IN THE FAMILY COURT
SITTING AT LUTON

Neutral citation: [2023] EWFC 266 (B)

Floors 4&5, Arndale House
The Mall
Luton
LU1 2EN

Date: 29/11/2023

Before :

DEPUTY DISTRICT JUDGE MARK HARROP

- -

Between :

KA **Applicant**

- and -

LE **Respondent**

- -
- -

Helen Brander (instructed by **Cadence Solicitors LLP**) for the **Applicant Wife**
The **Respondent Husband** in person

Hearing dates: 25-26 October 2023

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JUDGMENT

- -

This matter was heard in private. The judge gives permission for this version of the judgment to be published. In no report of, or commentary on, the proceedings or this judgment may the parties or their children or their addresses be identified. All persons, including representatives of the media and legal bloggers must ensure that the terms of this rubric, are strictly observed. Failure to do so may be a contempt of court.

Deputy District Judge Mark Harrop:

Introduction

1. This is my judgment following a two day final hearing at Luton Justice Centre in respect of an application for a financial order on divorce.

2. Normally, cases like these do not get written decisions. In most cases heard by District Judges the judge explains their decision verbally at the end of the final day.

3. In this case, however, I decided on the first morning to refuse the husband's request to postpone the hearing. The trial would go ahead even if he was not there. As the husband was not present when I made that decision I promised to prepare a written record of my reasons.

4. Having already committed myself to writing out my reasons, and given the strong encouragement that now exists for more "everyday" cases to be published, I decided that it made sense for me to put the main judgment in writing as well.

5. Because this judgment is being published, I have avoided using the parties' names to protect their anonymity. Instead, I refer to them as "the wife" and "the husband". I have used randomly generated initials in the case header and have avoided naming businesses, properties or (for the most part) giving exact dates for the same reason. I have, of course, had access to all that information during the hearing.

Background

6. The wife is in her late 30s and the husband in his early 40s. They married in 2009, having not lived together previously. They have two children, one of primary school age and one at secondary school, who both live solely with the wife.

7. In 2019 the wife applied for non-molestation and occupation orders, although the parties tried to carry on living in the same home until mid-2020. At that point the wife refused the husband access to the family home and stopped him from seeing the children. She applied to the court for an order under the Children Act 1989 to limit the husband to indirect contact with the children. The children have not spent time with him since.

8. There followed a long legal battle about the children. After a 7-day fact-finding hearing in 2021, Deputy District Judge Leigh-Smith found that the husband had bullied, coerced and controlled the wife throughout the whole of their ten year marriage. The judge also found that, once their marriage had broken down, the husband was so driven to harm and undermine the wife that he did so despite the harm that it caused the children. The judge refused to allow the husband direct contact with the children and made an occupation order excluding him from the family home.

9. After further hearings, the Children Act proceedings ended with an order allowing only indirect contact. The husband was required to undergo therapeutic work and risk assessments before direct contact could be considered. Despite this, the husband made a new application without completing all the required therapeutic work. As a result, the court imposed a "section 91(14) bar" preventing him from making further applications regarding the children without the court's permission until the eldest child turns 16.

10. This is the context within which the parties have conducted these financial remedy proceedings.

The Financial Proceedings

11. The wife applied for a financial order in late 2021. The First Appointment took place in January 2022. The husband represented himself at that hearing and for the rest of the financial proceedings.

12. A Financial Dispute Resolution (FDR) appointment was scheduled for May 2022 but had to be adjourned because the husband had not provided several of the documents that had been ordered to prepare. District Judge Ayers attached a penal notice to the outstanding directions warning that further breaches would be a contempt of court, and ordered the husband to pay the wife's costs relating to the wasted hearing.

13. The adjourned FDR took place in September 2022 but did not lead to a resolution. A final hearing was listed for February 2023.

14. Due to the history of domestic abuse, the FDR judge ruled that it would not be appropriate for the husband to cross-examine the wife himself at trial. Instead, the judge set out how cross-examination was to take place if the husband did not have a lawyer at the hearing. He directed that the husband would have to send to the court a list of the questions he wanted to ask the wife at least five days before the final hearing. The trial judge would then review the list of questions and ask the relevant questions herself during the hearing.

15. In light of the abuse, the judge also made "participation directions" providing for separate waiting areas, entrances and exits so that the parties would not encounter each other outside the courtroom, and for privacy screens to be placed in the courtroom so that the parties would not see each other during the hearing.

16. The order also provided for the parties to prepare an agreed schedule of assets and to exchange written position statements 7 days before the final hearing.

17. Unfortunately, the hearing in February 2023 had to be cancelled because there was no judge available. The parties were only notified of this the day before the hearing. By that time, the husband should have submitted his list of cross-examination questions, filed a position statement and liaised with the wife's lawyers regarding the asset schedule. He had done none of those things, nor did he do so in the 8 months between February 2023 and 25 October 2023 when the case came before me.

The Application to Adjourn

18. On Friday 20 October 2023, the husband emailed the court stating that he would not be attending the hearing on medical grounds. In the email, he also raised concerns about the wife's care of the children that had nothing to do with the financial proceedings. He asked the court not to share the email with the wife.

19. Two days later, on the evening of Sunday 22 October 2023, the husband emailed the wife's solicitor's trainee, who he knew was on holiday. He said that he had informed the court that he would be unable to attend the hearing *"[t]he reasons for which, I am not at liberty to divulge"*.

20. Subsequently, on Tuesday 24 October 2023, the husband again emailed the court (but again not the wife's solicitors) attaching a letter from his GP and asking that the hearing be adjourned.

21. Finally, at 2.37am that night, the husband sent a further email to the trainee solicitor in the following terms:

> *"Hi [Trainee],*
>
> *Sorry for the late night email...*
>
> *I obviously cannot make the hearing this week due to medical reasons.*
>
> *A mental health charity has guaranteed that they will provide legal defense and offence for anyone who defies my reasons for not making it to court...*
>
> *I again implore you to prevent [the wife] and her group in attending... Prevent her costs!*
>
> *One of the people I've spoke to knows [the wife's solicitor] ... They described him in an unsavory way, which I won't share in text... Maybe when we next meet.*
>
> *Have an awesome break,*
>
> *[Husband]"*

22. The letter from the husband's GP, which was dated 23 October 2023, stated as follows:

> *"The above patient informs me he is due a financial court hearing due to the separation from his ex-wife. Unfortunately the ongoing issues with his ex-partner and being unable to see his children has been having a profound effect on [his] mental health. As a result he has been having increasing panic attacks and has had to take several days off work due to these. He informs me he would find it incredibly difficult to attend court with his ex-wife and would likely provoke further panic attacks and anxiety.*
>
> *I have increased his medication as of the 20th October, but given this scenario I would be grateful if this letter could be used to excuse him from the court hearing."*

23. The husband did not come to court on 25 October 2023. As at 10am the wife and her legal team had not seen the doctor's letter and had had only a few hours' notice even that he was seeking an adjournment for *"medical reasons"*.

24. Miss Brander, representing the wife, urged me to press on with the hearing. She argued that this application exemplified the husband's ongoing abusive behaviour

towards the wife and children and emphasised the need for them to be free of what she described as his malign, controlling and coercive influence.

Adjournment – The Law

25. Requests such as these are relatively common. In *Levy v Ellis-Carr* [2012] EWHC 63, Mr Justice Norris observed that:

> "33. Registrars, Masters and district judges are daily faced with cases coming on for hearing in which one party either writes to the court asking for an adjournment and then (without waiting for a reply) does not attend the hearing, or writes to the court simply to state that they will not be attending. Not infrequently 'medical' grounds are advanced, often connected with the stress of litigation. Parties who think that they thereby compel the court not to proceed with the hearing or that their non-attendance somehow strengthens the application for an adjournment are deeply mistaken. The decision whether or not to adjourn remains one for the judge."

26. The decision is a case management one, covered by rules 4.1(3)(c) and 27.4(2) and (3) of the Family Procedure Rules 2010 (FPR). Rule 27.4 says a hearing can go ahead in a party's absence where they have had reasonable notice of the hearing (as the husband clearly did) and the circumstances of the case justify it.

27. Mr Justice Warby considered a similar application in *Decker v Hopcraft* [2015] EWHC 1170 (QB). He observed (at [22]) that the court should generally be slow to refuse a first request to adjourn on medical grounds. But that was subject to some qualifications:

i) First, it is always a decision for the court. A party cannot impose an adjournment simply by announcing that they are not coming;

ii) Second, the adjournment needs to be justifiable on careful scrutiny of the evidence. As Norris J explained in *Levy* (at [36]):

> "Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."

iii) Third, whether a party can or cannot take full part in a hearing does not always have a simple yes or no answer. There may be adjustments that can be made to enable a party to participate effectively. The applicant (and his medical expert) should address this. Family judges are required by Part 3A and Practice Direction 3AA of the FPR to think about these issues is every case they hear.

iv) Fourth, the decision is also influenced by the nature of the hearing and the issues before the court.

Adjournment - Decision

28. This is the first time the husband has used his health as a reason to seek an adjournment. He has previous suggested postponing the case while child arrangements are reconsidered. He has also caused delay in the past by not supplying the documents needed for the FDR to go ahead.

29. The doctor's letter lacks many of the details identified by Norris J in *Levy*. In particular, it is not clear that the assessment is an *"independent opinion after a proper examination"* rather than the husband's self-reporting; no history is provided (there is reference to increasing medication, but not what medication or what it is for); and no

prognosis or assessment (either from the GP or the husband) of what adjustments could allow the hearing to proceed.

30. The husband's situation is very similar to the appellant's in *Forresters Ketley v Brent* [2012] EWCA Civ 324. There, Lord Justice Lewison stated (at [25]) that:

> "While the court must recognise that litigants in person are not as used to the stresses of appearing in court as professional advocates, nevertheless something more than stress occasioned by the litigation will be needed to support an application for an adjournment. In cases where the Applicant complains of stress-related illness, an adjournment is unlikely to serve any useful purpose because the stress will simply recur on an adjourned hearing."

31. This is a final hearing, so going ahead without the husband would be a significant decision. It is not as significant as it might have been, however, because the husband has already forfeited his right to cross-examine the wife by not submitting any written questions (either in February 2023 or since).

32. It is also relevant that the husband has had all the evidence, and the wife's position statement, since February 2023. He should have put his own position in writing in February and could have done so at any time since. Even now, anxiety about attending court (which is the concern raised in the letter) could still be avoided by making his submissions remotely or in writing.

33. It appears that the husband may indeed have some history of anxiety and/or panic attacks. But that being the case he should have been able to anticipate this issue and could have raised it at the FDR, or any time since then, and not left it until 3 working days before the trial. Participation directions could then have been considered. It was not appropriate for the husband simply to announce that he was not coming in the way that he did.

34. More generally, the way the husband communicated his intentions causes me considerable concern. Emailing the most junior, female, member of the wife's legal team while she was on holiday, alluding to future meetings between the two of them; withholding the underlying details of his application and requesting the court keep them secret from the wife; implying, without specifics, that the wife's solicitor is widely regarded as incompetent or improper, undermining the wife's confidence in her lawyers; threatening *"legal defence and offence"* for anyone who *"defies"* him: these are all things I have seen from him in other emails and see reflected in the fact-finding judgment from 2021.

35. I am required by the overriding objective (FPR 1.1) to deal with cases justly, having regard to any welfare issues involved. Here, the court has already found that the husband bullied, coerced and controlled the wife throughout their ten year marriage. Given the way the husband communicates, there is a real risk of these proceedings becoming an extension of that abuse.

36. Weighing all those factors in the balance I came to the clear conclusion that the just way to proceed, having regard to the circumstances of the case and the welfare of all involved, was to continue with the hearing.

Adjournment – Next Steps

37. As the husband had not come to court it was clear that nothing more could be done that first day. I asked the court staff to inform the husband of my decision and invite him to make his submissions by videolink or in writing the next morning if he did not feel up to coming to court in person.

38. Initially, the husband repeated that he could not attend. Later that evening, however, he did send in a written position statement and said that he would try to attend the following day.

39. Ultimately, the husband did feel able to attend the second day of the hearing. To help him take part, both the court staff and I sought his input on what could be done to ensure that he could engage fully in the hearing. At his suggestion we adjusted the seating arrangements, placing him close to a door so that he could leave quickly if he felt overwhelmed. I also reassured him that we could take both regular and unplanned breaks if needed.

40. Happily, the husband played a full part in the rest of the hearing. He made confident and reasoned oral submissions in support of his case and was able to react and respond to the arguments made on the wife's behalf. I am quite satisfied that he was not disadvantaged by the decision to proceed.

Financial Remedies on Divorce – The Legal Framework

41. When a couple divorce and put financial matters in the hands of the court, the aim of the court is to achieve an outcome that is *"as fair as possible in all the circumstances"* (*White v White* [2001] 1 AC 596).

42. In deciding how to do this, the court is required by section 25 of the Matrimonial Causes Act 1973 (MCA) to have regard to all the circumstances of the case, with first consideration being given to the welfare while under the age of 18 of any children of the family. In particular, it should have regard to the following:

> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any

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

43. In addition, section 25A of the MCA provides a powerful encouragement towards a "clean break".

44. The statute does not provide guidance on how to balance the various section 25 factors against each other, but case law has provided us with three overarching principles of "needs", "sharing" and "compensation".

45. Compensation is rarely relevant. The sharing principle only applies where the assets exceed the parties' needs. In nearly all cases, the decision starts and ends with the parties' needs. This is one of those cases.

46. Need is an elastic concept, and an assessment of needs must be tailored to each individual party. Particularly relevant of the section 25 factors are the needs, obligations and responsibilities of the parties, the standard of living during the

marriage, the age of the parties and any physical or mental disability of either of them (see *Charman v Charman* [2007] EWCA Civ 503 at [70]).

47. At their simplest, however, a party's needs often boil down to having somewhere suitable to live and having enough money coming in each month to pay the bills. The question then becomes what qualifies as "suitable" and how much is "enough".

The Parties and their Resources

Joint Assets

48. The parties married in 2009 when both were in their mid-20s. They lived with the husband's parents for a while, saved up, and bought their current home in joint names in 2013. It is a modest three-bedroom home a bike's ride from the children's schools. A surveyor has valued it at £425,000. The parties have a joint £135,000 mortgage, giving it net equity after costs of sale of around £280,000.

The Wife

49. When the parties married the wife was working short-term contract jobs. It appears that her work was unreliable and insecure during the early years, while she juggled work with childcare. She sought but struggled to find full-time employment.

50. Things changed in 2015 when the wife secured a permanent sales role at Company A. She was extremely successful there, and by the time of her Form E in December 2021 she was earning a base salary of £63,000 plus sizeable commissions. Her gross annual earnings in recent years had been £76,000 in 2019, £189,000 in 2020 and £137,000 in 2021.

51. Unfortunately, the wife had to leave her role at Company A during 2022. She is now working at Company B with a base salary of £90,000 plus commission. The impression the wife has given is that only her base salary can be relied upon. At no point did she ever say how much commission she receives or hopes to achieve. She should have done. In the end, I had to hunt through the disclosure bundle myself to find this out. It turns out that in the last 12 months she has received £30,100 in commission. Since the wife has not tried to convince me that this is unusual, I assume it is sustainable. That takes her gross income to £120,000 per annum, giving an average net monthly income of £6,200.

52. The wife has supplied a letter from a mortgage broker regarding her mortgage capacity. It suggests that the maximum borrowing available to her would be £395,000. That figure was based on her basic salary alone (plus a small amount of child maintenance). In light of the commission payments I have identified, her true borrowing capacity is probably somewhat higher.

53. In addition to her interest in the family home, the wife has a one-quarter share in her parents' home overseas, which she values at £2,134. The husband claims this flat is worth close to £60,000, but has provided no evidence to support this claim, and I accept the wife's valuation. She has pensions worth £25,000.

The Husband

54. The husband is a teacher by profession. Sometime around 2016 or 2017 the husband left employment as a teacher and started working through Company C as a self-employed tutor. By the time of his witness statement in February 2023 the husband was reporting that Company C had failed, that he was claiming universal credit and that his new plan was to obtain a master's degree and retrain. If the final hearing had

taken place that month I suspect a lot of time would have been spent arguing about the husband's earning capacity.

55. Instead, things have moved on. The husband revealed in his position statement on the second day of the hearing that he had returned to work as a teacher in September 2023 on a salary in the region of £46-47,000 pa, which is around £3,000 per month net. It should go without saying that the husband should have shared this information much earlier – both parties have a duty to provide full and frank information about their finances.

56. The husband reports that Company C will now be folding with debts in the region of £30,000. It is a limited company, so he should not be responsible for meeting those debts. He has teacher's pensions worth around £37,000.

Liabilities

57. The jointly-owned family home (£280,000) and the pensions (W: £25,000; H £37,000) are more or less the entirety of these parties' assets.

58. The only other significant entries on the asset schedule are loans and other liabilities. Nearly all of these relate to the legal fees the parties have incurred in their various court cases against each other.

59. The wife has provided statements showing she owes around £36,000. Most of that is money currently owed to her lawyers or loans taken out to pay their earlier bills. The husband says that he owes his mother £60,000 for money she loaned him to meet his legal fees in the Children Act proceedings.

60. Judges need to think carefully about how they treat debts arising out of legal fees. On the one hand, the general rule in family cases is that each party is responsible for paying their own legal fees. The court will not make a costs order unless it believes it is appropriate in order to sanction a party for the way they have conducted the litigation. I do not want to make what has been described as a costs order by the back door.

61. On the other hand, it is quite usual for the court to include settling debts in its assessment of a party's needs. Where these relate to anything other than legal fees it is rarely controversial. Sometimes it is also necessary to include a party's legal fee debts as part of their needs if, for example, the debts significantly impact their income or mortgage capacity. This is true even though it means that, in effect, the other party has subsidised their legal fees despite no costs order being made. But I should only do this if it is necessary to meet needs.

62. A third consideration is the costs orders already made against the husband. I am told that, including interest, he owes the wife around £17,000. Just as I do not want to make a costs order by the back door, I also do not want to undermine the costs orders that have already been made. Fortunately, the case law is clear that I can put these debts to one side and not worry about the impact they will have on my assessment of the husband's needs (see, for example, *WC v HC* [2022] EWFC 40 at [13]). I do include the amount owed as a resource available to the wife.

The Parties' Positions

The Wife's Position

63. The wife's position is that the current family home meets her and the children's needs and that she should be allowed to buy the husband out of his interest in the property for £74,000 (which would reduce to £57,000 after the existing costs orders have been deducted). She says there should otherwise be a clean break.

64. This structure allows the children to remain in their current home and cuts as many financial ties between the parties as possible. Child support would be the only ongoing link, and this is being managed by the Child Maintenance Service.

65. The wife acknowledges that this would be a 74/26 split of the equity in the family home in her favour. She says this is appropriate because her needs, which includes the cost of housing and caring for the two children, are greater than the husband's. She also wants to have enough money left at the end to carry out some renovation or extension work on the property.

66. The wife's proposal would leave the husband with £57,000 (ignoring the debts he says he owes to his mother). She says that would be sufficient to meet his needs, as it would be enough to fund a deposit on a shared ownership property. To demonstrate this she provided examples of three two-bedroom shared ownership properties at £120,000, £132,500 and £146,250 (representing 40%, 50% and 45% interests respectively).

The Husband's Position

67. The husband agrees that the children should be allowed to stay in the family home. His main proposal is that the property remain in joint names and then be sold when the children grow up (by which I assume he means they finish secondary school or perhaps university).

68. He says that the house should then be sold and the proceeds divided. Earlier in negotiations he proposed that the proceeds be divided equally. At trial, he asked for an additional balancing payment in his favour of £52,000. This would be to reimburse him for: (i) rent he says the wife should have paid to his parents during the period she lived in their house; (ii) contributions towards running costs of the family home he made between separation in mid-2020 and October 2021; (iii) payments he has made towards the joint life insurance since May 2021; and (iv) half the amount his parents contributed towards family holidays.

69. Alternatively, the husband says that he will buy the wife out of the family home for £57,000 (to match her proposal) or that he is willing to be bought out now for £189,000 (which would be a 67.5/32.5 split of the equity in his favour).

70. The husband appears to agree that this is not a case where spousal maintenance or pension sharing is appropriate.

Discussion

The Wife

71. I have little doubt that the wife's real reason for seeking more than half of the equity in the family home is the appalling way that the husband has treated her, both during

the marriage and since separation. I can quite imagine that her preference would be for him to have nothing at all.

72. That is not, however, the way that she has presented her case, and she was correct not do so. 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 – *"it is unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct"* (Mr Justice Mostyn in *OG v AG* [2020] EWFC 52 at [72]).

73. In the absence of a conduct-based reason, however, the wife has struggled to justify why the equity should be divided in her favour. She has really relied on two key arguments.

74. The first argument is that her needs are greater than the husband's, both in terms of capital and outgoings, because she has sole care of both children. This means that she needs a bigger home, which in turn costs more to run. She also has to spend a significant amount of money on childcare to be able to work the hours and earn the income that she does.

75. The second argument is that the more she has to pay to buy out the husband's interest, the bigger a mortgage she will have to take out, and so the bigger the mortgage repayments she will have to make every month. She says that she already struggles to meet her outgoings and cannot afford to borrow more than she has proposed, even if (as her mortgage broker suggests) a bank would be willing to lend her more.

76. I accept the wife's first argument. She *does* need more than the husband both in terms of capital and income. But that cannot be the end of the assessment. Too often (at

District Judge level at least) lawyers announce that *"this is a needs case"* or *"the wife needs a bigger property than the husband"* as if that alone justifies their preferred, uneven, division of assets in their client's favour.

77. As the children's primary carer my first task is to assess and quantify the wife's needs. Here, both parties agree that the family home meets the wife's housing needs. It would be good for the children to stay there and I do not consider it excessive. That quantifies her housing needs at £425,000. But that is only the first stage of the analysis.

78. Section 25(2)(a) of the MCA requires me to consider not only the wife's property but also her financial resources. The second question that I need to ask, then, is whether the wife can meet her needs *from her own resources*. That includes what is available to her through borrowing. The evidence from the wife's mortgage broker is that she could borrow £395,000. In fact, as I have said, she may be able to borrow even more. But she does not need to. The wife could buy out the husband's interest in the family home and pay off all her loans with a £295,000 mortgage. That would leave £100,000 (and probably more) available that she could borrow to spend on redecoration, renovation or extension of the property if she chooses to do so.

79. Unless she can show that that the repayments on such a mortgage are unaffordable, I am not persuaded that there is a good reason to give the wife a share of what is currently the husband's interest in the family home.

80. Looking at income, I have assessed the wife's average net monthly income, after commission, at £6,200. Now that the husband is working again she will soon start receiving child maintenance of around £600 a month as well. But the wife has

provided a budget putting her needs at £8,200 per month. At that level of outgoings she could not afford to service any mortgage at all.

81. I do not need to go line-by-line through the wife's budget here. She is by far the bigger earner of these parties. She falls comfortably within the top 5% of earners in the UK and, after child support, has a net income nearly three times that of the husband's. She is going to have to look carefully at her income and expenditure and, as she acknowledges in her witness statement, cut her coat accordingly.

82. The wife has provided detailed repayment calculations for a 25 year mortgage at 3.99% APR. It is worth noting that the difference in monthly repayments between the wife's proposed lump sum of £74,000 and an equal split at £140,000 would be £348 per month. I do not see how it could be a fair outcome to take £66,000 away from the husband, pushing him towards shared ownership rather than an outright purchase, simply to save this high-earning wife £348 per month on her mortgage repayments.

83. Turning to the wife's debts, I accept that these are "hard" debts that will need to be repaid. In my judgment the wife can afford to repay them herself, either from her earnings or by consolidating them within a larger mortgage. I am not therefore going to include them as an additional capital need, bearing in mind what I have already said about back-door costs orders.

84. As for renovation work, the surveyor found that the house was well maintained and in reasonable order, although the fittings were dated, the boiler may need replacing and the conservatory needs insulating. This was all factored into his assessment of the value of the property. If the wife wants to carry out the work she can afford to fund this through borrowing – I will not adjust the share of the family home to pay for it.

The Husband

85. It is difficult to carry out the equivalent assessment of the husband's needs. He has not given me the information I need to do so. His focus has very much been on what happened in the Children Act proceedings and telling me that the court got it wrong. It is clear that he does not accept the findings made in those proceedings about his behaviour. He continues to disparage the wife and her parenting. Despite the orders made in those proceedings, he talks confidently about a time in the future when he and the wife will share equal care of the children.

86. The husband was first told to provide examples of properties that meet his housing needs at the First Appointment in January 2022. That direction was repeated at the hearing in May 2022 and once again following the FDR. He still has not done so, and has said nothing more about it than that he wants a house in the town where the family live. In his view it should be big enough for the children to stay with him and, reading between the lines a little, comparable to wherever the wife is living.

87. I am not persuaded that the husband needs a three-bedroom property to accommodate the children. At present, not only is he not seeing them but he is barred even from applying to see them without the court's permission. Even if I did accept that three bedrooms were necessary, however, the husband has not provided any information about what that would cost or how it could be afforded.

88. I am satisfied that a two-bedroom property will meet the husband's housing needs. The only examples of two-bedroom properties that I have been shown are those provided by the wife. One is a house and two are flats. Ignoring the shared ownership point for a moment, their asking prices are £265,000, £300,000 and £325,000 respectively. The husband has not told me whether he thinks they are appropriate for

him or not, whether in terms of size, specification or location, saying only that "*It is not for the applicant to make comment regarding my housing need and mortgage capacity"*. But as has not put forward any alternatives for me to compare them to they are the only properties on which I can base my decision. I have not been given any reason to think they are inappropriate.

89. I have also been given no information about the husband's ability to borrow. The only mortgage information he has provided dates back to a time when he was not working. He only informed the wife and the court that he now has a job on the second day of the hearing. He has not provided any information about what effect that has on his borrowing capacity and the wife has not been given time to investigate it either. Miss Brander invites me to conclude that he should be able to borrow in the region of £200,000 (which is around 4.3 times his gross salary). While that strikes me as a little high, the husband's own offer to buy the wife out for £57,000 would require him to borrow £192,000, so it may be he believes this much at least is achievable.

90. Combining a mortgage at that level with his half of the equity in the family home would give the husband a housing fund of £332,000 – enough to buy any of the properties the wife has suggested for him. Based on the information I have, this would appear to meet his housing needs without him having to rely on a shared ownership scheme.

91. What about the husband's debt to his mother? On this front he has three difficulties. First, he has provided no evidence that the loan exists, let alone details of its terms or evidence of when (or if) it will ever need to be repaid. Repayment of this debt has never been included in the calculation of any of his settlement proposals. Second, if it were to be considered, it would fall at the very softest end of the scale described by

His Honour Judge Hess in *P v Q* [2022] EWFC B9. Importantly, it would not impact his ability to get a mortgage. Finally, it relates almost entirely to legal fees incurred in the Children Act proceedings and I do not want to make a back-door costs order. I have already decided that the wife's debts should not be included as a separate capital need within her needs assessment. In my judgment, neither should the husband's.

92. As for the husband's income needs, after child maintenance he should be left with a net income of around £2,400 per month. That is considerably less than the wife, but more than he put in his budget in his Form E. Neither party has suggested that spousal maintenance is needed and in light of the findings of abuse I am particularly keen to achieve a clean break in this case.

93. I can address the other points raised by husband in short order. I am not going to add back money said to have been contributed by the husband's parents to family expenditure. If it was a gift then it is more important that I meet needs than account for contributions made during the marriage. If it was a loan, it has not be pleaded or evidenced and I have no basis to make that finding.

94. Nor am I going to add back expenditure that kept the family running during the course of proceedings. In the absence of wanton dissipation of assets the court needs to be future-focused.

95. Finally, the husband suggests that without his assistance in the past the wife would not be able to earn what she does now. It is not entirely clear how he says that should impact the outcome, but in any event the door was firmly closed on the idea that earning capacity is an asset that can be shared in the case of *Waggott v Waggott* [2018] EWCA Civ 727.

Conclusions

96. In *Cordle v Cordle* [2001] EWCA Civ 1791, Lord Justice Thorpe said (at [33]):

> "[I]n the typical ancillary relief case the district judge will always look first to the housing needs of the parties. Homes are of fundamental importance and there is nothing more awful than homelessness. So in the ordinary case the court's first concern will be to provide a home for the primary carer and the children (whose welfare is the first consideration). Of course in many cases the satisfaction of that may absorb all that is immediately available. But, as in this case, where there is sufficient to go beyond that, the court's concern will be to provide the means for the absent parent to rehouse."

97. This is just such a case. There is enough money, when taken together with the wife's borrowing capacity, for her to buy the husband out of his share of the family home for its current value of £140,000. That money, together with his own borrowing capacity, should give the husband sufficient to house himself too, albeit in a smaller property than the wife. There is no need for any further adjustment or redistribution.

98. Standing back, I am satisfied that this achieves a fair outcome between the parties.

Costs

99. At the outset of the hearing Miss Brander told me that, whatever the outcome, the wife would be seeking a costs order against the husband. I asked her to make her submissions on costs at the end of the second day to avoid the extra cost of a further hearing after my judgment had been handed down.

100. I am content that it was fair to hear costs arguments before giving judgment because (i) any complaints about the husband's litigation conduct related to behaviour that had already taken place, and (ii) any issues related to whether or not the wife had beaten an open offer would be obvious to me once I had decided what award to make. As it

happens, the second point does not apply as the wife has not come close to beating her settlement proposals.

101. The general rule in financial remedy proceedings is that the court will not make a costs order against a party unless the court considers it appropriate to do so because of the conduct of that party in relation to the proceedings.

102. One increasingly relevant factor, particularly now that the rules make early offers compulsory, is whether a party has achieved or come close to a settlement proposal they made earlier in proceedings. If they did, the view is that the other person ought to have accepted that offer when it was made, saving both of them the cost and stress of litigating further.

103. In this case, an unusually large number of settlement proposals were made by each of the parties. The most generous proposal from the wife was to buy the husband out of his interest in the family home for £95,000. In the event, he has done far better than that. I cannot fault him, therefore, for not accepting that offer.

104. The second complaint is that the husband himself made no serious or principled proposals to settle the case at an earlier stage. His own best offer was for a deferred sale of the family home with equal division of the proceeds, or to buy the wife out himself for £74,000. The second of those proposals was obviously unrealistic – he had no way of raising any funds at that time to buy the wife out – but I accept that it was intended to convey, if a little facetiously, the message that the husband would not accept any figure that the wife would not accept herself. The first proposal is in fact consistent with the award I have made in amount, but not in structure. It should have been obvious to the husband that the court would not countenance leaving them as joint owners of a property given the findings of controlling behaviour that had already

been made. In this he was blinded, it seems, by his belief that he will soon be sharing care of the children with the wife. Overall, however, I do not consider that his approach to settlement was noticeably less reasonable than the wife's.

105. The third complaint is about the husband's repeated failure to comply with court orders. He has already received a costs order from DJ Ayers for his wholesale failure to comply with the First Appointment directions. Since then he has failed to comply with the FDR directions to provide updating financial disclosure (including the extremely relevant fact that he had obtained employment), example properties, mortgage information, cross-examination questions, and made a last-minute unsuccessful attempt to adjourn the final hearing. While some of these damaged his ability to present his own case, they have also forced the wife and her lawyers to undertake additional work and considerably reduced the chance of settling the case without a trial.

106. Finally there is the content and tenor of the husband's communications with the wife's lawyers and with the court.

107. The SRA guidance on offensive communications notes that:

> "It is not uncommon for emails with the other side in relation to a client's matter to be robust, particularly in litigation. However, you should ensure such communications do not cross the line by using inflammatory language or being gratuitously offensive, either to the other side or about their client."

108. Although that is guidance intended for solicitors, it reflects a more general understanding that, within litigation, there is a line between robustly asserting your legal position and gratuitous offence and abuse.

109. That is not just a matter of courtesy or manners. In everyday life one should be able to avoid, ignore or block someone who sets out to upset or offend you. If the behaviour is serious enough, you can even report it to the police or seek an injunction from the court to make it stop. You cannot do that in litigation – you need to read everything the other person sends you in order to consider its effect on the case and whether you need to respond. A party cannot avoid abusive messages. Nor, for that matter, can their lawyers.

110. The communications I have seen from the husband have not been dredged up unexpectedly. They are documents the husband expected, and in most cases, intended the court to see – his witness statement, his position statement for the hearing, his open settlement proposals and his emails relating to the adjournment. Even in those documents, in which one might expect the husband to be on best behaviour, he has gone well beyond a robust assertion of his case and strayed far into the territory of gratuitous offence and abuse.

111. I suspect that the documents I have seen are only the tip of the iceberg. Even within those limited communications he manages to:

i) accuse the wife of having an undisclosed mental condition;

ii) make salacious allegations about the wife, making sure the court would hear them even while claiming not to want to bring them into the proceedings (precisely, I should add, as he did at the fact-finding hearing);

iii) accuse the wife's solicitor and barrister of monetising child abuse, with promises to expose them;

iv) allege that the wife's solicitor has a bad reputation locally and is well known for acting unprofessionally;

v) accuse the wife's solicitor of lying, having previously reported him to the police; and

vi) allege that he has been diagnosed with PTSD as a result of the abuse he has suffered from the wife and her *"malevolent legal team"*.

112. Something I have found particularly disturbing is the husband's insistence on directing all of his emails to the wife's solicitor's trainee. The husband wrote to the court about his *"positive interactions"* with her and on numerous occasions proposed to her that the two of them meet to discuss the case or just *"chew the fat"*. As I said above, a party's lawyers cannot avoid communications from the other party just because their contents might be unsavoury. Deliberately sending all his emails only to the most junior, female, member of the wife's team, even when she was on holiday, suggesting private meetings and asking her not to share his messages with her employer, strikes me as an egregious abuse of the obvious power imbalance between them; one which I can only imagine made her deeply uncomfortable.

113. The husband's communications in these proceedings crossed the line. They are controlling, undermining and threatening, and I can quite believe that the wife would experience them as a continuation of the abuse that she suffered throughout the marriage. It seems quite likely that they will have taken an emotional toll on her lawyers too.

114. Taking these last two heads together, in my judgment the husband's misconduct in these proceedings has been sufficiently serious to justify a departure from the general

rule that each party is responsible for meeting their own costs of the proceedings.

115. I will therefore express the court's disapproval of the way in which the husband has conducted this litigation by ordering him to pay the wife a sum representing 25% of the legal fees she has incurred in these proceedings, which I summarily assess at £10,000. This sum should be deducted from the £140,000 I had previously calculated as the lump sum to be paid by the wife to buy the husband out of his interest in the family home.