J the mother argued the court could award a lump sum subject to a condition that it be used towards housing which would in due course revert to the father in accordance with the terms of the original settlement. It was therefore suggested that the lump sum provisions could be used to circumvent the prohibition against ordering a second settlement of property. This was rejected on the basis that it would be a misuse of the court's power. The judge held at [27] that lump sums are not designed to revert to the payer but are paid *"once and for all and are used to reimburse past expenditure or are spent on current or future needs. To the extent that whatever was purchased with the lump sum is not consumed it will be retained for or by the child"*. Lump sum orders therefore do not revert to the paying party.

Property-related orders

80) Pursuant to CA 1989 paragraph 1(2)(d) and (e), the court may make an order requiring a settlement or transfer of property to be made for the benefit of a child. Although the duration of such orders is not expressly limited by statute, as it is for periodical payments orders by paragraph 3 (1) and (2), there is a long line of authorities to the effect that the power to order such provision is in practice limited.

81) By way of one example, in *MT v OT (Financial Provision: Costs)* [2008] 2 FLR 1311 Charles J stated that as a matter of statutory construction the powers in paragraph 1(2)(d) and (e) should only be exercised so as to confer an absolute interest on the relevant child(ren) in special

circumstances relating to the child(ren) – such as suffering from a disability - and not, for example, the extreme wealth of a father or that the child might not benefit on his death.

82) Further, in *Re N (Payments for Benefit of Child)* [2009] 1 FLR 1442 per Munby J (as he then was) stated at [78]:

> In my judgment, "special" or "exceptional" cases apart, "dependency" ceases at majority. So, "special" or "exceptional" cases apart, any capital settlement under Schedule 1 should be expressed as terminating upon the child attaining the age of 18 or completing tertiary education.

83) This restriction was considered in *UD v DN (Schedule 1, Children Act 1989; Capital Provision)* [2022] 2 FLR 308. Moylan LJ (with whom King and Newey LJJs agreed) allowed an appeal against Williams J's settlement of property order whereby the father was required to settle a property in London in trust for the benefit of the parties' two younger children, then aged 19 and 14, whereby at the end of the trust period - which included the date on which the youngest child attained the age of 18 or 6 months after they completed full-time tertiary education - 6.5% of the gross sale price or market value of the home *"shall be held on trust for the benefit of the children … absolutely"*.

84) In addressing the question as to whether, on the evidence and in the particular circumstances of this case Williams J had been right to make that award Moylan LJ stated [at [76]:

> … it is, in my view, clear that such power as there is to order financial provision in favour of an adult child who is not in education or training is limited to 'special' or 'exceptional' circumstances. It is also clear, for example from what Booth J in *Kiely v Kiely* [[1988] 1 FLR 248], that these are circumstances "relating to the children". They must be circumstances, such as a physical or mental disability, which create a financial need.

85) Moylan LJ then concluded that there were no such circumstances which could justify the settlement that had been made in favour of the children. In particular (at [80]) (original emphasis):

> … seeking to protect children from financial pressure or 'manipulation' that a parent might seek to exert does not begin to come within the scope of a 'special' or 'exceptional' circumstance which would justify the outright capital award which the Judge made or, indeed, any award. … this element of the Judge's assessment was not based on the children having a continuing need for financial provision, or on (to quote again from *Kiely v Kiely*) some circumstance *'relating* to the children', but on the father's prospective behaviour.

86) Moylan LJ further stated (original emphasis):

> [83] I make clear that I accept, of course, the emotional and psychological damage caused to children by parental abuse. The harmful effects of such abuse are well established. However, the general observations made by the Judge are not sufficient to establish any specific consequences for the children in *this* case which would support the exercise of the powers under Sch 1 to make a financial award. As Mr Pocock submitted, there was no evidence as to the children's mental health in the future, which is why the Judge said that his decision *was 'not underpinned by, as it were, a medical evaluation of the children's vulnerability'*.

87) In my view following *UD v DN (Schedule 1, Children Act 1989; Capital Provision)* any assessment of what properly constitutes *"special"* or *"exceptional"* circumstances must focus on dependency rather than vulnerability. This distinction is an important one. At [82] Moylan LJ stated that Williams J supported his decision *"by interpreting the use of the word 'dependency' in the authorities as connoting 'some form of vulnerability or need continuing from childhood into adulthood which can be remedied by capital provision'. In my view, this does not support his decision because it is far too broadly expressed a proposition …"*. Whilst they are likely to overlap, they are not one and the same as 'vulnerability' is a much broader category than 'dependency'. Whilst 'dependent' children may well also be 'vulnerable', dependency in my view

implies some continuing and quantifiable financial need. Vulnerability is a broad spectrum on which many people fall, but not everyone with a vulnerability is 'dependent' in the sense of requiring financial support.

88) I further take the view that as a consequence of *UD v DN (Schedule 1, Children Act 1989; Capital Provision)* the relevance of the conduct of the paying party to the question of long-term financial provision is solely to the extent it creates an ongoing dependency and/or financial need.

89) I shall consider whether there are such *"special circumstances"* later in this judgment.

M's late father's estate

90) M's father died in November 2021. On 14th November 2022 Francis J directed *inter alia* that "*[f]or the avoidance of doubt [M's] Form E shall include at paragraph 2.14 full details of any inheritance she has received and/or will receive from her late father's estate".* In her Form E dated 25th November 2022 paragraph 2.14 was completed with *"N/A".* In her Replies to Questionnaire dated 5th February 2023 M stated at 9 a) that "*I have not received and do not expect to receive any inheritance from my late father's estate"* and in her Replies to Schedule of Deficiencies dated 22nd April 2023 she stated that she had no documentary evidence of the same.

91) F's case is (and always has been) that M is a beneficiary under the estate of her late father and that she will receive and/or has an entitlement to receive capital from this source. It is said that M will have access within the foreseeable future to one-half of late father's estate. Further F's case is that M has failed to make a full and frank disclosure of the position and the relevant documents and she has done so to frustrate his claims on Child A's behalf.

92) On 4th July 2023 I ordered *inter alia* that (i) Mr. LM (who M's brother, DS, had confirmed on 23rd May 2023 was the Country A lawyer who was the executor of M's late father's estate) be invited to provide an explanation as to the current position and provide a copy of the will and estate accounts (or their equivalent in Country A); and (ii) if this information was not provided M was invited to seek the same information directly from her brother by way of a witness statement. My order stated that if M declined to seek this information and/or file a witness statement from her brother, she was to explain at the final hearing why she had declined to assist the court. My order also warned M that depending on whether the information was provided and if not the reasons for this F may invite me to draw adverse interferences against her.

93) On 19th July 2023 Mr. LM confirmed that he had been appointed the executor of M's father's estate by the probate court of Country A. However he said that he would not provide any information until expressly requested to do so by the probate court.

94) As F records at paragraph 27 of his witness statement of 1st November 2023 he has sought and obtained legal advice from an attorney of Country A, Mr. BM.

95) On 22nd November 2023 F's solicitors received a copy of M's father's will dated 3rd April 2019 which was subsequently the subject of a certified translation. It records *inter alia* under (i) *"Inheritance"* that *"I appoint my children as my heirs in equal shares and my aforementioned son as an exempt preliminary heir. In turn, my daughter [M] will inherit after my son. The succession will occur upon the death of my son DS"*; and (ii) *"Execution of wills"* that *"After my death, I order the permanent execution of my son's intended inheritance"*, *"The executor has to … manage my son's inheritance permanently until his death and then settle it*", and "*The executor of the will shall pay my son, at his/her reasonable discretion, an appropriate monthly allowance …".* The will also stated the current value of assets net of liabilities to be €500,000.

96) M's father's estate includes a property in Country A which is in the process of being sold. The property is being marketed for c. €450,000.

97) I understand Mr. BM first saw the probate file early on 6th December 2023 (i.e. on Day 3 of the final hearing) and provided a copy of it (or parts of it) on that date to F's solicitors. I declined Miss Amaouche's request to admit the file piecemeal and anticipated that M may be recalled to be questioned thereon. Hence I acceded to F's application to adjourn part-heard. As part of the directions made when I did so I admitted the file and its certified translation into evidence.

98) It can be seen from the file (which I saw on 13th February 2024) that:

a) M wrote to Mr. LM stating that *"due to my circumstances"* she did not wish to be the executor of her late father's will and she proposed Mr. LM undertake this role for her. Although this letter is undated, assuming the file is in chronological order (as all the other documents are) this was written between 7th March 2022 (when Mr. LM first wrote to the County Court of Country A) and 9th May 2022 (when M's letter was sent to the County Court of Country A by Mr. LM);
b) by decision of the court on 20th June 2022 Mr. LM was appointed and he accepted the position by letter dated 19th July 2022; and
c) on 26th July 2022 Mr. TC, Notary, wrote to the court stating that the value of the entire estate had been indicated as €1 million *"20% of which shall be used for the issuance of the certificate of executorship"*.

99) As part of the directions made when I adjourned the case part-heard on 6th December 2023 I directed a witness statement from F's solicitors setting out F's interpretation of M's status under her father's will and the basis for that interpretation. The statement duly filed by Ms. AP dated 7th December 2023 said:

a) the will had been received in the language of Country A on 22nd November 2023 from Mr. BM;
b) in his covering email of 22nd November 2023 Mr. BM had said *inter alia* that (i) M's father had directed M and her brother to be his heirs in equal shares; (ii) other than M's share her brother's share was encumbered with the execution of the will; (iii) M's brother was only ordered as a preliminary heir exempted from certain statutory restrictions and obligations; (iv) when he died M would inherit his share (or what was left of it) as a beneficiary heir; (v) in the meantime M was directed permanently to administer her brother's share and provide him with an ample monthly allowance and additional payments at the executor's discretion; and (vi) the will therefore provided that M was heir to her father as to 50% and would also receive the rest of her brother's 50% share on his death; and
c) in a subsequent telephone call on 23rd November 2023 Mr. BM had stated (i) M's entitlement under the will was 50% with no limitations and her brother was also entitled to 50% but his entitlement was with limitations; (ii) the distinction between the two was that the beneficiary of an entitlement with no limitations can utilise this entitlement in whichever way they see fit to do so whereas a beneficiary of an entitlement with limitations will not receive their entitlement, and an executor on their behalf will be appointed and that executor will distribute the entitlement/funds to the beneficiary as they see appropriate to do so; and (iii) M was appointed as an executor of her brother's entitlement from their late father's will and further, that on the death of her brother, if there are any remaining assets from his 50% entitlement this shall automatically pass to M.

100) On 21st December 2023 M stated in response that she had no comments to make as she did not have the required qualifications to understand the same.

101) On 31st January 2024 I acceded on paper to an application made by F's solicitors on 23rd January 2024 for the instruction of an SJE. The evidence in support of the application stated *inter alia*:

a) as per the F's understanding, Mr. LM was the executor of M's late father's will. On 20th November 2023 M provided F's solicitors with authority to liaise with Mr. LM but this was later withdrawn by M by way of a letter dated 6th December 2023; and

b) during the third day of the final hearing, M was adamant to raise queries with Mr. LM and accordingly, a direction was made for her to set out any questions she wanted to raise with him to F's solicitors by 15th December 2023. F's solicitors did not receive any questions from M.

102) On 14th February 2024 when the case was adjourned part-heard again I gave M the opportunity to state within seven days whether she objected to the SJE report being admitted into evidence and, if she did, I would determine the issue on paper. On 29th February 2024 it was confirmed by F's solicitors that they had received no correspondence from M as to whether or not she objected. Therefore and in accordance with my order the report was sent to me.

103) Mr. JV was appointed as expert. The letter of instruction was dated 31st January 2024. His report is dated 8th February 2024. In short he confirms the views expressed by Mr. BM namely that M and her brother are the two equal beneficiaries of their late father's estate, the division is to be carried out by the executor, with M to receive her one-half of the estate outright and her brother not free to dispose of his share but to receive a monthly pension and further payments at the discretion of the executor.

Adverse inferences

104) Miss Amaouche seeks that I draw adverse inferences against M on the basis of her financial (non) disclosure principally (but not exclusively) in relation to her late father's estate.

105) The leading case is *Moher v Moher* [2020] 1 FLR 225 where the Court of Appeal approved (with one modification) the principles that had previously been set out in *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211 per Mostyn J at [16]. The Court of Appeal rejected the appellant's assertion that a judge is *required* to evaluate the scale of the undisclosed wealth by providing a figure or a bracket of figures. In so doing Moylan LJ offered the following *"broad conclusions"*:

> [87] (i) It is clearly appropriate that generally, as required by s 25 of the 1973 Act, the court should seek to determine the extent of the financial resources of the non-disclosing party.
>
> [88] (ii) When undertaking this task the court will, obviously, be entitled to draw such adverse inferences as are justified having regard to the nature and extent of the party's failure to engage properly with the proceedings. However, this does not require the court to engage in a disproportionate enquiry. Nor, as Lord Sumption said, should the court 'engage in pure speculation'. As Otton LJ said in *Baker v Baker*, inferences must be 'properly drawn and reasonable'. This was reiterated by Lady Hale in *Prest v Petrodel Resources* [2013] 2 FLR 732, at para [85]:
>
> '… the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are.'
>
> [89] (iii) This does not mean, contrary to Mr Molyneux's submission, that the court is required to make a specific determination either as to a figure or a bracket. There will be cases where this exercise will not be possible because, the manner in which a party has failed to comply with their disclosure obligations, means that the court is 'unable to quantify the extent of his undisclosed resources', to repeat what Wilson LJ said in *Behzadi v Behzadi*.
>
> [90] (iv) How does this fit within the application of the principles of need and sharing? The answer, in my view, is that, when faced with uncertainty consequent on one party's non-disclosure and when considering what Lady Hale and Lord Sumption called 'the inherent probabilities' the court is entitled, in appropriate cases, to infer that the resources are sufficient or are such that the proposed award does represent a fair outcome. This is, effectively, what Munby J did in both *Al-Khatib v Masry* and *Ben Hashem v Al Shayif* and, in my view, it is a legitimate approach. In that respect I would not endorse what Mostyn J said in *NG v SG (Appeal: Non-Disclosure)* [2011] EWHC 3270 (Fam), [2012] 1 FLR 1211, at para [16](vii).
>
> [91] This approach is both necessary and justified to limit the scope for, what Butler-Sloss LJ accepted could otherwise be, a 'cheat's charter'. As Thorpe J said in *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359, although not the court's intention, better an order which may be

unfair to the non-disclosing party than an order which is unfair to the other party. This does not mean, as Mostyn J said in *NG v SG*, at para [7], that the court should jump to conclusions as to the extent of the undisclosed wealth simply because of some non-disclosure. It reflects, as he said at para [16](viii), that the court must be astute to ensure that the non-discloser does not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations.

106) In *AF v SF (Dynastic Trust: Needs-Based Award)* [2020] 1 FLR 121 Moor J stated as follows:

> [63] … It has been said that it is up to the respondent to financial remedy litigation to open the cupboard door and show that the cupboard is bare. If he or she does not do so, the court can draw the inference that the cupboard is not bare. As explained in *Baker v Baker* [1995] 2 FLR 829, this is not an improper reversal of the burden of proof. It remains for the applicant to prove his or her case. A failure by the respondent to discharge the duty of providing full and frank disclosure can, however, lead the court to draw inferences that are appropriate.

107) In *Ditchfield v Ditchfield* [2024] 1 FLR 687 Peel J at [15] referred to *Moher v Moher* and continued:

> … The law is clear. The court is entitled, in the absence of full and frank disclosure, to draw adverse conclusions where appropriate and to the degree of specificity or generality deemed fit. A non-disclosing party cannot complain if the lack of disclosure leads the court to make an order which by necessity is based on less secure foundations than the court would wish; that is the fault of the miscreant party.

108) I accept the submission that M has failed to provide full and frank disclosure. I reach this conclusion for the following reasons:

a) M accepts that during her late father's lifetime she enjoyed a good and close relationship with him. She knew he had been divorced twice - both from her own mother and subsequently. She has one sibling who she knows has no children of his own. She knew her father owned a property in Country A and that he lived alone;

b) M accepts that she was not informed by anyone - either prior or after her father's death – that she would not inherit;

c) I consider that M would therefore have had a reasonable expectation of inheriting from her late father's estate (whether or not she (re)paid him €45,000 - €50,000 in 2020 as she asserts to which I refer below);

d) M's father died on either 18th or 19th November 2021. Her evidence (which I accept) was that she was not informed of this for about nine days until she spoke on the telephone to a friend in Country A;

e) M completed her Form E on 25th November 2022. In light of the above to say simply *"N/A"* at paragraph 2.14 ('Other Assets') was insufficient. Her Replies to Questionnaire on 5th February 2023 she said *"I have not received and do not expect to receive any inheritance from my late father's estate"*, that she had not received a copy of her late father's will or copy of the estate accounts (or its equivalent in Country A), and had no knowledge of the progress of any sale of his property and when the funds from his estate might be realised. In her Replies to Schedule of Deficiencies dated 22nd April 2023 she said she had no documentary evidence to support her assertion that she did not expect receive any inheritance. M's explanation as to why she said she did not so expect was that she would have been so informed by either a solicitor and/or executor but no-one made contact with her and she had not received documents other than (i) one letter from Mr. LM dated 30th August 2023 which said they had previously confirmed to F's solicitors that they did not represent her, *"had not been mandated by you"*, and *"had not received any mandate from you in relation to the estate of [M's father]"*; and (ii) her late father's will which she received in late November 2023 via F's solicitors. M acknowledged that she made no proactive enquiries of her own as to whether she was a beneficiary - whether of her brother or

otherwise - and the letter of 30th August 2023 gave her the impression she was not inheriting. Likewise M accepted that she had not sought estate accounts (or their equivalent in Country A) and said she would not do so unless I ordered her to do so. She accepted that she had made no effort to understand the value of the estate. I find this approach to be (at best) a very incurious attitude and (at worst) a deliberate attempt to prevent either F or the court being aware of any potential inheritance;

f) as a result of my order of 4th May 2023 M's brother, DS, emailed F's solicitors on 23rd May 2023. The email said the court of Country A had informed him at the end of July 2022 that Mr. LM *"who had been chosen by my sister"* had been accepted as executor. F's evidence was that he believed from a conversation with M's mother that *"[M] may originally have been the executor and disclaimed this and asked for Mr. LM to act as executor instead."* In her oral evidence in December 2023 M stated that this was not true, and she did not choose or instruct Mr. LM. I have no reason not to accept what DS and M's mother say, and it is also contradicted by the letter written by M to which I have referred above. When M was taken to this letter when recalled to give further evidence she accepted that she now had a *"vague recollection"* of writing to Mr. LM to this effect but could not recall when she did so. M also said that it was a *"friend"* (whose name she could no longer recall) who had given her Mr. LM's details. I did not find such a vague answer to be convincing. M's evidence that her letter in which she proposed Mr. LM as executor was only a *"suggestion"* and not an *"instruction"* to him and hence it was the probate court that appointed him and she did not choose him was likewise an unconvincing justification of her earlier evidence that her brother's email of 23rd May 2023 that she had chosen Mr. LM was untrue. Given it is clear that M wrote to Mr. LM I reject her original evidence which was to the effect that she was given indirect legal advice via friends in Country A that if the solicitor who reads the will saw (as in M's case) that she could not be executor and was in prison they would instruct an alternative one. M's letter also suggests that she was aware that her father had a will and that she was executor of the same. Her evidence that her letter should have said she did not wish to be executor *"in case there is a will"* was unconvincing and I reject the same;

g) as a result of my order of 4th May 2023 we now have M's father's will dated 3rd April 2019 in which M is the sole named executor. M's initial evidence was that she was unaware of this until she received a copy of the will from F's solicitors. This cannot be accurate in light of M's letter to Mr. LM;

h) M's evidence was that she only ever wrote to Mr. LM once. Given his letter to the County Court of Country A dated 7th March 2022 stated that he had been asked to assist the two heirs in the administration of the estate and that *"[p]ower of attorney to this effect has been duly legally certified and can be submitted on request"* this would not seem to be correct. When taken in combination with the fact that (i) M gave only the vaguest explanation as to who had given her Mr. LM's details; and (ii) M's evidence that her first direct contact with Mr. LM was his letter to her of 30th August 2023 which is not correct, this suggests (as Miss Amaouche submitted) that there is further correspondence between M and Mr. LM that I have not seen; and

i) M's choice of language as to whether or not her father ever discussed his estate with her prior to his death was to say "*not that I am aware",* she *"did not recall"* and *"I do not remember"*. In my view this was to avoid saying something that she knew would be untrue.

109) I am fortified in my conclusion that M was evasive by other aspects of her written and oral evidence namely:

a) the fact that although there was an error in F's Questionnaire which asked M to provide details of the sale of Property A in that it referred to her as the 'applicant' rather than the 'respondent' she chose to answer it simply by pointing this out. In my view she would have understood the question referred to her (she knew that she had been the owner of the two properties concerned) and therefore could – and should – have answered this question. In my view M's reason why

she answered it as she did – that it was a *"legal document"* that the question had *"not been addressed"* to her, and that she *"followed legal protocol and answered what I was asked"* was not a convincing one;

b) in my view the fact that M could not recall *anything* about the sale of Property A on 7th June 2016 – the estate agent, the buyer, the conveyancing solicitors, or the net proceeds of sale (it having sold according to Land Registry documents for £169,000) after redemption of the mortgage – was also unconvincing. M then accepted in evidence that two credits of £99,999 and £3,601 paid into one of her Q Bank accounts on 8th June 2016 represented the net proceeds;

c) I did not find that M could not recall *anything* about the purchase of Property B – the purchase price or the level of mortgage - on or around 16th June 2016 to be convincing. Again M subsequently accepted that the debit from the same Q Bank account on 16th June 2016 of £96,385 represented the deposit/completion monies for this property;

d) likewise M did not volunteer in her written evidence that the sale of Property B for (I believe) £110,000 in early 2020 was to a private buyer – a builder who she had asked to come to the property in relation to some works and who expressed an interest in purchasing it – from whom she subsequently agreed to continue to rent the property from at a cost of £500 pm without a formal tenancy agreement but on a rolling basis with a one/two month's notice period;

e) I did not find M's evidence in relation to the sale proceeds of Property B to be convincing. She initially said that she had believed they had been paid into one of her Q Bank accounts. She then said (in a letter dated 20th September 2023) that if there was no record of such a payment (and there is not) then they must have been paid into a bank account held in Country A (the details of which she did not recall despite it being her only account in Country A since childhood and she had only opened it a couple of months earlier) which had later been closed. Such a payment had the effect of converting it from Sterling into Euros. M said she had then withdrawn the monies in cash in one tranche from a bank branch (the location of which she could not recall save that it was in a named town in Country A) – a sum she recalled as being between €45,000 and €50,000 - which she said she had paid to her father when she had the means to do so as he had told her that he had reimbursed Mr. and Mrs. K (her first cousin and husband) this amount being the costs they had incurred when involved in the public law children proceedings. However I was provided with (i) a Notice of Acting filed by Mr. and Mrs. K's legal representatives dated 27th January 2021; and (ii) a copy of the order made by His Honour Judge ZA on 17th February 2021 which recorded that (a) in in attendance on 8th February 2021 only (Day 1) were Mr. and Mrs. K; and (b) Mr. and Mrs. K's application issued on 28th January 2021 (shortly before the IRH) for leave to pursue an application for a child arrangements order or special guardianship order had been dealt with as a preliminary issue and refused on 8th February 2021. Even though I note from paragraph 9 of the judgment of His Honour Judge ZA dated 17th February 2021 that Mr. and Mrs. K had previously withdrawn an application for permission to make an application for a special guardianship order in April 2020 I struggle to accept that such a limited involvement in the public law proceedings meant they incurred legal costs of €45,000 - €50,000. I do not know whether any of the net proceeds of sale of Property B remain and if so in what sum but I am satisfied that they were not all spent on reimbursement of her father. However, notwithstanding this conclusion I do not consider that I can find (as Miss Amaouche invited me to) that these sums remain available to M; and

f) I did not find M's reasons for opening a bank account in Country A to be convincing. M said that she did so for "*potential transactions"* which she said were either to enable her to repay her father or if her family from Country A wished to pay money to her whether on her birthday or otherwise. However she had not held an account in Country A since moving to England in 2003 and her Q Bank accounts show credits from family members from Country A. I do not know whether or not this account was in fact opened to conceal receipt of the net proceeds of sale of Property B. However, given M's right against self-incrimination and that (at least so far as I am

aware) this had not been alleged on F's behalf prior to the final hearing and (likewise so far as I am aware) this was never alleged in the criminal proceedings I express no view in relation to this.

110) I should record for completeness that M's evidence was that she sold and rented Property B back in early 2020 as the monthly rent was cheaper than paying mortgage payments of £700/£750 each month and gave her the flexibility to move as it was *"bittersweet"* to live in a house with she once had a child. It was suggested to her that she was seeking to put money away in preparation for the criminal offence she committed. M's response was that the CPS had found that she made no plans in relation to that offence until September 2020. I note that in paragraph 18 of His Honour Judge ZA's judgment of 10th March 2022 he stated that the preparation to commit the criminal offence had commenced some months earlier. However for the same reasons as set out in the above paragraph I express no view in relation to this.

111) M's evidence also changed in that although she said in her Replies to Questionnaire dated 5th February 2023 she had not received €70,000 from her family in 2013 or 2014 she confirmed at the hearing on 4th May 2023 that this was an error and she did have money around that time from her family and that this was spent on legal fees. She confirmed this in a letter of 18th May 2023. M stated on 4th May 2023 that the error was because she was in prison and did not have access to documents. I do not accept that this justifies such an error.

112) I therefore consider that I am entitled to draw adverse inferences where necessary and relevant.

113) In light of both the SJE evidence and my entitlement to draw inferences I am satisfied that (i) M has engaged in a deliberate attempt to prevent either F or the court being aware of the quantum of any potential inheritance; and (ii) under Schedule 1 paragraph 4(1)(a) the *"property and other financial resources"* M *"has or is likely to have in the foreseeable future"* includes (a) 50% of her late father's estate; and (b) the remainder of her brother's 50% share (if any) on his death.

114) In the absence of any estate accounts (or the equivalent in Country A) the best evidence I have as to the value of M's late father's estate is the letter from Mr. TC dated 26th July 2022. Using a figure of €1 million and deducting the 20% he referred to gives €800,000 which at current exchange rates equates to c. £683,430 of which 50% is £341,715. This figure includes M's late father's property in Country A which is being marketed at €450,000 (c. £385,000).

The correct approach

115) The exercise of the court's powers under Schedule 1 has been described as *"highly discretionary"* (*Re M-M (Schedule 1 Provision)* [2014] 2 FLR 1391 per McFarlane LJ (as he then was) at [33]) which involves *"an essentially broad-brush assessment to be taken by family judges with much expertise and experience in the specialist field of ancillary relief"* (*Re P (Child: Financial Provision)* [2003] 2 FLR 865 per Thorpe LJ at [43]). Moreover, the overall result should be *"fair, just and reasonable taking into account all the circumstances"* (*Re P (Child: Financial Provision)* per Bodey J at [76](viii)). The discretion is however limited by the requirement that financial provision is made (as set out in paragraph 1) *"for the benefit of the child"*.

116) For many years *Re P (Child: Financial Provision)* and in particular the guidance given by Thorpe LJ at [45]-[49] has been the lead authority as to the proper approach to an application under Schedule 1. This was confirmed in authorities including (i) *A v V* [2022] EWHC 3501 (Fam) per Francis J at [18] where it was said to be *"still the seminal case"* and *"[t]he guidance given in that case is applicable now as it was in 2003 when it was given"*; and (ii) *Re Z (A Child) (No. 4) (Schedule 1 Award)* [2023] 2 FLR 955 per Cobb J at [14] where it was said to be the *"seminal authority"* on Schedule 1 cases.

117) Although *Re P (Child: Financial Provision)* has most often applied in cases where *"one or both of the parents lie somewhere on the spectrum from affluent to fabulously rich"* (per Thorpe LJ at

[45]), as His Honour Judge Hess observed in *SP v QR* [2024] EWFC 57 (B) at [13] *"it does not follow from this … that awards cannot properly be made (if justified on the merits) against paying parents of more modest wealth, even where all or most of the available capital is needed to provide a home for a child."*

118) The applicable principles have now been set out in *Y v Z (Schedule 1)* [2024] EWFC 4 per Peel J:

[35] I have been referred to a number of authorities. From these I draw the following principles:

i) The main orders which Schedule 1 entitles me to make are:

a. Settlement of property, which invariably will be on a trust, licence or lease arrangement such that the payer retains ownership thereof, and the payee is entitled to occupy with the children during their minority, or until conclusion of tertiary education; *Re A* [2015] 2 FLR 625 and *UD v DN* [2021] EWCA Civ 1947.
b. Lump sum or sums for the likes of furniture, car, and clearing debts.
c. Child maintenance (secured or unsecured).

ii) Each such order, by the wording of the statute must be *"for the benefit of the child"*, or made direct to the child (which will be very rare).

iii) The court shall have regard to the matters set out at para 4 of Schedule 1 in the exercise of its discretion.

iv) Although para 4 does not expressly refer to the welfare of the child, in the generality of cases welfare will be a constant influence on the discretionary outcome; *Re P* [2003] EWCA Civ 837 at para 44.

v) Nor does para 4 refer expressly to standard of living, although in my judgment that is likely to be a highly material factor in many cases, particularly those which fall into the so-called "big money" category.

vi) In *Al Maktoum* (supra) at para 91, Moor J suggested that *"… the children should be able to have a lifestyle that is not entirely out of kilter with that enjoyed by them in Dubai and that enjoyed by [the father] and his family"*. In *Collardeau-Fuchs v Fuchs* [2022] EWFC 135 at para 119, Mostyn J observed that standard of living before breakdown of the relationship *"… should not however be allowed to dominate the picture as there will be many children, particularly children dealt with under Sch 1, who will not have experienced a standard of living within a functioning relationship either because the liaison between the parents was very brief, or because the child was born after the relationship had come to an end"*. In my judgment the relevance of the standard of living during the relationship, and the standard of living of each party after the end of the relationship, will vary from case to case, and, as was said at para 21 of *Re A* (supra), will have to be seen in context.

vii) The court will ordinarily determine the claims in sequence as to (a) property, (b) lump sum or sums, and (c) child maintenance; *Re P* (supra) at para 45.

viii) The court deals with property first because, as stated at para 22 of *Re A* (supra), *"The nature of the child's home environment provides the obvious base line from which to consider commensurate levels of maintenance and is as good as any other"*.

ix) Child maintenance can be interpreted sufficiently broadly to include elements referable to the claimant in his/her capacity as the child's carer; *Re P* (supra) at paras 48-49. For many years this proposition, or concept, was known as the carer's allowance. More recently, at para 129 of *Fuchs* (supra) Mostyn J has suggested referring to it as a Household Expenditure Child Support Award [HECSA]. Whatever terminology is applied, the principle is clear, although its application is highly discretionary. It is not always easy to draw a bright line between budgetary items to which the claimant has no entitlement as being exclusively personal to him/her, and personal items which may reasonably be claimed as being necessary to discharge the carer's duties, including items which help sustain the carer's physical/emotional welfare; *Re P* (supra) at para 81. The court *"… has to guard against unreasonable claims made on the child's behalf but with the disguised element of providing for the mother's benefit rather than for the child"*; *J v C* (supra) at 159H.

x) The court should *"not generally attach weight to the risk that the father may reduce or withdraw his support when the child comes of age (or ceases education or training) thereby obliging the child to adapt*

to a lower lifestyle at that time"; *Re P* (supra) at para 77 (iii).

xi) In general (and particularly in the bigger money cases), the court is entitled to paint with a broad brush and will not ordinarily need to descend into a line-by-line budgetary analysis; *Re P* (supra) at para 77(i) and *Fuchs* (supra) at para 129(f).

xi) Ultimately, *"the overall result … should be fair, just and reasonable taking into account all of the circumstances"*; *Re P* (supra) at para 76(viii).

119) I gratefully adopt this summary of the relevant principles and bear all of this guidance in mind.

The parties' means

120) F is of very limited means. His capital position is very modest.

121) At as the date of his Form E, F owned no real property assets and had liquid assets totalling £10,637. He had debts of £24,949, £24,000 of which was owed to his mother for legal fees. He updated his financial position in his narrative statement: his assets have reduced and his liabilities increased.

122) F's mother died during the course of these proceedings. F is sole executor and he applied for the Grant of Probate on 29th September 2023. F is a beneficiary of his mother's estate, and F has provided disclosure of the same (including by letter from his solicitors to M dated 2nd October 2023 under cover of which they provided her with a copy of his late mother's will dated 9th November 2018). F's mother's estate comprises a property, liquid assets of c. £40,000 (of which F has borrowed £33,000) and £48,845 that he borrowed from his mother.

123) Under the terms of his late mother's will F estimates (depending on what his late mother's property may sell for (I believe it was originally marketed for £315,000 but reduced (according to his oral evidence) to £305,000 and more recently yet further to £285,000) he may receive c. £240,228. This figure reflects that under the will (i) there are legacies of £5,000 each to two grandchildren (one of whom is Child A); (ii) F alone is to receive the proceeds of sale of his late mother's property; and (iii) the residue of the estate is divided equally between F and his brother. If F shares the estate equally with his brother, he will receive (on the same basis) c. £98,652.50 (F's figure was £99,152.50 but the difference is not material). Both of these scenarios take account of the £81,845 referred to above.

124) I accept F's evidence that his late mother did not leave her estate in equal shares to him and his brother given her concerns that his brother may squander the same (he not having ever managed money well) but that she trusted F to ensure his brother was safely housed. I likewise accept that F feels morally obligated to assist in housing his brother – particularly as he lived with their mother for the last five years of her life - and that ultimately her estate should be divided equally. I accept that F intends to do this by purchasing a retirement flat for his brother at a cost of c. £120,000 with the remainder of his share held in trust. I likewise accept F's oral evidence that he has discussed this with his brother who seemed *"perfectly happy with that"*. I therefore accept that I should limit F's potential inheritance to c. £100,000.

125) I also accept Ms. Amaouche's alternative submission that that the obligation to house a child falls on both parents (subject of course to their financial means to be able to do so) and that even if F had available to him his strict entitlement under his late mother's will (thereby leaving his brother homeless) that does not negate M's obligations towards Child A.

126) F was previously in employment in a different role. I accept his case that the criminal offence and all that followed directly led to him being unable to maintain this employment. As at the date of his Form E in his current role, his anticipated net earnings for the next 12 months were £11,189. He also received Child Benefit of £1,100 pa and M's mother had been voluntarily gifting him £1,000 pm to assist in meeting Child A's needs up to June 2023 when the payments suddenly

stopped.

127) F's income and earning capacity has been directly impacted by the trauma caused by the criminal offence committed against Child A and subsequent events. This is one example of both the high threshold and the causative link I have referred to above in relation to conduct being satisfied in this case. He was earning c. £2,000 pm prior to November 2020. Not only was he required to change employment, but I accept he now restricts his working hours (to 18 hours per week) in order to be available for Child A in non-school hours. I accept that it not easy to find third parties to assist with care. I also accept F's evidence that he has not left Child A alone since the October 2023 half-term when Child A called F crying after only 20 minutes and F returned home. The fact that F's employer offers flexibility by way of a 'family friendly' policy may well not be replicated with another employer.

128) F's current income is £10,328 pa (n), child benefit of £96 pm and £576.49 pm from his pension. He also receives a variable amount of Universal Credit (which he believes may be £101 pm in the future). On that basis his overall income is c. £1,841.84 pm/£21,972 pa. He will lose eligibility for Universal Credit when he receives his inheritance from his late mother's estate.

129) F's debts have increased to £48,845 borrowed from his late mother and a further £33,000 borrowed from her estate. These have been taken into account in the calculations above.

130) M is likewise of modest means (save for the future receipt from her late father's estate). On 27th October 2023 she confirmed that since the beginning of the proceedings her financial position had not changed.

131) M formerly worked as a highly qualified professional but was struck-off by her professional body because of either her conviction and/or prison sentence. She formerly earned sums that varied (given her hours for her employers varied) but were up to c. £2,100 pm (I was taken to one credit of this level and told that this was one if not the highest). It is accepted that her only earned income is very modest from her prison job (and at the present time as confirmed on 27th October 2023 she has no income). As M accepted, the loss of her income is a direct result of her criminal conviction. Again, this is an example of both threshold and a causative financial consequence of M's conduct.

132) From around 2016 to mid-2019 M also received a modest income of £50 pm - £1,000 pm via letting out an annex at Property B via Airbnb. This is also no longer available to her.

133) Against this legal and factual background I shall determine the issues in the following order:

a) what are Child A's housing needs? How should those housing needs be funded? For how long should the provision be made?;
b) whether a lump sum should be paid to purchase a car for F's use. If so at what level?;
c) whether an additional lump sum should be paid to meet Child A's therapeutic costs. If so at what level?;
d) whether additional lump sums should be paid to meet Child A's technological needs. If so at what level?; and
e) costs.

Housing needs

134) F and Child A currently live in rented accommodation. Although I accept this is not a view shared by M (not least because living in long-term rental accommodation is far more common in Country A than it is in England) in my view F has the need for the greater security offered by owner-occupied accommodation.

135) Child A's needs will be met by a modest two to three-bedroom property with a small garden. F's evidence is the cost will be in the region of £330,000 to £400,000 with SDLT of between £4,000

and £7,500 respectively. For obvious reasons F has not produced property particulars but I accept this evidence in his statement in relation thereto (and in this context bear in mind the comments made about the court's ability to decide on such a cost (albeit in the different context of a failure to provide realistic property particulars) in *AR v ML (Financial Remedies: Finality of Judgment)* [2020] 1 FLR 523 per Mostyn J at [31] and in *X v C* [2022] EWFC 79 per His Honour Judge Farquhar at [69]). I accept that legal costs, removal costs, and new furniture may add a further (say) c. £10,500 to £13,000 to this figure. The capital need is therefore £348,000 to £420,500.

136) F's mortgage capacity report from Boon Brokers dated 2nd November 2023 states that *"according to Newcastle Building Society, assuming a £100,000 deposit as declared, the maximum purchase price is £193,820."* The term referred to is seven years.

137) I accept Miss Amaouche's submission that in fact after considering the list of lenders and whether F would be considered eligible and the mortgage affordable F is unlikely in fact to have a mortgage capacity of £93,820 as the author of the report references. The weight of the evidence is that if the F has a mortgage capacity it is modest, and the Newcastle Building Society illustration (an initial monthly cost of £1,379.59 based on 6.20% fix for 27 months) is very much an outlier.

138) I likewise accept Ms. Amaouche's submissions that M's conduct (i) is in the words of Baker J in *O v P (No 2) (Sch 1 Application: Stay: Forum Conveniens) "plainly relevant. It would be not merely inequitable but also impossible to disregard it"*; and (ii) the impact of that conduct on Child A and F is at the very serious end of the spectrum.

139) I therefore accept that I should strive to ensure that Child A's housing needs are met in a property which is free of mortgage. A mortgage is not affordable to F given his income and even if I were minded to find a very modest mortgage capacity on his current income, were he to lose this income then the mortgage would be unaffordable and Child A would be at significant risk of losing their home. I accept that given the trauma that Child A has suffered and their diagnosis I should strive to minimise any risk of Child A facing the further upheaval and destabilisation of the loss of their home.

140) I likewise accept that this is an area where my taking into account M's conduct is permissible: but for M's conduct F would have a higher income, earning capacity, and mortgage capacity. Further, although many children may well face disruption where homes purchased with a mortgage subsequently become unaffordable but Child A's PTSD and past traumas mean the impact on them would be far more harmful than to a child who has not suffered such trauma. Child A's trauma and PTSD are a direct result of M's conduct and this conduct is a magnifying factor when considering Child A's needs.

141) I am also wholly satisfied that this is a case where I should exercise my jurisdiction to order long - term capital provision as there are special or exceptional circumstances relating to Child A. The ordinary dictionary meaning of exceptional is *"unusual, not typical"* and of special *"better, greater or otherwise different from what is usual"*. In my view these circumstances exist in this case:

a) M's actions mean that Child A has experienced very considerable disruption and trauma in their life. Child A was removed from the care of their parents and lived in foster care until they transitioned from foster care into F's full-time care. Child A was alienated from F and had no contact with him between August 2018 and July 2020. Child A was the subject of unproven allegations of sexual abuse and lengthy care proceedings and the victim in criminal proceedings, and had to engage with multiple professionals in their young life. This is abnormal and the direct consequence of M's conduct;

b) Child A has therefore had a far from normal childhood as His Honour Judge ZA has observed in all three of his judgments:

i) *24th July 2019 – 57: [Child A] has been subjected to two ABE interviews. [Child A] has been removed from parental care into foster care. [Child A] has been subjected to a Child Protection Medical. [Child A's] direct contact with [their] parents has now been stopped. All of this at the age of only six;*

ii) *17th February 2021 – 91: [Child A] will need, sadly, to develop a wariness in [their] dealings with others (for reasons of self protection and for [their] own safety). This is part of the terrible legacy of the mother's actions. [Child A] has been provided already with personal equipment by the police for [their] protection … and other security measures may well be provided for [them]. So much for the innocence of [their] childhood;*

iii) *10th March 2022 – 28 and 29: The Local Authority and the guardian were apprehensive about the risks to [Child A's] physical and emotional safety emanating from the web of supporters assembled by the mother online (and ultimately in person) who were receptive to wild conspiracy theories relating to the satanic and ritual abuse of children and the collusion of the courts, local authorities and others therein. Accordingly, extreme protective safeguards were (or might be) required, it was contended, involving [Child A's] relocation, a change of school and a change of identity for [Child A]; and*

iv) *10th March 2022 – 77: [Child A] has <u>not</u> experienced a normal childhood, and the incident in November 2020 has left its mark.*

c) M accepted this premise - stating that Child A had never had a proper childhood since the day they were born - but said that this was for different reasons than given by His Honour Judge ZA: Child A had been "*raped and tortured since [they were] born"* but she had not been believed. I reject this evidence as being contrary to the previous findings but this underlines both how abnormal Child A's childhood has been and will continue to be and that M's views towards F remain as strongly held as ever;

d) F stated in his witness statement that the threat from M and his anxiety about the threat remains. He exhibited posts/websites where Child A and F continue to be written about. Notwithstanding the confidentiality orders the list of posts continued up to and including 6th September 2023. In his oral evidence F said that there had been near daily further posts up to and including 3rd December 2023 (i.e. the day before he gave evidence). These posts include naming M as Child A's mother in breach of reporting restrictions. In his oral evidence F said that the police had advised him to *"be more vigilant"* wherever he goes, and he became tearful when he said that for a long time he had lived in fear stating that he had barricaded his letter box because of fear that petrol would be poured through it;

e) based on this evidence – all of which I accept - I am satisfied that M still poses a real threat harm to Child A (and indeed F) if she or her associates/supporters were to be aware of Child A's school, location, and/or home address;

f) as a result Child A should properly be considered 'dependent' (in addition of course to being 'vulnerable') as Child A has some continuing and quantifiable financial needs that will continue beyond their majority. Although I am conscious there is no expert medical/psychiatric evidence in these proceedings, there is such evidence in the public law proceedings and I accept the record of the diagnoses and vulnerabilities as set out in the third judgment of His Honour Judge ZA dated 10th March 2022 including PTSD and attachment difficulties (as diagnosed by Dr. ME, psychologist), the precipitating events being the traumatic circumstances of the criminal offence, which followed the instability and acrimony of their early years. M acknowledged Child A's PTSD and trauma but as she does not accept the court's findings she does not accept responsibility for the same; and

g) I am fortified in this conclusion by F's evidence that he has not left Child A alone since the October 2023 half-term when Child A called F crying after only 20 minutes and F returned home. That this was their behaviour given their age is suggestive to me of the likelihood of a long-term dependency.

142) To my mind this is therefore another area where I may take into account M's conduct as part of reaching this conclusion: Child A's PTSD and past trauma means the impact on them of the capital reverting to M on their majority would be far more than harmful than to a child who has not suffered such trauma. This trauma and PTSD are a direct result of M's conduct.

143) I am satisfied that in reaching this conclusion I am not being punitive or confiscatory for its own sake (which is impermissible) but that M's conduct is a magnifying factor when considering Child A's needs (including a dependency on F after Child A's majority).

144) I therefore conclude that this is one of those rare cases where the capital should not revert to the paying party on the child's majority.

145) I should state for completeness that I do not consider that Child A's funds - £32,753 held in a Halifax ISA as of 28th April 2023 and a further £2,581 held in a Tesco account – should be utilised towards meeting Child A's own housing needs.

146) I also record that in her oral evidence M said (for the first time in these proceedings) that her extended family including Child A's grandmother and great aunt have made and are making financial provision for Child A should they wish to continue in higher education beyond the age of 18. I do not take this into account given (i) this information was only provided for the first time in evidence; and (ii) I have no idea as to the level of this financial provision save that my impression was that as it is principally by way of birthday and Christmas presents since Child A's birth (as is often the case within families) it is likely to be (in relative terms) a fairly moderate sum; and (iii) M's knowledge that this provision was still being made was either months ago (in the case of Child A's great aunt) and several years ago via their great aunt (in the case of their grandmother). Therefore although Child A will be able to access this sum at age 18 it will not in my view provide a resource that could be used to house Child A during their dependency after that age. I reach the same conclusion in relation to any legacy that Child A may receive from any of Child A's maternal family in due course.

147) The mid-point of the capital need figure for housing of £348,000 to £420,500 (which I consider is appropriate to adopt) is £384,250. Assuming that F receives c. £100,000 from his late mother's estate the shortfall is therefore **£284,250**.

Car

148) I am satisfied that it is reasonable to order a lump sum of **£15,500** to enable F to purchase an approved used car. The cost will be c. £21,495 and F will part-exchange his five-year-old car with a value of c. £6,000.

Therapeutic costs

149) Child A was diagnosed with PTSD during the public law proceedings. Issues relating to Child A's attachment difficulties were also identified. Child A was described by an expert as an *"emotionally traumatised child"*. The local authority funded had therapeutic support and advice with a psychologist from 31st January 2020 until March/April 2022 (a cost of £110 per session) until Child A said that they no longer wished to continue them as they felt they had become increasingly intrusive.

150) Prior to the Care Order being discharged, the local authority had indicated that should Child A decide to re-commence these sessions, they would continue to fund the same. However, now that the Care Order has been discharged and the local authority no longer have any legal obligation to

do so, F stated that it is highly doubtful that any further funding will be received. In his oral evidence F said that he had asked the local authority to confirm their position about a month ago, but he had received no response.

151) I agree with F that further funding from the local authority is doubtful. I am fortified in this view by the fact that although a senior solicitor at the local authority stated in a witness statement of 14th December 2022 that if the care order was discharged the local authority would continue with the support the statement also said that the local authority *"is prepared to continue funding this service for a further 10 sessions, subject to review thereafter and the availability of alternative services such as CAMHS."*

152) In her evidence M said that she had qualms in relation to the aims of therapy and did not agree with much of the therapeutic approach and narratives given. However, she accepted that if it was needed, then yes, she would support the same.

153) I am satisfied that it is reasonable to order a lump sum of **£10,000** to meet Child A's therapeutic needs.

Technological needs

154) I decline to order a lump sum of (i) £500 to buy a laptop for Child A; or (ii) a lump sum of £1,500 to meet Child A's mobile contract costs for the next five years. These are relatively modest costs which I consider Child A can in the circumstances be expected to meet from their own resources of £35,334.

155) The aggregate of the above figures is **£309,750**. Given my finding that M can expect to receive £341,715 from her late father's estate she will have sufficient funds to meet this. I shall therefore order that M pay F this sum on an outright rather than reversionary basis.

156) M's accommodation needs are of course currently met. She does not expect to be released from prison for many years. By this time she may have received the residue of her brother's one-half interest in their late father's estate. She will also have her pension. In any event, however, her conduct means that (as I am entitled to do) it is appropriate that I prioritise Child A's needs over her own.

Child periodical payments

157) A list of F's income needs was provided with his Form E (£49,049 pa for himself (including rent of £22,800 pa) and £2,573 pa for Child A – a total of £51,622 pa) and these were updated in his witness statement. Based on his income F cannot meet these income needs.

158) I do not address any further the issue of child periodical payments and/or the concept of a Household Expenditure Child Support Allowance ('HECSA') – so named in *Collardeau-Fuchs v Fuchs* [2023] 2 FLR 345 by Mostyn J at [129] b. – as there is no CMS maximum assessment. Therefore pursuant to *Dickson v Rennie* [2015] 2 FLR 978 child support remains a matter for the CMS. I understand an assessment is in place and on 19th May 2023 the CMS refused F's most recent application for a variation.

Costs

159) F's H1 records costs of £124,124 (with £102,655 paid) and of which £5,000 relates to implementation. The N260 records costs of £85,284 (including VAT and disbursements). The difference in these figures reflects that it is accepted on F's behalf that some of his costs (such as those that relate to an *Imerman* issue that he did not pursue) cannot fairly be sought. F has met most of his paid costs from the £81,845 he borrowed from his late mother/her estate.

160) Miss Amaouche requested that if I did not consider it appropriate to decide the issue of costs as part of my draft judgment (and I do not) I express a provisional view in relation to the same.

161) The starting point on costs is set out in r28.1 namely that the court may make any order as to costs *"as it thinks just".* Schedule 1 applications are thereafter governed by the costs rules set out in r28.2. As a consequence:

a) the costs are not governed by the 'general rule' set out in r28.3(5) that the court will not make an order requiring one party to pay the costs of another party;
b) the CPR costs rules set out in Part 44 apply but r44.2(2)(a), which provides a 'general rule' that the unsuccessful party will be ordered to pay the costs of the successful party, does not apply; and
c) the position is therefore a 'clean sheet' - as so described by Wilson LJ (as he then was) in *Judge v Judge* [2009] 1 FLR 1287 and *Baker v Rowe* [2010] 1 FLR 761 - as neither the 'no order for costs' presumption nor the 'costs *prima facie* follow the event' presumption apply.

162) I am therefore to have regard to all the circumstances and the matters set out in r44.2(4) and r44.2(5). There have, however, been a number of cases as to the relevance in the exercise of the judge's discretion that one party has been successful and the other unsuccessful in a 'clean sheet' case. These include *Baker v Rowe*, *KS v ND (Schedule 1: Appeal: Costs)* [2013] 2 FLR 698, *Solomon v Solomon* [2013] EWCA Civ 1095, *H v W (No. 2)* [2015] 2 FLR 161 and *LM v DM (Costs Ruling)* [2022] 1 FLR 393. In essence they conclude that, as in *Gojkovic v Gojkovic (No. 2)* [1991] 2 FLR 232 per Butler-Sloss LJ (as she then was) at p236, there remains a starting point that costs 'follow the event' even in a 'clean sheet' case albeit the presumption may be somewhat 'softer' and therefore more easily displaced (in *LM v DM (Costs Ruling)* at [1] Mostyn J used the phrase *"soft costs-follow-the-event principle"* to describe what governs). I may summarily assess costs under r44.6.

163) My provisional view is that given (i) F has succeeded in his application; (ii) M did not accept that she was a beneficiary of her late father's estate – one of the central issues in the case - until recalled to give evidence on 5th March 2024; (iii) my findings in respect of the same; and (iv) M made no offer to pay a lump sum for Child A's benefit, a costs order is justified. As Mostyn J observed in *KS v ND (Schedule 1: Appeal: Costs) at* [21] *"by virtue of CPR 44.3(4) (which is applied to these proceedings by FPR 2010 r 28.2(1)) the court has to consider the conduct of the parties; whether a party has been successful in whole or in part; and any admissible offers made by the parties … These would be the first things to write on the clean sheet."* However (again provisionally) I see no reason why such costs should be ordered on an indemnity rather than a standard basis. In this context I adopt the summary of the applicable principles set out in *Re Z (No. 5) (Enforcement)* [2024] EWFC 44 per Cobb J:

> [39] In order to justify an award of costs on an indemnity basis, it is necessary for the applicant to show that the respondent is guilty of a high degree of unreasonable litigation misconduct. CPR rule 44.3(3) applies in these circumstances which provides:
>
> "(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party".
>
> Although no authorities were referred to me on how I should apply that rule, I have reminded myself of the decision of the Court of Appeal in *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Ham Johnson* [2002] CPRep 67, and the judgment of Tomlinson J (as he then was) in *Three Rivers District Council & others v The Governor and Company of the Bank of England* [2006] EWHC 816 (Comm) at [25]. In this jurisdiction, the judgment of Eleanor King J (as she then was) in *M v M & Others* [2013] EWHC 3372 (Fam) is also relevant. In short, and as the authorities make clear, the applicant must show *"a circumstance which takes the case out of the norm"*.

164) I am not satisfied that, in relation to issues relevant to costs as distinct from its wider facts, this case has been taken *"out of the norm"*.

165) Further, based on the above figures M does not have the means to pay the £85,284 sought. Using the above figures M has a surplus of £31,965 (i.e. £341,715 less £309,750). My provisional view is that this would be the appropriate sum for M to pay towards F's costs. It would represent c. 37% of the costs claimed. It would mean that F could pay his outstanding costs of £21,469 and have a further sum of c. £10,000 to put towards Child A's housing (should he seek to rehouse slightly above the middle of the bracket) or other costs.

166) If either party wishes to invite me to conclude other than my provisional view on costs I shall determine the same on the basis of concise written submissions.

Other

167) On 2nd March 2024 F sent an email to the court marked for the attention of Her Honour Judge ZC. A copy of this email was sent to me on 4th March 2024. I have not taken any account of the contents of this email in reaching my decision in this case.

168) I order that the present reporting restrictions should continue (something sought on F's behalf and to which M confirmed she agreed).

169) If this judgment is to be published my provisional view (subject to considering submissions to the contrary) is that the *"balancing exercise"* espoused in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 which has regard to the interests of the parties and the public as protected by ECHR Articles 6, 8 and 10, considered in the particular circumstances of this individual case, is likely to lead to a conclusion that the judgment should be published on an anonymised basis.

Addendum

170) This judgment was circulated in draft on 13th March 2024. I sought comments thereon by 4 pm on 28th March 2024.

171) On 26th March 2024 Miss Amaouche stated that F invited me to make a final costs order that reflected my provisional view.

172) A copy of my draft judgment was delivered to and signed for at HM Prison Y at 8.45 am on 15th March 2024 but there has been no response from M.

173) I therefore confirm my provisional view in relation to costs.

174) On 26th March 2024 Miss Amaouche also confirmed that F acknowledged that transparency in the Family Court was best served by the publication of this judgment subject to anonymisation and I was provided with a draft thereof.

175) I confirm my provisional view in relation to publication and anonymisation.

176) The anonymised version of this judgment makes significant amendments to the original. As Miss Amaouche observed there is a balance to be struck between seeking to achieve the purpose of anonymisation and ensuring that the judgment remains coherent. I am satisfied this version of the judgment strikes that balance.

177) That is my judgment.

NICHOLAS ALLEN KC