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, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2021] EWFC 53

Case No: BV18D33648

**IN THE FAMILY COURT**
**SITTING REMOTELY AT THE HIGH COURT OF JUSTICE**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2021

**Before**:

**MR JUSTICE PEEL**

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**Between:**

**ND**
**(by her litigation friend KW)** **Applicant**

**- and –**

**GD** **Respondent**

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**Katherine Kelsey** (instructed by **Charles Russell Speechlys**) for the **Applicant**
**Stuart McGhee** (instructed by **Sherwood Wheatley**) for the **Respondent**

Hearing dates: 8-11 June 2021

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Mr Justice Peel:**

## Introduction

1. In this financial remedy case, where the total assets are about £2.6 million, there are three factors of particular relevance which require a careful balancing exercise:

   i) The length of marriage, some 23 years;
   ii) The undoubted fact that the bulk of the assets are non-matrimonial in origin, having been inherited by the husband ("H") some 5 years before separation;
   iii) Very sadly, a diagnosis of the wife ("W") in late 2018 of Young Onset Alzheimer's ("YOA") which will have a significant effect on her life expectancy and medical needs during her remaining years.

2. W is represented by a litigation friend, KW who was appointed on 1 May 2019. She has Power of Attorney and is responsible for managing W's financial affairs, which will include such award as I make. It is obvious that KW, despite her own busy family and work life, has been, and continues to be, a source of enormous support to W. The parties agreed that W should not be required to give evidence. Written and oral evidence has been given by KW, who has carefully sought to reflect W's views where necessary. As was expected, W did not attend any part of the hearing.

3. At the start of the case the parties' open positions were, broadly:

   i) W sought total assets of £1.2m;
   ii) H proposed that W should receive £750,000.

   The difference is £450,000. As is dispiritingly commonplace in so many cases, the combined legal costs of about £483,000 match, and indeed slightly exceed, the difference between them. This is not a "big money" case by any stretch; the costs represent about 18% of the wealth, which is clearly disproportionate. To that should be aggregated the emotional toll which usually accompanies litigation of this nature.

## The proceedings

4. The proceedings started in December 2018, some 2 ½ years ago. There have been numerous hearings including a maintenance pending suit application, a legal services payment order application and a court FDR. In addition, the parties attended a recent, unsuccessful, Private FDR. H has generally been somewhat casual in his approach, not engaging as fully or promptly as he should have. Apart from the resultant delay and cost, this has caused W and KW anxiety and frustration. The case was allocated to High Court level in September 2020, I assume because of the complexity occasioned by W's particular needs. The bundle before me consisted of nearly 1500 pages. In the end, however, I cannot see that the case has been so complicated as to justify the costs or the exhaustive proceedings.

5. That said, I am immensely grateful to counsel, Ms Kelsey and Mr McGhee, for their assiduous presentation. They provided me with a single composite asset schedule, and a single chronology. In my admittedly brief experience on the Bench, these requirements are routinely ignored, creating confusion and extra judicial work. The practice guidance is very clear:

i) Paragraph 13 of the Statement of Efficient Conduct of Financial Remedy Hearings allocated to a High Court Judge states as follows in unequivocal and mandatory terms:
"At the Pre-Trial Review a direction should be made which ensures compliance with the indispensable requirement in FPR PD27A para 4.3(b) of provision of an agreed statement of the issues to be determined at the final hearing. To the statement of issues must be attached:
a. an agreed schedule of assets on which any unagreed items must be clearly denoted; and
b. an agreed chronology on which any un-agreed events must be clearly denoted".

ii) For cases allocated below High Court level:

a) Paragraph 15 of the Financial Remedy Protocol requires that: "Opposing advocates should, wherever possible, work together to produce a single (if possible agreed) asset schedule".
b) In respect of chronologies and other preliminary documents, paragraph 4.6 of PD27A provides that:
"The summary of background, statement of issues, chronology and reading list shall in the case of a final hearing, and shall so far as practicable in the case of any other hearing, each consist of a single document in a form agreed by all parties. Where the parties disagree as to the content the fact of their disagreement and their differing contentions shall be set out at the appropriate places in the document".

6. To recap:

i) At High Court level, in addition to the usual requirements of PD27A, it is <u>obligatory</u> at final hearing for the asset schedule and the chronology to be in the form of single, composite documents marked up with any differences between the parties;

ii) Below High Court level:

a) The asset schedule <u>should</u> be in a single, composite document, which I take to mean that it <u>must</u> be so absent good reason.
b) The preliminary documents at final hearing <u>shall</u> (which is synonymous with <u>must</u>) be in single, composite documents, and at other hearings shall be in such form so far as practicable.

I would expect advocates to adhere rigorously to these requirements. It is unacceptable for the parties and their lawyers to ignore them. Compliance may be burdensome, but that is no excuse and is necessary in the interests of proper use of judicial and court time.

## Background

7. W is 54 years old, H 59. They met in 1992, married in 1995 and separated in 2018 so that this was a long marriage of some 23 years. Their two children, aged 22 and 21, are at university and base themselves with W in the holidays. I have been told, and accept that for them it is very important to be able to continue to stay with W in the future.

8. During the marriage, W worked in events, then in a garden centre and, by the time of her YOA diagnosis, as a carer which has now ceased. H worked throughout the marriage, until his mother's death, in the construction industry. Since his mother's death he has generally worked part-time, on a freelance basis.

9. It is not seriously in dispute that the lifestyle of the parties during the marriage was modest. H says, and I have no reason to doubt, that their combined income was never more than about £50,000pa net.

10. In 2009 the parties moved out of London and bought the family home, in X town, in South East England ("the FMH") in joint names for £320,000. They had little in the way of other assets, so that up to the death of H's mother in 2013 this was a family with a house of relatively moderate value, enjoying a comfortable, but far from high level, combined income.

11. On the death of H's mother, H as sole beneficiary inherited her entire estate, consisting of a residential property portfolio of about 10 properties in South East England and South East London valued for probate initially at about £3.6m, revised downwards to £3.2m upon revaluation of the properties. Thereafter, there does not appear to have been a great surge in family expenditure on holidays, eating out, luxury items and so on.

12. Upon separation in late 2018, after an altercation at the FMH, H moved into rented accommodation. W left the FMH in 2019 and moved, by agreement, into an adjacent property in H's name, the cottage.

13. W's diagnosis of YOA in November 2018 followed a GP appointment where it was noticed she had difficulty with word recall. It is a neurodegenerative condition which will worsen, probably rapidly, over time. W is endeavouring to maintain her independence but needs some assistance from friends and family, particularly KW, and now from a carer. By March 2020 her condition had worsened such that her GP certified that she was unfit to work or drive. Since March 2021, W has been receiving 5 hours a week of professional care to assist with household jobs, at a cost of £606pm or about £7,200pa. She can find herself a little lost on a familiar dog walk. Her speech is affected, and she needs help with finances and making appointments. She mislays things, reading and writing have deteriorated, she tires easily and can no longer drive. That said, she is, with the current level of support, currently managing reasonably well at home. It is her wish to remain living independently at home for as long as possible before contemplating any form of residential care. It is inevitable that in time her cognitive decline will require much greater support, including from professional services. What is very difficult to predict in this case is the timescale of deterioration, increased care at home and possible residential care.

**Computation of assets (a schedule is attached)**

14. The FMH has a gross value of £500,000, subject to a mortgage of -£86,525. The net equity after costs of sale and CGT is £382,569.

15. The cottage, occupied by W, is valued at £450,000; the net equity after CGT and costs of sale is £436,500. It derives from funds inherited by H, and was bought in H's sole name in 2017.

16. H owns a further 8 properties, all inherited from his mother. The properties within the portfolio are residential, comprising a mix of regulated and assured shorthold tenancies, and one property is subject to a life interest. The total value, after allowing for costs of sale and CGT, is £2,863,272 net. There is a question mark about whether the CGT payable can be reduced by £24,000 on application of H's annual allowance, but this seems to me to be de minimis and would require staggered sales in circumstances where the order I make is likely to require immediate sale of a number of properties; I therefore take the figures for CGT on the schedule of assets.

17. The parties' bank accounts and investments total £86,825, and their combined pension provision is £171,013.

18. As for indebtedness, the total liabilities come to -£1,337,013 including;

    i) Outstanding inheritance tax liability on H's mother's estate of -£1,032,415.
    ii) H's outstanding litigation loan of -£145,035 which, in accordance with a legal services order made by me, encompasses legal fees for both himself and W.
    iii) W's unpaid legal fees of -£80,000 and H's of –£67,223. Those costs will be reduced by one less day of court time being required than was estimated, but on the other hand there will be costs of implementation and I therefore leave these figures undisturbed.
    iv) H invites the court to include liabilities of -£18,000 for repairs and electrical works to some of the rented properties. I decline to make this allowance. The properties were valued by the SJE on the basis of their current state "as seen" and in any event these figures are not such as to have any material impact on the outcome. Similarly, I ignore H's suggested liability of -£9,000 for his ongoing rent (I regard this as an income need for the future) or -£3,500 for a present for one of the children.

19. The total assets are therefore:

| | **Joint** | **H** | **W** | **Total** |
|---|---|---|---|---|
| FMH | 382,569 | | | |
| The cottage | | 436,500 | | |
| Property portfolio | | 2,863,272 | | |
| Bank accounts/investments | 348 | 64,706 | 21,881 | |
| Pensions | | 86,000 | 85,013 | |
| Liabilities | | -1,257,013 | -80,000 | |
| | **382,917** | **2,193,465** | **26,894** | **2,603,276** |

20. W, in my judgment, has no earning capacity and H finally acknowledged this obvious and inevitable finding in his oral evidence. Her only income is:

    i) £5,896 pa under an income protection plan until she is 60; and
    ii) £5,907 pa by way of state provided Personal Independent Payment.

    That is a total of **£11,803 pa net.**

21. H has some earning capacity, but given his age and lack of regular employment track record in the past 8 years, it is unlikely to be substantial. I judge that his reasonable earning capacity going forward does not exceed about £15,000 pa gross. He derives a rental income from the property portfolio which fluctuates depending on property related expenses, and it seems to me that to include the portfolio at its full capital value and to ascribe an additional income therefrom risks double counting.

## The evidence

22. The SJE occupational therapist, Mr O'Neill reported in writing, but was not required to give oral evidence. He costed various levels of care as follows:

    i) Day care provision costing between £10,000 pa (7 hours of care per week) and £40,000 pa (28 hours per week);
    ii) Live in care costing £65,000 pa;
    iii) Residential care costing £69,000 pa.

    He reported that a care home setting should only be considered when W is no longer able to live safely at home. If possible, she should continue to live in her current location (X town) as it is quiet and safe, and she has a level of structured routine there which is beneficial to her overall level of independent functioning. He considers that a single storey property would be desirable to avoid a need to move house or carry out adaptations in the future. His view is that the cottage is inappropriate for W's housing longer-term.

23. Dr Series, the SJE consultant old age psychiatrist, provided written and oral evidence. He was very impressive; clear and reasoned. He told me as follows:

    i) W's normal life expectancy would be about 30 years;
    ii) The YOA diagnosis means her life expectancy is very much shorter. It is difficult to say how much shorter because most studies are in respect of older people. She is exceptionally young to have dementia.
    iii) Based on a study by Columbia University, the best assessment of her life expectancy is about 5 years. He acknowledged that the study is of limited value in that the sample was small (230 patients) and of that number only 6 people were aged under 55. He said that "it is extremely difficult to predict life expectancy accurately in a person of any age with Alzheimer's disease". The Columbia study "falls short of being entirely reliable…when applied to a single individual, there are so many factors which can affect life expectancy that any individual predication will be much less reliable".
    iv) The 5-year estimate is qualified; "there is a substantial variation either side of this. These figures refer to average survival rates, meaning that 50% of people affected will survive for longer than this and 50% will survive for less than this".
    v) Counsel for H posed the direct question: "If W were to ask, how long do I have to live, what would you say?". He replied that a precise answer to one person would be very difficult, but he would tell her that the average life expectancy would be about 5 years. She could live a shorter time or a longer time. Given her extremely young age, she would probably survive longer than the average but probably not as much as 10 years. He told me that her prospects of living for 10 years were no better than 5-10%.

vi) Factors which would assist in life expectancy being on the longer side include the availability of high-quality care, living independently and better socio-economic circumstances.

vii) He thought it very reasonable, and desirable, for W to remain at home rather than enter a care setting. In a care home she would be much younger than the other residents, with little in common between them, and her brain would be subject to less stimulation than living in the community. He described it as being "very important" for her to be at home for her quality of life. He drew the important distinction between a residential care home and a nursing care home, the latter becoming only necessary when medical care is required. He told me that the majority of people with dementia are able to live at home for the rest of their lives, albeit becoming increasingly dependent on higher levels of care provision.

24. The SJE Financial Advisor, Mr Hutton-Attenborough, carried out a number of bespoke calculations and gave oral evidence. He acknowledged the limit of the exercise he was asked to do. His primary task was to calculate, on a capitalised basis, the sum required by W to meet her needs (including as to care); essentially a Duxbury style exercise.

25. He could only work on the basis of figures given to him by the parties as to income receipts, income needs and life expectancy. The range of outcomes was enormous, unsurprisingly so as he was invited to consider life expectancy from 5 to 30 years, multiple options involving day care, live in care and/or residential care, differing income figures and disputed budget figures.

26. In the same way that various assumptions are made by the familiar Duxbury programme, he made a number of assumptions about income yield, risk profile, inflation, life expectancy and so on. In answer to questions from me, he said that his underlying assumptions were:

i) 3.62% pa combined income and capital growth (whereas Duxbury assumes 6.75%).

ii) 2% pa inflation (whereas Duxbury assumes 3%).

That said, he thought that over a short timescale of 5-10 years the different modelling between himself and Duxbury would not lead to great variance in the computed figures. The longer the term, the greater the divergence.

27. The parties invited him to prepare no fewer than 5 reports, including those in the nature of updates/addendums, and 3 replies to detailed questions raised by solicitors. In total, the bundle section devoted to his written evidence amounted to about 450 pages of detailed analysis.

28. I have to say, with due respect to all who requested and sanctioned this exercise, that it has been of negligible value to me in resolving this case. In my view the parties could very easily have used the Capitalise programme to generate bespoke calculations. What matters is the figures which are put into the programme by each party to calculate the outcome contended for. Often during a hearing, as issues crystallise, the judge will ask for specific calculations to be carried out; indeed, I did just that in this case. The underlying assumptions can be adjusted on the Capitalise programme if required. I do

not see that the SJE was asked to do any more than create his own Duxbury style calculations, but, perhaps inevitably, he adopted different underlying assumptions. The result is a quasi-Duxbury calculation, inconsistent with the specific Duxbury model which has stood the test of time for decades in financial remedy cases. This is not to criticise Mr Hutton-Attenborough; he did exactly what he was asked to do, conscientiously and fairly. In my view, it was never "necessary" (to apply the Part 25 test) for him to have been instructed. Indeed, as things have transpired, and perhaps unsurprisingly, neither party really sought to rely on his figures which are so wide ranging as to be of minimal value.

29. Although I acknowledge that there may be the odd case where an expert is required to carry out a very clearly defined and tailored Duxbury calculation, in the vast run of cases it is inappropriate to reach beyond the Duxbury tables in At A Glance, or the Capitalise programme for a more advanced formula. For my own part, I strongly caution against the sort of exercise which was carried out here which has been a largely futile and costly exercise. There should rarely, if ever, be a need for an IFA to carry out a Duxbury style exercise which adds cost, delay, and confusion.

30. KW, was a very open, honest, and reasonable witness. Although a little mistrustful of H (perhaps one of the emotional consequences of prolonged litigation) she did not appear to me to be instinctively pre-disposed against him; her concern was for W. She told me that W does not want to go into a care home, nor do the children want to see her in a care home. They are all strongly opposed to such a course unless absolutely necessary. She said the children want to continue to make a base with her. She echoed Dr Series' views about the undesirability of a care home; views which social services have also expressed. She has done research into care homes and it appears that the minimum age for admission is 60, or more usually 65.

31. She was unpersuaded that ongoing maintenance would be appropriate. As I say, she was a little mistrustful of H, but the more significant point she made was the need for a clean break if possible. From an emotional point of view, she thought it would be important for W and the children. From a practical point of view, she did not relish the prospect of having to return to court in the event of change of circumstances. Better by far, she said, to draw a line under matters and move on which would be preferable, she thought, for H as well.

32. On W's housing needs, the priority in her view is location; to stay in the current area where she has facilities, friends, activities, and structure. Moving to a new area (for example H's suggested particulars which were on the outskirts of Y town) would be very unsettling; she needs familiarity for her wellbeing. She emphasised time and again the importance of W's immediate location. She told me that the cottage, where W currently lives, is not ideal in the long term although it passes muster for the time being; it is cramped, poorly configured and difficult to adapt.

33. She accepted, very fairly, that if W's capitalised income fund (should that be the chosen court route) runs out, W would need to deploy the monies tied up in her home, by selling it, or perhaps renting it out. Putting it another way W "will have to manage with what she is given" which is a refreshingly realistic attitude. Also, fairly, she accepted that W is not a big spender; she is frugal and anxious about money.

34. H was a little flat in his oral evidence. I felt that throughout the proceedings he has tended to bury his head in the sand, not engaging as fully as he should have done. I absolve him of any malicious intent towards W; rather, he seemed to me not to have fully thought through the issues in this case.

35. He told me that he had a strategy of not paying the inheritance tax in annual instalments over 10 years, but instead allowing the property portfolio to appreciate in value to a greater extent than the interest payable on the tax. It took a while to establish precisely how much was gained by this approach, but it seems that he has made a net (after CGT) profit on the properties of £688,000, compared to £184,000 of additional payable interest. That gain, however, has been comfortably offset by legal fees and the costs of running several households during these proceedings. It also means that he is now facing the double hit of inheritance tax which must be paid in full within 2 years, and an award to W. He will have to undertake a significant programme of property realisation.

36. He accepted that his conduct of the proceedings, in certain respects, has fallen below par, creating anxiety, and upset for W and KW. I formed the clear view that it is only now, when at court, that the reality of these proceedings really dawned on him. He accepted that he should have kept W better informed about his dealings with HMRC, who made contact with her out of the blue. He accepted that he was wrong not to have responded to, or participated in, an early application by W for maintenance pending suit, or a subsequent application, heard before me, for a legal services payment order. He agreed that he had not complied with disclosure orders on a number of occasions. He told me that he regretted not having engaged better in the litigation. He made an open offer very late in the day and overall, I judge his conduct of the litigation to have been very unsatisfactory.

37. I asked him how long it would take him to raise monies to meet W's award. He proposes to do so by selling properties, and needs up to 6 months to do so. As for his earnings, he thought it would be difficult for him to secure employment but talked of working at B and Q.

## The Law

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

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

40. There is no place for discrimination between husband and wife and their respective roles; **White v White** at 989C.

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

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

add that in my view the very real and substantial benefits of a clean break, both financial and emotional, should not be underestimated by parties in these cases

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

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

45. Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall in principle prevail; **Charman v Charman [2007] EWCA Civ 503**.

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

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

48. The evaluation by the court of the demarcation between marital and non-martial assets is not always easy. It must be carried out with the degree of particularity or generality appropriate in each case; **Hart v Hart [2018] 1 FLR 1283**. Usually, non-marital wealth has one or more of 3 origins, namely (i) property brought into the marriage by one or other party, (ii) property generated by one or other party after separation (for example by significant earnings) and/or (iii) inheritances or gifts received by one or other party. Difficult questions can arise as to whether and to what extent property which starts out as non-marital acquires a marital character requiring it to be divided under the sharing principle. It will all depend on the circumstances, and the court will look at when the property was acquired, how it has been used, whether it has been mingled with the family finances and what the parties intended. I accept the submission on behalf of H that in the ordinary course of events (acknowledging, of course, that each case will turn on its own facts) the attribution of income derived from a non-marital asset towards the domestic economy will generally not convert the character of the underlying capital asset from non-marital to marital and therefore susceptible to the sharing principle; I am fortified in this analysis by the decision of Roberts J in **WX v HX [2021] EWHC 242.**

49. Needs are an elastic concept. They cannot be looked at in isolation. In **Charman (supra)** at [70] the court said: "The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b); of the standard of living enjoyed by the family before the breakdown of the marriage

(s.25(2)(c); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e)". Mostyn J said in **FF v KF [2017] EWHC 1093** at [18]; "The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise**".** To that I would add that the source of the wealth is also relevant. If, as here, it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in **N v F [2011] 2 FLR 533** at [17-19]

50. Counsel for H submits that needs should be "relationship-generated". The logic, in its purest form, is that W's health is not causally linked to the marriage, was diagnosed after separation and therefore none of her needs occasioned by health fall to be met by H. He shied away from pressing me to reach this conclusion, but invited me to bear this in mind when considering needs in the round. In my judgment, this approach cannot be right. The statute does not limit consideration of needs in this way (s25(2)(e). In **Miller; McFarlane** at [11] Lord Nicholls said: "Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."

51. At [137] of **Miller; McFarlane** Baroness Hale refers to factors which are linked to the parties' relationship, either causally or temporally, and not to extrinsic, unrelated factors such as disability arising after the marriage has ended. I do not read her as saying that in such circumstances needs cannot or should not be provided for by the paying party, particularly as she signals no dissent with the observations of Lord Nicholls cited above. It would be odd if W's health is excluded from consideration if a diagnosis is made 1 month after separation, but included if the diagnosis is made 1 month before separation. Further, in this case it is likely that the diagnosis, coming as it did shortly after separation, was the end result of a period of deterioration during the marriage; it is not possible or fair simply to take the diagnosis as the start date of the condition.

52. What does seem clear from paragraph [140] is that the compensation principle does depend on a direct causal link between the additional economic disadvantage and the relationship; that seems entirely logical given that the principle goes beyond core needs.

53. During the hearing, as I have observed, I was presented with a number of capitalisation calculations by an IFA who used underlying assumptions which differ from the Duxbury model. In **JL v SL (No 3) [2015] EWHC 555** Mostyn J reviewed the Duxbury assumptions and concluded that they remain sound. The Duxbury model has stood the test of time since the eponymous case of **Duxbury v Duxbury** some 30 years ago. As has been often stated, it is a tool and not a rule. The court has the flexibility to depart from it to the extent necessary in any given case, as, for example, in **A v A [1999] 2 FLR 969.** There, an elderly applicant was, by reason of her age and length of the marriage, entitled to less under the Duxbury model than would have been the case had she been younger and/or the marriage shorter; the so-called Duxbury paradox. Singer J departed from the strict Duxbury application to meet this unfairness. True, the court is not barred from considering capitalisation calculations other than by the Duxbury methodology (e.g **Tattersall v Tattersall [2018] EWCA Civ 1978)** but I am firmly of the view that there would have to be a very good reason to go down a different route.

54. W relied on a number of, now somewhat outdated, authorities, to demonstrate that the court should not throw upon the state the burden of providing care for W if the family's financial resources can meet such needs; **Barnes v Barnes [1972] 3 AER 872, Delaney v Delaney [1990] 2 FLR 457, Peacock v Peacock [1984] 1 AER 1069** and **Foot v Foot [1987] FCR 62.** I do not consider these authorities to be of any particular relevance as it seems to me to be unlikely, on either party's proposal, that W will become so destitute as to require state assistance.

55. Where there are issues of liquidity, per Wilson LJ in **Behzadi v Behzadi [2008] EWCA 1070** "…it is for the owner of property to establish, if such be the case and unless it is self-evident, that its value cannot be realised (which includes being borrowed against: ***Newton v Newton*** [1990] 1 FLR 33 at 44) or, if realised, that its proceeds cannot be transferred to the place at which it is suggested that they can be deployed".

56. Finally, given that in this case life expectancy is a central issue, I have been referred to dicta of Munby J, faced with a similar situation in **PJC v ADC and others [2009] EWHC 1491** that "I must do the best I can on the basis of available evidence."

## Proposals

57. W proposes a net total in her hands of £1.2m (excluding her pension). Of that, she seeks £700,000 by way of housing fund, and £500,000 as an income fund.

58. H offers W a sum of £750,000. Of that, he proposes a housing fund of £525,000 and an income fund at £225,000. His counsel provided me with projected calculations as to W's income and care needs over the next 10 years, coming to a total of £626,000 (less her own income sources) so that on his case W's care costs can be met, albeit with the inevitable sale of her property. The difficulty with these projections, as with any others in this case, is that they are largely speculative.

59. Both proposals are on a clean break basis. H offers an alternative, essentially saying that were the court minded to order a clean break capital figure which risks overpaying W, in the sense that W might die before the income fund is exhausted, then the housing fund of £525,000 should stand, but the income fund should be replaced by a joint lives periodical payments at £16,216pa; the latter figure being calculated as what H says are her reasonable budgetary needs of about £28,000 less her income from other sources.

60. Both parties agree that mathematical exactitude would be highly problematic given the multiple variables surrounding W's health. Both agreed that I have to look at the case holistically and, as Ms Kelsey suggested, in a broad-brush way.

## Analysis

61. This is not a sharing case. It is clear that the great bulk of the assets originate from H's mother's wealth. It was received by H some 5 years before separation and not substantially mingled in the family economy. In my judgment only the marital home, the liquid bank balances and investments, and the pensions, fall within the category of marital assets. Taking the gross value of the marital home for these purposes, that is no more than about £750,000 such that W's 50% entitlement, at its maximum, and ignoring the accrued indebtedness, does not exceed £375,000. Applying the **Charman** comparator, her needs claim comfortably exceeds her sharing claim.

62. As I said at the outset of this judgment, W's needs must be informed by all the circumstances of this case, in particular the length of the marriage, her medical condition, and the provenance of the wealth. It seems to me to be reasonable to accede to W's wish to be independent, living at home, for as long as possible, for reasons of her own contentment and quality of life; of particular importance, in my view, is to enable her to maintain a family home where the children can come and stay. Moreover, in practice, she would be unlikely to secure a care home placement before age 60. Her needs therefore comprise a property and income, whilst acknowledging that a time may come when she will need to access the funds in that property to defray some of her income needs. Whether, if it comes to that, a sale of property, or equity release, or renting the property out will be a matter for her or, in reality, KW who will likely make the decisions in consultation with the children. I do not consider, on these facts, that it would be reasonable to insulate W in such a way that she never has to have recourse to her principal asset going forward. After all, many people in the country when they reach a certain age are required to do just that in order to fund their care.

63. W's current accommodation at the cottage is far from suitable in the long term, in terms of size, configuration and adaptability. Very belatedly, H suggested it could be adapted to downstairs living for W's needs, but (i) this was raised very late in the day, (ii) no expert was asked about this, (iii) I have no costings and (iv) H accepted that W's room would be a box room size. I prefer the evidence of KW who thought this would not be feasible, and that of the SJE occupational therapist who considers the property to be unsuitable.

64. In my judgment, W needs to live in the immediate X town area, where she has lived for many years. It enables her to walk to the village centre and shops. It is quiet and safe. Her GP is in X town. Her friends and activities are in X town. She is settled. To move from X town would be disruptive and unsettling, and acquiring new friends and support structures would be problematic for her. The view of the SJE occupational therapist, with which I agree, is that it is highly desirable for her to remain in the X town area. W's social services take the same view. As for size of accommodation, she needs a 3-bedroom property. That would allow the children to stay with her during university holidays and thereafter. Looking further ahead it would permit a live-in carer to be accommodated. Ideally, it should be a single storey property. I accept that finding such a property may not be easy, and may take time; in the end, W will have to make choices.

65. I do not accept the submission on behalf of H that to provide W with a housing fund in excess of the value of the FMH would be to afford her a housing standard beyond that enjoyed during the marriage. In many (perhaps most) cases, it would be ambitious to seek a fund greater than the value of the FMH, but on the very specific facts of this case I do not regard the value of the FMH at £500,000 as a ceiling on W's housing needs for three main reasons:

    i) It is in a very poor state of repair, and the parties had intended to carry out a complete renovation which would no doubt have increased the value. W moved out precisely because of its state of disrepair. Photographs in the bundle show it to be in a state little short of dilapidation and although there are no formal estimates of the costs required to carry out a complete overhaul, it would plainly be an expensive exercise. According to the marketing agents, it requires complete modernisation.

ii) W's health requirements take this case beyond the usual arguments about standard of living and appropriateness of housing.

iii) H in his Form E sought £750,000 by way of housing fund. I appreciate that he now suggests a rather lower figure, but the Form E claim was perhaps indicative of the lack of suitability of the FMH.

66. The specific sort of property which W aspires to does not frequently come on to the property market. She has identified 4 currently available properties on the market at between £630,000 and £750,000, to which, on her case, should be added the costs of SDLT, moving and furnishing. H puts forward properties for W ranging between £450,000 and £575,000, submitting that a housing fund of about £525,000 is reasonable.

67. I regard H's proposed properties as inappropriate. They are not in the X town area. Most are in the outskirts of Y town, a busy town rather than a quiet village. W would have to start over in terms of friends, interests, facilities, and support; given her condition and life expectancy, that would be wholly unreasonable. They are for the most part too small, with only 2 bedrooms and limited square footage. They are generally unappealing and not in my view suitable. On the other hand, some of W's particulars seem to me to be in excess of what she reasonably needs. Ironically, one of the properties put forward by W for H at £575,000 seemed to me to tick many boxes, save that, although it is in the general location of X town, it is not proximate to the facilities she needs access to. I suspect that W will have to recognise that not every requirement will be achievable; the ideal property may not be available within budget. She will have to compromise. It is anticipated that she will continue to live at the cottage for the foreseeable future, and she will therefore have time to find the best available property. Looking at the particulars, and having read and heard the evidence on this issue, I consider that a total housing fund (including SDLT and moving costs) of **£650,000** is reasonable.

68. As for income needs, the starting point is W's budget of about £44,000pa. That budget excludes current or future care costs and has been described as her basic budget. H makes criticism of some of the items on her list, although I note that his own budget, stripping out all housing costs, is £37,320pa and with housing costs would be further increased. There is some force in H's contention that the cost of a dogwalker at £10,950 included by W is not currently payable; W's dog is 10 years old and W, happily, is able to undertake the dog walking herself. The cost in any event seems to me to be excessively high. I do not know whether, or when, she will require a dog walker, nor whether she would get another dog in due course. Specialist transport at £4,160 is not currently required. Deducting those two items brings the budget down to £28,000pa. Further, I have the sense that W is frugal and well able to live within her means. She can make modest cuts to her basic expenditure if required. On the other hand, there is little room for contingencies or unforeseen events. Looking at the matter in the round, I am satisfied that a basic budget (excluding care costs) of about £30,000 pa is reasonable. Care costs are likely to increase over time to a maximum of £65,000pa should there be full-time live-in care, in addition to the basic budget, such that her total needs at that time would be around £95,000pa. Alternatively, if she has no choice but to go into residential care her needs would be £69,000pa, being the costs of the care home, and an estimated £5,000 of other basic expenditure i.e a total of about £74,000pa.

The difficulty in this case is not being able to predict when, or how quickly, these care costs will mount.

69. Against that, W has income of £11,803pa net, which will reduce by £5,896pa net when she loses the income protection policy cover at age 60.

70. The evidence of Dr Series satisfies me that W's likely life expectancy is 5 to 10 years, although I cannot rule out a shorter or longer term. I accept that the average is 5 years, but W's particular features (her youth, good level of supportive care and higher socio-economic circumstances) tend towards a longer period.

71. Doing the best I can on the available evidence, and acknowledging that it is impossible to map out W's income needs with absolute precision because of the high level of variability, I have concluded that W requires an income fund of £300,000. Counsel helpfully produced a selection of Capitalise calculations, inputting W's PIP and income protection income. £300,000 (together with those additional sources of income) would produce £79,519pa net for 5 years, or £46,008pa net for 10 years. I consider that these sums represent a reasonable balance in terms of assessing immediate and long-term costs; not providing for the highest level of costs over a full 10-year term, nor restricting W to the bare minimum. Although I have not found Mr Hutton-Attenborough's income fund calculations to be of much assistance (through no fault of his own), I note that £300,000 is roughly in the middle of the permutations put forward by him for the 5 to 10 year periods.

72. It is possible that W will live longer and/or require the upper level of care costs very soon; either could have the effect of leaving her short of the necessary funds to live at home with full time care. In a sense, that is a risk which she must run having disavowed any thought of ongoing maintenance. If the fund proves to be insufficient, I would expect her to deploy the monies tied up in her property. I make it plain that I am not dictating how W apportions this award between housing and income. That is a matter for her and KW. She may choose to spend more on a property and have less available by way of income fund. She may choose to spend less on a property (or even remain living where she currently is) and have more to allocate for income.

73. The total needed by W is therefore a £650,000 housing fund together with a £300,000 income fund i.e £950,000. Assets/liabilities in her sole name are:

| | | |
|---|---|---|
| i) | Bank accounts and investments | £21,881 |
| ii) | Pension (net lump sum) | £61,225 |
| iii) | Unpaid legal fees | -£80,000 |
| | | **£3,106** |

74. She therefore requires the full £950,000 from H. That shall comprise:

| | | |
|---|---|---|
| i) | Transfer of the cottage | £436,500 net |
| ii) | Lump sum payable by H | £513,500 |

75. The net effect on the parties will be:

| | | | |
|---|---|---|---|
| i) | Wife | own assets | £3,106 |
| | | lump sum | £950,000 |

**£953,101**

ii) Husband **£1,650,175**

Standing back and applying a cross check, that is a division of 63/37 in H's favour which to my mind is entirely fair in the context of all the s25 criteria. It represents an equitable balance between W's needs, the long marriage, and the origins of the wealth on H's side.

76. I do not consider it necessary to consider H's needs in any depth. With £1.65m of assets, and an, albeit modest, earning capacity, he can comfortably meet his own housing needs (whether at his suggested level of £450,000 or at W's level, as I have found it, of £650,000) and his income needs with the balance of c£1 million to his name. Nobody in this case suggested otherwise.

77. I have carefully considered whether instead of a capitalised income fund of £300,000, I should order ongoing periodical payments. The superficial advantages would be (i) to enable the court to calibrate the level of payment depending upon care requirements and (ii) to avoid the risk of overpayment in the event that W, to put it bluntly, dies well before her expected life expectancy leaving a large part of the fund intact.

78. I am quite satisfied that such an approach would be wrong in this case. A clean break is highly desirable. There is some tension between the parties, and I do not consider that W is strong enough to cope with the ongoing stress of financial and legal links. A periodical payments order could be subject to multiple applications to court because there are so many variables in care requirements; the expense and emotional toll would be heavy. There has been far too much litigation already and it would be inimical to W's health. In my view, a clean break is as much in H's interests as W's. He can move on with his life, and continue to invest the property portfolio as he thinks fit. He would not be at risk of substantial increases in periodical payments should the full care regime be required. He would not be at risk of W's life expectancy prolonging well beyond the expected timescale; a risk which, according to Dr Series, is not impossible. I also take the view that W needs the flexibility of a capital fund to apportion between housing, medical/occupational therapy equipment and income needs as appropriate. Should an expensive item be required, KW would need to act quickly which she can only do if the fund is available. Finally, I observe that H proposed a capitalised fund of £225,000, and I have alighted upon £300,000; I do not think the difference is of such magnitude as to detract from the many advantages of a clean break.

79. In order to meet part of H's concern about overpayment, I will accept W's undertaking to leave her estate to the children. I note that in H's Form E he aspired to providing the children with monies to assist in buying properties at some point, so the undertaking meets his concern to retain his mother's money within the family.

80. Finally, I turn to H's liquidity. Raising money will take some time. He will need to sell properties, including the FMH. That said, he has had time measured in years to prepare for this, and in my view he has to get on with it. I propose to order as follows:

i) H to transfer the cottage to W forthwith.
ii) H to pay 2 non-variable lump sums:

a) £30,000 in 28 days (which W can apply towards her legal fees).
b) £483,500 by 14 December 2021.

## Costs

81. Contrary to the clear requirements of Rule 9.27A and PD28 paragraph 4.4 H, in my judgment, has not negotiated openly in a reasonable manner; I have, of course, no knowledge of without prejudice discussions. He did not make an open proposal until 30 April 2021, some 6 weeks before the final hearing, whereas W made an open proposal nearly a year ago on 13 July 2020. Parties must constructively and openly attempt to settle a case. In **OG v AG [2020] EWFC 52** Mostyn J said; "if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs". That message must be fully taken on board by all those who practise in this field.

82. However, in this case I will not make a costs order because the net effect of this order is to place W in a position where her needs are met after payment of all her legal costs. Given that this is a needs claim, rather than a sharing claim, in reality W's costs have been funded from H's assets. I shall make no order as to costs. I pause only to comment that had settlement been reached, and costs saved, it is likely that H would have enjoyed the benefit of the savings, he being the payer. There are, however, three existing costs orders against H (two in these proceedings and one relating to the suit) which H must comply with. I order that payment must be made by 28 June 2021 where the figure has been assessed, or otherwise after assessment in the usual way.

## The order

83. My order is as follows:

i) The FMH shall be sold and after payment of costs, mortgage, the litigation loan which it is agreed shall be redeemed, and each party's CGT, the proceeds shall be paid into a bank account in H's sole name and shall be used by him solely for the purposes of complying with the lump sum orders unless he has by then already met his obligations in full, in which case he shall retain the proceeds.
ii) The cottage shall be transferred forthwith to W, H to be responsible for the costs of transfer.
iii) The proceeds of the joint account to be retained by H. Each party shall retain the assets, including pensions, in their sole names, and shall be responsible for liabilities in their sole name. For the avoidance of doubt W must discharge her own unpaid legal fees (c£80,000).
iv) H shall pay W £513,500 in 2 lump sums as set out above.
v) I shall not provide for any form of security.
vi) In the interim, until payment of the entire capital provision (not just until transfer of the cottage):

    a) H shall meet all mortgage payments, council tax, utilities, buildings, and contents insurance on the family home and the cottage. He shall in addition maintain the boiler and heating services at the cottage.
    b) H shall continue to pay W £244.04 per month under the interim order. When the entire capital provision is paid, the periodical payments shall end with a s28(1A) bar.

vii) Contents to be divided by agreement.

viii) Clean break.
ix) Liberty to apply.
x) W shall undertake not to alter her current will, which provides for her estate to be left to the children, other than in respect of two particular items for KW.