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SCHEDULE 1 CHILDREN ACT 1989: COSTS, CAPITALISATION AND HOUSING PROVISION

Samantha Hillas QC

St John's Buildings

COSTS

A. Costs allowances

1. Costs allowances are particularly important in Schedule 1 cases: the applicant has no entitlement to a capital award for herself and is therefore unlikely to attract third party litigation funding or a *Sears Tooth* agreement.

2. The scope of Schedule 1 extends to interim costs (*M-T v T* [2007] 2 FLR 925), which can be funded either via a lump sum (*CF v KM* [2011] 1 FLR 208) or periodical payments (*G v G (Child Maintenance: Interim Costs Provision)* [2010] 2 FLR 1264).

3. Although the legal costs provision set out in s.22ZA MCA 1973 does not apply to Schedule 1 proceedings, the criteria is analogous and is as set out in *Currey v Currey (No 2)* [2007] 1 FLR 946. In essence an applicant must demonstrate that she cannot reasonably procure legal advice and representation at the appropriate level of expertise by any other means.

4. The court must have regard to the reasonableness of the applicant's stance in the proceedings, and the merits of her claim: *G v G* (above).

5. The authorities are clear as to the advantages flowing from competent representation and equality of arms, which are of ultimate benefit to the child: see eg Charles J at § 92 of *CF v KM* (above):-

> *All cases are different, or have different aspects, but in my view, it is clear that it is more likely than not that it would benefit the child if the mother were represented in both the s 8 proceedings and the Schedule 1 proceedings. This accords with the conclusion I reached in M-T v T and the conclusion reached by Moylan J in G v G (Child Maintenance: Interim Costs Provision). In large measure, this view is based on the generally recognised advantages flowing from competent representation, and there being an 'equality of arms' in an investigatory as well as in an adversarial process.*

6. The court may take the father's costs as a benchmark, allowing for the extra costs for the mother in making the application: *PG v TW (No 1) (Child: Financial Provision: Legal Funding)* [2014] 1 FLR 508.

7. See also Cobb J in *Re F (A Child) (Financial Provision: Legal Costs Funding)* [2016 1 WLR 4720 at § 22:

> *My concern is to ensure that the mother and father have equality of arms, and equal access to justice in this case. I do not, as Mr. Turner sought to persuade me, treat equality of arms as "equality of payments" – a suggestion that, £ for £, the father should ensure that the mother is more or less equally provided for in relation to her costs as he is…*

8. Although a s.22ZA MCA 1973 case, Mostyn J's guidance as to best practice set out in *Rubin v Rubin* [2014] 2 FLR 1018 should be followed. In particular, an application for a costs allowance should be supported by written evidence and include:

    a. A detailed estimate of current and future costs
    b. Evidence of refusal to fund by two commercial lenders of repute
    c. Evidence as to the (non)availability of a *Sears Tooth* agreement
    d. Funding should not in the first instance last beyond FDR stage
    e. Monthly instalments are preferable to a single lump sum payment
    f. Historical unpaid costs would not be met unless the court was satisfied that without such a payment appropriate legal services would not be obtained
    g. A costs allowance can be made to assist in the costs of mediation and arbitration
    h. In determining the availability of funding from another source, the court will not normally require an applicant to deplete her modest savings or sell or charge her home; but this depends on the facts

9. In relation to 'historical' costs under Schedule 1, in appropriate cases, the court has found it necessary for the paying party to be responsible both for accrued

legal costs and costs going forward, to enable equality of arms and for the pressures of litigation to be more fairly divided between the parties: *PG v TW (No 1) (Child: Financial Provision: Legal Funding)* [2014] 1 FLR 508.

10. In this regard see also Cobb J's decision in *BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)* [2017] 1 FLR 1521, in which he ordered the father to pay a sum to include the mother's accrued and prospective costs of the proceedings (including the s.8 CA 1989 proceedings) and, further, his decision in *Re F* (above) in which he said at § 22:

> *However, for as long as any client has incurred significant outstanding legal costs with his or her solicitor, there is no doubt but that they become bound…to each other by the debt; this may well impact on the freedom of, and relative strengths within, their professional relationship. Further, the solicitor may feel constrained in taking what may be important steps in relation, for instance, to discovery, or in relation to exploring parallel non-court dispute resolution. The debt may materially influence the client's stance on possible settlement, and the solicitor's advice in relation to the same: a client – without independent resources – is in a vulnerable position, and may be more inclined to accept a settlement that is less than fair simply because of the concerns about litigation debt. This would not be in the interests of this, or any, child in Schedule 1 proceedings. A level playing field may not be achieved where, on the one side, the solicitor and client are 'beholden' to each other by significant debt, whereas on the other there is an abundance of litigation funding. Though there is an increasingly familiar and commendable practice of lawyers acting pro bono in cases before the family courts, particularly where public funding provision previously available has been withdrawn, legal service providers, including solicitors and barristers, are not charities, nor are they credit-agents. It is neither fair nor reasonable to expect solicitors and the bar to offer unsecured interest-free credit in order to undertake their work; there is indeed a solid reason for lawyers not to have a financial interest in the outcome of family law litigation.*

11. Query whether this line of jurisprudence will now include the decision in *LKH v TQA Al Z (Interim Maintenance and costs funding)* [2018] EWHC 1214 (Fam), where (in a matrimonial case) Holman J refused to order H to make interim

payments towards historical costs on the basis he did not accept the submission made on behalf of W that her (top flight, London) solicitors would not continue to act without payment of W's historical costs in full, stating:

> *If a partner of Payne Hicks Beach had made a clear and unequivocal witness statement, to be publicly relied upon, to the effect that they would now, to quote Mostyn J "down tools" or, to use another metaphor, pull the plug on their client unless the past costs are rapidly paid, even if the future costs are provided for, then I would have to consider that. But it would in my view be a regrettable and regressive development in this class of expensive family litigation. I am not prepared to assume, on the basis of a submission, that this very distinguished firm would act in that way.*

12. For a recent decision on legal costs funding, see *Re Z* (above) in which Cobb J considered a claim for interim provision in a case where the mother had returned to the North East of England from the US, where F lived and remained. M claimed c£157,600 for historical costs of lawyers in the US in the UK, a further c£95,000 for costs of the Schedule 1 proceedings to FDR and another c£95,000 for costs of the Section 8 proceedings to the dispute resolution appointment. F offered nothing for the historical costs and £10,000 per month in total on an ongoing basis for the Schedule 1/Section 8 proceedings.

13. in respect of the historical costs, Cobb J reminded himself of what he said in *Re F* (above) and that, in *Rubin* Mostyn J was concerned with historical costs in the context of proceedings which had by then concluded in this jurisdiction, rather than ongoing costs. Cobb J considered that where the proceedings were ongoing, *Rubin* should not be applied so strictly or those firms who were willing to (as he said in *Re F*) "*…soldier on (perhaps somewhat against their better commercial judgment) for the good of the client or the case"* would be materially disadvantaged.

14. Cobb J distinguished the costs incurred by M in the US from those of her current solicitors in the UK. The case would continue whether the US lawyers were paid now or not. However, her UK lawyers should not have to carry significant debt working for the mother unpaid. His award permitted them to be paid their

historical costs (c£86,000) less a notional 30% deduction for standard assessment, reducing it to c£60,000.

15. As to future costs, the Judge awarded M £65,000 (against c£95,000 claimed) for work on the Schedule 1 case to FDR and £25,000 (against c£95,000 claimed) for the Section 8 proceedings, noting that (a) F had offered to attend mediation and (b) the issues were not complex and M indicated she was keen to facilitate contact. Both payments would be made by way of monthly payments: £15,000 for six months.

B. Inter Partes costs orders

16. Within Schedule 1 cases, the Court has power to make a lump sum order to cover an amount of costs OR consider costs in accordance with the relevant practice rules: see Charles, J in *CF v KM* (above) at § 31:

> *Before me, in my judgment correctly, it was accepted that the court has jurisdiction to make an order that provides for the payment of costs incurred in advancing a claim under Schedule 1 because such an order can be 'for the benefit of the relevant child'. It follows (and this was not disputed) that when disposing of all aspects of the present claim the court could make an order for a lump sum for the purpose of funding such costs and is, therefore, not limited to leaving issues relating to such costs to the different discretion to make an order as to who should pay the costs of proceedings.*

17. In any event, costs are in the discretion of the Court (s.51(1) SCA 1981).

18. Costs in family proceedings are dealt with under Part 28 FPR 2010, which imports certain aspects of the CPR 1998.

19. Family proceedings are excluded from the general civil rule (set out in r.44.2(2) CPR) that the unsuccessful party will be ordered to pay the costs of the successful party.

20. However, Schedule 1 CA 1989 cases are *also* excluded from the general financial remedy rule (set out in r.28.3(5) FPR) that the court will not make an order requiring one party to pay the costs of another party (the general rule of no order for costs).

21. On any analysis, therefore, the parties start with a clean sheet and costs are entirely in the discretion of the Court.

22. In "clean sheet" cases, the Court of Appeal considered in *Gojkovic (No2)* [1991] 2 FLR 233 that:

> *…in the Family Division there still remains the necessity for some starting point. That starting point, in my judgment, is that costs prima facie follow the event (see Cumming Bruce LJ in Singer (formerly Sharegin) v Sharegin [1984] FLR 114 at [119]) but may be displaced much more easily than, and in circumstances which would not apply, in other divisions of the High Court.*

23. The Family Division has expressed some doubt about whether the *Gojkovic* 'starting point' should apply to Schedule 1 proceedings, when the applicant mother acts in a representative capacity for the child: *KS v ND (Schedule 1: Appeal: Costs)* [2013] 2 FLR 698 at § 19 (Mostyn, J):

> *An open question since the promulgation of Part 28 FPR 2010 on 6 April 2011 has been whether this principle of costs prima facie following the event has now been resurrected following the exception of these, and the other specified proceedings, from the general rule of no order as to costs now found in r 28.3. I consider it is certainly arguable that this principle should now apply in such proceedings when they are between husband and wife or between civil partners. However I am doubtful whether it should apply in Schedule 1 proceedings where the mother in effect makes her application in a representative capacity for the child. In Schedule 1 proceedings the court should in my opinion start with a 'clean sheet', as Wilson LJ (as he than was) put it in Baker v Rowe [2009] EWCA Civ 1162, [2010] 1 FLR 761.*

24. In exercising its discretion, the criteria to which the Court must have regard are set out at r.44.2(4) and (5) CPR, namely:-

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended the case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

25. Helpful guidance is set out in HHJ Booth's decision on costs in the case of *M v F* [2016] EWHC B12 (Fam), in which he said at §§ 9-10:

[9] The applicable principles appear to me to be as follows:

a. *Costs in family proceedings are governed by the Family Procedure Rules Part 28 and PD28A;*
b. *Although rule 28.3 establishes the principle of no order for costs, PD28A paragraph 4.2(b)(i) provides that Schedule 1 proceedings are excepted from the general rule;*
c. *Applying the reasoning in Judge v Judge [2008] EWCA Civ 1458 and Baker v Rowe [2009] EWCA Civ 1162 the correct starting point is a clean sheet of paper;*
d. *Factors to direct the reasoning on the clean sheet of paper include,*

i. Per Wilson LJ in Judge: the days are gone when judges of the Family

Division would not uncommonly order a wealthy party to pay the costs of an impoverished party irrespective of outcome;

ii. *The correct starting point may well ordinarily be that costs follow the event;*

iii. *In bringing the claim under Schedule 1 the mother was in effect acting in a representative capacity for the child;*

iv. *Even a representative is not immune from the consequences of litigating unreasonably;*

v. *Lawyers are not a charity;*

vi. *The welfare of the child is the court's paramount consideration in administering the child's property – section 1(1)(a) Children Act. Any reduction of the sums awarded for the benefit of the child to pay towards litigation costs would absence something exceptional be impermissible;*

vii. *Any consequences that led to the financial impoverishment of the child's primary carer would be unlikely to be in the best interests of the child;*

viii. *All parties, representative or otherwise, are obliged to help the court further the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved and which includes ensuring the parties are on an equal footing and saving expense;*

e. *Civil Procedure Rules 1998 Part 44.2 provides a useful checklist of generically relevant matters for the court to consider when exercising discretion on the basis of a clean sheet of paper;*

f. *The judicial determination as to costs is likely to be fact specific in each case.*

[10] I start with a clean sheet of paper. The mother succeeded in achieving an award for A that was not available to her without the need to litigate to a conclusion. The mother acted at all times in a representative capacity and has no resources of her own. It would be grossly unfair for her solicitors to be responsible for her costs, subject only to the process of assessment by a costs judge to protect the paying party's interests. The father's proposal that the mother should be left at risk of bankruptcy at the hands of her own solicitors was not a proposal that paid any regard to the welfare of A. Looking at the checklist in CPR 44.2(4): both parties can be criticised for overstating their respective cases, the mother succeeded even if she was not wholly successful and the father did not make an offer to settle in terms that might have been relevant.

26. As conduct is relevant to costs (r.44.3(4) CPR), any offers to settle, whether open or *Calderbank* "…*would be the first things to write on the clean sheet*", but

clearly the economic impact of an order is also relevant (although not in the circumstances of *KS v ND* (above) itself as the debt position of both parties with regard to their costs was equally calamitous).

27. Costs orders *against* an applicant mother are rare, but not unheard of. In various pieces of satellite litigation, the mother in *DE v AB [2012] 2 FLR 1396* had several costs orders made against her (reported as *Y v Z* [2014] EWHC 650 (Fam).

28. See also *Re A* in which the mother's litigation conduct led to an adverse costs order, to be paid on a monthly basis from her PP.

29. In appeals under Schedule 1, costs should follow the event: *KS v ND* (above).

30. Anecdotally, the impact of those cases has already filtered down. It is by no means a given that a claimant will recover all of her costs at the conclusion of a Schedule 1 case, especially if there has been some litigation conduct on her part, for example unfounded allegations of non-disclosure, dogged pursuance of an unmeritorious case etc. There remains a risk (even without those factors) that a claimant may have to fund at least part of her own legal fees.

31. This is reinforced by the recent decision of Cobb J in *Re Z* (above) in which he said at § 39:

> *Deduction for notional standard assessment: I have made a deduction of 30% from the incurred legal costs incurred ([31] above) to reflect a notional standard basis of assessment. In this case, I have taken a broad view about whether the costs are reasonably incurred, reasonable in amount and proportionate to the matters in issue, recognising that any costs which are disproportionate in amount may be disallowed or reduced, even if they were reasonably or necessarily incurred (CPR 44.3(2)(a) and PD 44.6.2), and on the basis that the court would resolve any doubt in favour of the paying party (CPR 44.3(2)(b)).*

32. Further, note the interesting decision of Mostyn J in the recent case of *LM v DM (Costs Ruling) [2021] EWFC 28.* This is not a Schedule 1 case, but a wife's

application for MPS/LSPO under MCA 1973. It is relevant because, like Schedule 1, costs of interim MCA 1973 applications are not subject to the general rule of no order for costs set out in FPR 2010 28.3.

33. Although W did not achieve the quantum sought, the outcome was closer to her position than H's and she succeeded on points of principle which divided the parties.

34. As interim remedies do not fall within the general FPR costs rule, FPR 2010 PD28 paragraph 4.4 - to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs – does not apply.

35. However, when it came to the issue of costs, Mostyn J confirmed that interim applications are not governed by the no-order-for-costs general rule in FPR 2010, r.28.3(5) but by a 'soft costs-follow-the-event principle'. He also found that in priniciple, the outcome (described as "*a win"* for W) justified a costs order in her favour on the standard basis. But nevertheless:

    a. No *Calderbank* offers had been made
    b. Whilst FPR 2010 PD28A para 4.4, did not apply, the obligation to negotiate openly and reasonably is especially important in interim applications, which ought to be pragmatically settled
    c. W made no seriously attempt to negotiate openly and as a consequence H was ordered to pay only 50% of W's costs on the standard basis and warned that:

> *Litigants must learn that they will suffer a costs penalty if they do not negotiate openly and reasonably.*

36. All of that said, a Judge *may* be persuaded to take a different view, bearing in mind M has incurred costs for the benefit of the child. Arguably, unless M's costs are discharged in full, this will simply create another 'need'. See Roberts J in § 72 of *CA v DR* [2021] EWFC 21, in circumstances where F argued that

M had failed to engage in meaningful negotiation and maintained the pension claim which he contends was always "*doomed to failure*":

> *I have some sympathy with those submissions, particularly in relation to the pension point, but it is equally clear that court intervention was likely to be required in any event given the gulf between the parties in terms of the level of provision sought and offered. £12,000 odd is not a significant sum in terms of this father's resources, but it is a contractual debt for which the mother is liable. As such it represents a financial need which she will otherwise carry into the new circumstances of her independent life with E. I would want to see her make that transition on a debt-free basis. Whilst it is a great shame that the parties were unable to settle this litigation at the private FDR which took place this time last year, I do not propose to leave her with that debt. I hope that the father will agree to clear her costs in full on the basis of a payment of £97,000. If he will not, then I will include provision for the shortfall in my order.*

CAPITALISATION – A VERY RARE BIRD INDEED

37. Whilst it was an MCA 1973 cases and not a Schedule 1, in *AZ v FM* [2021] EWFC 2, Mostyn J interpreted s.31 Matrimonial Causes Act 1973 as permitting capitalisation of child maintenance on a variation application.

38. By way of reminder, prior to 1 November 1998 the court was prohibited from capitalising maintenance on a variation application by s.31(5) MCA 1973. This was amended to create exceptions set out at s.31(7A)-(7H), enabling the Court on an application to vary spousal PP to capitalise the PP.

39. Whilst the capitalisation provisions explicitly relate only to spousal PP, Mostyn J consider whether the same provisions enabled the court to capitalise child PP by way of a lump sum.

40. The original order required H to pay child PP at £1,700 per month until the later of the child reaching 18 or concluding tertiary education. The daughter was now 19 and still in education.

41. In October 2017, H had moved to the US and applied to vary child maintenance to £800 per month. The hearing took place in July 2018, judgment was reserved to January 2019 and, due to requests for clarification, the order was not finalised until October 2019. It provided for a modest reduction to the child PP on the basis that "*payments shall be made entirety in advance*" and upon W's agreement not to make any further applications for child PP.

42. H did not make payments and applied for permission to appeal on the basis:

    a. As applications for child PP cannot be dismissed, further claims could follow a capitalised award
    b. The child's circumstances may change e.g. moving to live with the other parent/dropping out of tertiary education
    c. Child PP is always variable and based on the paying parent's income, which may vary

43. As to the jurisdiction to make such an order, Mostyn J found that "*The language is completely clear. Where the application is to vary a periodical payments order in favour of a child of the family then there is power to award a lump sum*".

44. As to the *merits* of making such an order:

    a. An order capitalising child maintenance would be "extremely unusual"
    b. Although a child PP order cannot be dismissed:

    where the court has made a capitalisation of child maintenance it would need a change of circumstances of exceptional magnitude before the court would augment what was intended to be a one-off commutation payment

45. Furthermore, a capitalised award was justified on the particular facts of this case, namely:
    a. Continual litigation on which H "*thrived*"
    b. Repeated default by H in the payment of child PP
    c. The relatively short term remaining (the child being 19 and would be finishing full time education within two years)

46. It was also acknowledged that in most cases, the "*risks and uncertainties*" inherent in capitalisation would lead the court to a usual periodic payment order.

47. But what of position under Schedule 1? Evidently, the s.31 MCA 1973 provisions cannot be utilised, however, that conversely opens up the jurisdiction of the Court: under Schedule 1, there is no limit on further capital claims and the Court can make one or more lump sums at any time. There is no reason why, in principle, the Court cannot capitalise child PP.

48. However, the objections to capitalisation are the same whether it is a Schedule 1 or a MCA 1973 case (inherently variable; depends on F's income; difficult to predict).

49. Furthermore, because the Child Support Act 1991 provides that the CMS jurisdiction to make an assessment can only be excluded for 12 months, capitlisation could only be considered where the CSA 1991 does not apply e.g. because one of the parents or the child was habitually resident abroad, or because the child was over 19.

50. In *MT v OT* [2018] EWHC 868 (Fam) – a Schedule 1 case which shared some similarities with *AZ v FM (*continual litigation, alleged breach of orders, F lived overseas), Cohen J ordered F to pay to M's solicitors a lump sum equating to 5.5 years' PP and education costs on the basis M's solicitors would make monthly payments to M to cover those expenses. He ordered that if there was a surplus at the end of the term, this would be returned to F.

51. However, it would be wrong to place too much reliance on *MT v OT* as F had *agreed* in principle to the capitalisation of payments (§ 4). The process by which Cohen J calculated the capitalised sum due is set out at §§ 33-41 of the Judgment, namely:

    a. He calculated M's income needs at £90,000pa for the 18 months the children would remain at home with her before entering into tertiary education and capitalised that sum at £135,000
    b. He reduced the amount required slightly for the remaining 4-year period when the girls were in tertiary education. Index linked, this required a further £312,000
    c. For the costs of tertiary education (tuition fees and accommodation etc) he added another £158,750

52. With additional sums for future private tuition costs and professional costs as well as a further £50,000 for removals/furnishing the new property and to cover M's debts, F had to pay a total lump sum of £917,062 plus interest.

HOUSING PROVISION

(a) How should the property be held?

53. Provision for housing is usually the starting point in any capital claim under Schedule 1: *Re P (Child: Financial Provision)* [2003] 2 FLR 865.

54. As to whether it is appropriate to rent - rather than buy – a property for the child's benefit, if there are the resources available to provide for the purchase of a property, this is preferred. A settled property will provide a child with stability and security: *Re C (Financial Provision)* [2007] 2 FLR 13.

55. There are three possible orders within Schedule 1 which enable provision for a property for a child:

    a. Lump sum – para 1(2)(c) (which could be used for a housing fund)
    b. Settlement of property – para 1(2)(d) (i.e. on trust for the benefit of the child)
    c. Transfer of property – para 1(2)(e) (i.e. outright transfer to the other parent for the child's benefit or to the child themselves)

56. The family standard precedent orders[1] includes an omnibus for Schedule 1 case (Standard Order 2.2). This is invaluable and sets out in some detail how the various orders might work in practice. The various types of property orders set out in Standard Order 2.2 include:

    a. One parent undertaking to purchase a property and grant a tenancy or irrevocable licence to the other parent
    b. Payment of a lump sum by one parent to the other to purchase a property
    c. Transfer of property (outright or with a charge back)
    d. To settle a property on the other parent (or both parents, or other

[1] www.judiciary.uk/publications/practice-guidance-standard-children-and-other-orders/

trustees) as trustees for the benefit of a child

57. Whichever property holding vehicle is chosen, there are common aspects to each and the standard orders act as a useful checklist to ensure all bases are covered. The common issues which will need to be considered are:
    a. How the property will be selected
    b. How the cost of future repairs/maintenance of the property will be funded
    c. M's right to move during the child's minority and how that will be managed and funded
    d. What will be the determining events (triggers) for reversion to F
    e. The arrangements for any future sale
    f. The terms on which M might acquire an interest

58. Requests to limit the mother's future occupation of the property or for the insertion of provisions which seek to trigger an earlier reversion (for example in the event of the mother's cohabitation) should be resisted. The settled property is for benefit the *child*: as long as the child lives with the mother, the mother's cohabitation or remarriage ought not to affect a settlement of property – see *F v G (Child: Financial Provision)* [2004] EWHC 1848 (Fam) in which Singer J approved a trust agreed on those terms (at § 2).

59. As to which vehicle is chosen, there are no hard and fast rules and this is therefore often the subject of much to-ing and fro-ing in terms of negotiation. The case of *Re C* above compared only the options of renting versus a trust structure. Although Thorpe LJ referred (at § 36 of *Re P* (above)) to Ward J in *A v A (A Minor) (Financial Provision)* [1994] 1 FLR 657 ordering a settlement of property over a transfer of property, this was in the context of M seeking an outright transfer to her, without reversion.

60. Often the facts of the case narrow down the available options. If a paying parent needs a mortgage in his sole name to buy the property, it may be difficult for the property to be held in anything other than in his name and with a tenancy agreement in M's favour. Alternatively, in some cases a trust structure may already exist to make provision for the child and the property can be

incorporated into that existing trust provision.

61. There are clearly risks with a mortgage-free property being held in the sole name of either parent. Whilst they can give undertakings not to charge the property, if they are made bankrupt, the property could be at risk of attack from creditors. However, a trust would usually ensure the property is protected during the child's minority.

62. There may be tax consequences which need to be considered. If F is purchasing a second property, he may have to pay more stamp duty than M, if this is her only property. There are similar considerations with CGT on ultimate disposal if the property is not the paying parent's principal private residence. Will M receive a taxable benefit if she enjoys rent-free occupation? As every case is different, it is advisable to obtain accountancy advice prior to purchase.

63. However, in the modest cases, the court should avoid over-complicating Schedule 1 orders which are simple trusts for the benefit of children until a specified date. See for example Mostyn J in *G v A (Financial Remedy: Enforcement) (No 1)* [2012] 1 FLR 389 at § 42:

> *… I venture to suggest that an order properly drawn by the court is sufficient and indeed preferable method to define a trust in a case of this simplicity and in most s 1 cases where modest provision for a small house or flat is made…*

(b) How long will the home be made available?

64. The provision of a home usually lasts only as long as it will benefit the child and ultimately reverts to the father (see *Re P* and practically every subsequent authority). Those authorities in which there has been an outright transfer to the mother, or provision for the trust property to revert to the child invariably involve *agreed* orders to that effect.

65. This is because, absent 'special circumstances', any settlement of property under Schedule 1 should be expressed as terminating when the child attains

18 or completes tertiary education. In *Re N (Payments for Benefit of Child) [2009] 1 FLR 1442*, this included a gap year, in *A v A* (above) Ward J allowed 6 months after the completion of full time education for the child to 'find his feet'. In the recent case of *CA v DR* (above), a three month period was permitted.

66. The future needs of a carer beyond the child's dependency plays no part in the calculation of a Schedule 1 award: *Re A (A Child: Financial Provision)* [2015] 2 FLR 625. Per Macur J:-

> *The literal or purposive interpretation of Schedule 1 does not permit of the concept of sharing or compensation for the benefit of the child, nor, by the back door, financial provision and compensation for the carer beyond that element attributable to the care of the child during his minority, or other determined duration of dependency. There is no established authority to the contrary. The judgment of Baroness Hale of Richmond JSC in Gow v Grant 2013 SC (UKSC) 1, paras 44-56, which urges reform of the law to re-balance the financial consequences of relationship breakdown in cohabitation, makes this clear, as does the prevailing case law on this point: see: J v C (Child: Financial Provision) [1999] 1 FLR 152 , 159H; In re P [2003] 2 FLR 865 , paras 40, 41, 49; PG v TW (No 2) [2014] 1 FLR 923 , para 105.*

67. On this point, see also the recent decision of Roberts J in *CA v DR* (above) in which the Court refused to require F to make provision for M to enable her to pay into a pension.

68. Note that the Court has the power to revoke/vary its own orders where there is a change of circumstances as in terms of the parent with whom the child lives: see HHJ Booth's decision in *C (A Child) Schedule 1 Children Act Variation.*

(c) Capital/housing provision for adult child?

69. As set out above, 'special circumstances' can take provision beyond the age of 18. This is usually confined to situations in which the child remains in full time education or vocational training or the child suffers from a disability.

70. "Special circumstances" do not include the extreme wealth of the father or the

possibility that the child might not inherit upon his death: *MT v OT (Financial Provision: Costs)* [2008] 2 FLR 1311.

71. However, recent decision of Williams J in *DN v UD (Schedule 1 Children Act: Capital Provision)* [2020] EWHC 627 (Fam), a Schedule 1 case involving a very long relationship and an extremely wealthy father. It was very much a case which turned on its own (unusual) facts, but F's conduct was such that the Court felt able to bring the children's needs within 'special circumstances', adopting the following analysis:

    a. Absent special or exceptional circumstances, capital orders which provided a benefit beyond minority or the cessation of tertiary education should not be made
    b. What amounted to special or exceptional circumstances was restricted – see *Chamberlain* [1973] 1 WLR 1557; *MT v OT (Financial Provision: Costs)* [2007] 2 FLR 1311 and *Re N* (above)
    c. The power to make outright capital transfers existed but would only be deployed in limited circumstances and where the court identified some continuing dependency
    d. Dependency connoted some form of vulnerability or need continuing into adulthood which could be remedied by capital provision
    e. The youngest children carried a vulnerability arising from their childhood as a consequence of the F's abusive/bullying behaviour
    f. F represented an ongoing risk and it was more probable than not that he would seek to resume a relationship with them and persuade them to join his business in Russia
    g. Likely that if they did not willingly return when they reached adulthood he would likely wash his hands of them
    h. At that point they would be vulnerable as maintenance would have come to an end and they would have lost their long-term home
    i. They would need protection which could only be provided by giving them financial independence from the father
    j. F had provided a home for the eldest and told the Court he had intended the same for the middle child – he had set up his other children in Russia

k. The children should not lose out on the possibility as a result of the dispute between M and F or M's decision to seek to protect herself and the children from F
l. Those factors amounted to an exceptional circumstance justifying the making of a capital award which would endure into adulthood
m. Court found the children needed and their welfare justified the provision of a 'financial ultimatum' (FU) fund to enable them to deal with this probable scenario
n. The appropriate capital award was £650,000, which was broadly similar to that which had enabled the eldest child to achieve independence

(d) Second settlement of property?

72. The Court cannot make more than one settlement or transfer of property order against the same person in respect of the same child – para 1(5)(b) Schedule 1. In support of that, *Phillips v Peace* [2005] 2 FLR 1212 confirmed that an additional lump sum could not be ordered to increase the original settlement of property.

73. However, in *MT v OT* [2018] EWHC 868 (Fam) Cohen J did make what appears on the face of it to be a second settlement of property order. In the original *MT v OT* case (reported at [2008] 2 FLR 1311) Charles J made a settlement of property order which included provision for a replacement property in the event of a significant issue arising which reasonably required the relocation of M and two children.

74. M applied to move on the basis that the property was no longer suitable for the family. F opposed the move on the basis this would constitute a second settlement of property order and was therefore prohibited under 1(5)(b) Schedule 1.

75. Cohen J rejected F's submission, holding that the replacement of one property by another does not amount to a new settlement of property. It is simply the

substitution of one property for another.

76. This is entirely acceptable in the context of a Schedule 1 claim where the housing provision may be required for many years. See Roberts J at § 41 of *CA v DR* (above):

> *There will be provision in my order for the substitution of a replacement property at some point in the future should the mother's circumstances change. We are looking at an arrangement which will remain in place for a number of years and it is simply not possible for the court to predict at this stage events which might influence future plans.*

77. Cohen J was not called upon to decide the issue of whether the replacement property could be of greater value than the sale price of the original property. The original property had increased in value to £1.35m and Cohen J ordered that the same amount (and on the same terms) was to be paid to M for her housing fund. Arguably, any further lump sum increasing the value of the settlement of property would fall foul of *Phillips v Peace* [2005].

(e) Quantum and funding

78. The reasonableness of housing and other capital provision under Schedule 1 is considered in the context of the father's resources. The reported Schedule 1 authorities almost always involve very wealthy fathers, where the scale of provision (however generous) is dwarfed by the father's remaining resources.

79. Arguably, the court is so concerned to avoid tainting Schedule 1 cases with the concepts of sharing and compensation that it goes too far in the other direction. This might be considered especially parsimonious in those cases where outright housing provision cannot be agreed and housing is settled for the child only during his minority: in those cases, the property in which the mother and child will live is not much more than a long term investment for the father.

80. Although it is distinguishable on its own facts (the father had dissipated capital during a three year 'sabbatical' following his redundancy and there was,

subsequently, non-disclosure), in one unusual case, the court made an order which required F to pay £250,000 for a property (on reversion) plus a £40,000 lump sum to M, despite the fact it would require him to sell his home, in which he had £358,000 of equity: *DE v AB* (above)[2].

81. *DE v AB* is probably the only reported case in which mortgage capacity was said to feature (the court found that the £68,000 retained by the father would be sufficient to put down a deposit on property only).

82. There are no reported cases in which a father was required to raise a mortgage to pay a lump sum for housing (and the Court would have no jurisdiction to require it in any event) but as far as the *mother's* contribution is concerned, in *DE v AB* (above), Baron J permitted M the option of supplementing the £250,000 housing fund with her own mortgage capacity as long as there was no risk to the amount ultimately to revert to F.

83. Anecdotally (and in more modest, unreported Schedule 1 cases), the court has been prepared to take both parties' mortgage capacity into account as an available resource and then scaled the award for housing accordingly, with such sum as the mother requires to revert to the father when the children reach the age of 18 or cease full time education.

84. The standard precedent orders includes precedents for purchasing a property by way of a mortgage and the standard wording for other associated agreements/undertakings, such as standing as guarantor if a mortgage is to be used to purchase the property.

85. Such cases are unusual, however. Schedule 1 cases involving capital are usually limited to those cases in which F's resources are sufficient to provide amply for the child. In practice, they are sometimes tagged on to a TOLATA

[2] This is an interesting case - at first instance the mother was awarded £80,000 as a lump sum, this was reduced to £40,000 on appeal and then increased again to take account of the non-disclosure subsequently found on the part of the father

case as a tactical measure.

86. This is what happened in the (more modest) recent case of *V v W* [2020] 6 WLUK 292**.** This was a long relationship with 2 children aged 19 and 14. M applied under TOALTA for declaration of interests at 50/50 and an order for sale of their shared property, in which they both continued to live.

87. F asserted the beneficial interests were held 85/15 in his favour and applied under Schedule 1 to hold the property on trust until the later of the youngest child turning 21 or finishing his full time education, with F living in the property to M's exclusion until then. Directions given to ensure the TOLATA and Schedule 1 cases were to be dealt with together.

88. On the Friday prior to the start of the final hearing on the Monday, F conceded the 50/50 beneficial interest point.

89. F initially sought a stay of the Schedule 1 aspect to (a) negotiate and (b) if required, issue s.8 Children Act proceedings. He argued that the Schedule 1 proceedings could not be resolved until the child arrangements had been finalised.

90. HHJ Vincent sitting at Oxford County Court refused a stay because:

a. The Court already had information about what the arrangements were and permitted both to expand on this in their evidence in chief
b. F had had sufficient time to get his case in order if he considered it was fundamental for a s.8 CA 1989 application to be considered first – he knew the final hearing was approaching but had not yet even issued a s.8 application
c. What F effectively sought was an adjournment simply to improve his case
d. This would cause unnecessary delay and uncertainty for the parties and their children

91. The Court concluded that the house should be put on the market as soon as possible. The atmosphere at home was difficult for all and the couple needed to live separately. The child's welfare needs were not being met nor was the Judge persuaded that the child's needs could only be met by staying in the family home. Further:

    a. It was not reasonable to expect M to continue to contribute towards the mortgage in circumstances where she was not living at the house, nor receiving rent from F
    b. At the current time, there was sufficient equity in the house to clear the mortgage
    c. To delay would put M's financial stability at risk
    d. F was unable to provide evidence of how he proposed to find funds to keep the house in a good state of repair if a sale was delayed
    e. F risked defaulting on the mortgage payments.

LIST OF AUTHORITIES

A v A (A Minor) (Financial Provision) [1994] 1 FLR 657
AZ v FM [2021] EWFC 2
BC v DE (Proceedings under Children Act 1989: Legal Costs Funding) [2017] 1 FLR 1521
C (A Child) Schedule 1 Children Act Variation (2018 WL 03649480)[3]
CA v DR [2021] EWFC 21
CF v KM (Financial Provision for Child: Costs of Legal Proceedings) [2011] 1 FLR 208
Currey v Currey (No 2) [2007] 1 FLR 946
DE v AB [2012] *2 FLR 1396*
F v G (Child: Financial Provision) [2005] 1 FLR 261
FG v MBW (Financial Remedy for Child) [2012] 1 FLR 152
French v Secretary of State for Work and Pensions and Beckam [2018] EWCA Civ 470
G v G (Child Maintenance: Interim Costs Provision) [2010] 2 FLR 1264
J v C (Child: Financial Provision) [1999] 1 FLR 152
KS v ND (Schedule 1: Appeal: Costs) [2013] EWHC 464 (Fam)
LKH v TQA Al Z (Interim Maintenance and costs funding) [2018] EWHC 1214 (Fam)
M v F [2016] EWHC B12 (Fam)
MT v OT (Financial Provision: Costs) [2008] 2 FLR 1311
MT v OT [2018] EWHC 868 (Fam)
M-T v T [2007] 2 FLR 925
PG v TW (No 1) (Child: Financial Provision: Legal Funding) [2014] 1 FLR 508
PG v TW (No 2) (Child: Financial provision) [2014] 1 FLR 923
Phillips v Peace [2005] 2 FLR 1212
Re A (A Child: Financial Provision) [2015] 2 FLR 625
Re C (Financial Provision) [2007] 2 FLR 13
Re N (Payments for Benefit of Child) [2009] 1 FLR 1442
Re P (Child: Financial Provision) [2003] 2 FLR 865
Re Z (A Child) (Schedule 1: Legal Costs Funding Order; Interim Financial Provision) [2020] EWFC 80
Rubin v Rubin [2014] 2 FLR 1018
V v W [2020] 6 WLUK 292
Y v Z [2014] EWHC 650 (Fam)

[3] Can be found on Westlaw under reference **2018 WL 03649480** or on BAILII at *http://www.bailii.org/ew/cases/EWFC/OJ/2018/B40.html*