IN THE CENTRAL FAMILY COURT CASE NUMBERS FD01P01372 & ZC18P04077

B E T W E E N:

J

and

K

and

L

The judgments below were delivered in private, but the judge has given leave for this version (but no other version, of the judgments to be published.

J was represented by Mr Frank Feehan QC (instructed by Harrison Clark Rickerbys, Solicitors).

K was not represented at this hearing.

L was represented by Mr Alexander Thorpe QC (instructed by Levison Meltzer Pigott, Solicitors).

WRITTEN JUDGMENT OF HIS HONOUR JUDGE EDWARD HESS

(Handed down by email on 30th December 2021)

INTRODUCTION

1. I am dealing with the latest of a number of financial applications under Children Act 1989, Schedule 1 arising from the relationship between two parents, namely:-

   (i) J (born in 1964 – now aged 57) (herein referred to as 'the mother'); and

   (ii) L (born in 1971 – now aged 50) (herein referred to as 'the father').

2. The background to the current applications is lengthy, but it is appropriate that I set it out in a little detail.

3. The parents commenced a relationship in 1999 which was only fairly fleetingly one of cohabitation and was intermittent in the course of its duration. Nonetheless, the relationship produced two children:-

(i) N (born in 2001 – now aged 20); and

(ii) K (born in 2003 – now aged 18).

The mother has always been the primary carer for the children. Indeed, my view is that she has been devoted to both children and made many sacrifices for them. Neither child has ever had a relationship with the father – this judgment is not the place to examine who should bear responsibility for this, merely to state that it is a very sad fact. To nobody's credit, the children have been brought up against a background of conflict and confrontation between their parents and the evidence I have heard suggests that this has been significantly emotionally harmful to them.

4. No doubt amongst the emotional complications here is the fact that the father had another relationship, at around the same time as his relationship with the mother, with another woman, P. There are two children from this relationship, now aged 20 and 17. It appears that the father has amicable relationships with both these children and that the level of his financial support for them has always been consensual - there have never been any court proceedings. One commenced studies at a university as a medical student in September 2020 and the other currently attends a fee-paying school as he approaches adulthood. The father reports that prior to the older child attending university he was paying a total of c.£33,000 per annum in child support to P, but this reduced from September 2020 to a payment of c.£8,000 per annum directly to the older child plus c.£13,500 directly for the younger child's school fees plus c.£6,000 directly to P by way of child support for both children, that is to say he is currently paying a total of c.£27,500 per annum for these children. He also, a long time ago, invested £100,000 in a property to be occupied by P to house the children. This sum has helped to keep this family in purchased accommodation for the duration of the children's childhood.

5. If the relationship between the father and P and their children has been a good example of how things can and should be done, the relationship between the father and the mother in the present case is the very opposite. It has been characterised by acrimony, confrontational and expensive litigation and a complete absence of father/child contact. It will be seen from the story which I shall unfold below, that this has been a ghastly disaster for all the individuals involved. It does not necessarily follow from the above that the blame for the disaster can all be placed on the mother, as Mr Thorpe would wish me to accept. One of the depressing features of hearing this case has indeed been the repeated and lengthy focus on past battles, often at the expense of concentrating on the current needs of two quite vulnerable now adult children. Where appropriate and possible, I shall comment on what has happened in the past and the financial and other consequences of it, and my assessment of the blame for it, but I fear the past has played too large a part in the current proceedings. It is a fact of life in this case that, after twenty years of litigation echoing Dickens' depressing tale of *Jarndyce v Jarndyce*, the parties are fiercely entrenched and happy to see their legal teams engage in gladiatorial combat on their behalf without much thought for the effect on their children. The father strongly believes that he has made generous long-term provision for N and K and that the mother has been rapaciously greedy. In contrast the mother believes that the father

has made inadequate provision and has unkindly sacrificed her two daughters in favour of his other two children. The reality lies somewhere between these two positions, but in my view both parties are guilty of failing properly to reach out for a compromise. Both parents should feel really quite ashamed at what has happened; but I must remind myself that, however much the parties dislike each other, my principal task is to find a fair result for the children.

CHRONOLOGY OF EVENTS

The 2001 proceedings (FD01P01372)

6. The parents first became engaged in court proceedings in 2001. At this stage in the dispute the mother lived in a rented flat in London W6, but it was common ground that a property should be purchased for the benefit of N, then their only child. On 7th March 2002 DJ Black (as she then was) approved a consent order under which the father was to pay £110,000 to the mother for her to purchase a property (to be held on trust for the father) as well as child periodical payments of £1,300 per month for N. This was a relatively promising start, but things quickly deteriorated. The lump sum payment of £110,000 was not in the event paid (the court ultimately finding that by reason of the fault of the mother in delaying, indeed to some extent obstructing, a property purchase, and with a simultaneous rise in property prices, no purchase was in the end feasible) and the requirement to pay capital was later discharged. The mother has thus remained ever since in rented accommodation. This dispute has undoubtedly left its scars, visible to this day.

The 2004 proceedings (FD01P01372)

7. There was then a brief pause in the litigation during which a reconciliation occurred and K was conceived and born, but it was not long before the relationship broke down again and soon after K's birth that there were more court proceedings, commenced by the mother's application dated 23rd March 2004. These were bitterly contested proceedings during which there no fewer than 22 interim hearings and which culminated in a final hearing before DJ Berry in December 2005. DJ Berry's decision, eventually recorded in an order dated 16th January 2006, represented a substantial defeat for the mother. Although there was a child periodical payments order of £1,145.83 per month per child (a total of £27,500 per annum), the mother's applications for more capital provision and for a school fees order were (for all practical purposes) dismissed. The mother was ordered to pay the father's costs assessed at £60,000, not to be enforced without leave of the court. The costs order has never been paid and in view of the mother's financial position it does seem highly unlikely that this costs order will ever be satisfied. DJ Berry made some trenchant criticisms of the way the mother had presented her case. She was "*prone to exaggeration and allegations she could not substantiate*" and had "*a completely closed mind about everything in dispute in this case*". He found the father to have given his evidence in a "*reasonable manner*". These comments, and the costs order, strongly suggest that DJ Berry felt that the mother had pursued this application in an inappropriate manner. It was clear from her evidence in

the present case that she has never accepted his decision or his criticisms, but DJ Berry was a careful and experienced judge and would not have made these comments without good reason. Whilst I can take this as legitimate criticism of the mother's behaviour at that time, it would not necessarily be correct to assume that all her subsequent behaviour should be similarly condemned.

The first 2006 proceedings (the appeal) (FD01P01372)

8. The mother quickly sought to appeal the decision of DJ Berry and, again, the appeal proceedings were bitterly contested. After another 6 interim hearings, the appeal was substantively dealt with by HHJ Hughes QC in October 2006. Again, the appeal decision represented a substantial defeat for the mother. The appeal was dismissed and, in an order dated 5th October 2006, the mother was ordered to pay the father's costs assessed at £20,000, again not to be enforced without leave of the court. Again, this sum has never been paid and it is highly unlikely that it ever will be. Again, the costs order tells me that HHJ Hughes felt that the mother had pursued this appeal in an inappropriate manner.

The second 2006 proceedings (FD01P01372)

9. These defeats did not discourage the mother for very long and on 6th October 2006, the very next day, the mother made another application for a school fees order and, in the hope and expectation of victory, unilaterally placed the children in fee-paying schools. Again, these were bitterly contested proceedings, this time involving 5 interim hearings. This application was eventually dealt with on 29th July 2008 by HHJ Kaye QC. The mother had some success here, but (to the disappointment of the mother) the father's obligation to pay school fees was limited to the period from 2006 to Summer 2009 and was thereafter to be discharged. It appears that the children now see this battle and this outcome as the father impeding and obstructing the progress of their education and, rightly or wrongly, the pain is still felt by them. They have subsequently observed their mother somehow finding a way to procure some private education, probably at the expense of living at a low level, and it appears they blame their father for this.

The 2011 proceedings (FD11P00050)

10. On 13th January 2011 the mother made an application for an increase in child periodical payments and for further capital provision. On this occasion the application led to a swift consent order approved by DJ Simmonds (as he then was) on 1st February 2011. Under this order the father was obliged to pay a total of £30,736 per annum in child periodical payments (effectively an RPI increase on the 2006 order) until, in relation to each child respectively, the "*relevant child shall attain 17 years or cease full-time secondary education whichever shall be the later*", the total broken down as follows:-

    (i) £10,778 per annum to the mother for each child plus annual RPI increases thereafter; and

(ii) a further £9,180 per annum payable directly to the landlord, but referable to K, such sum to be increased "*to the extent that (the mother's) rent…shall be increased*".

Further, the father had to pay "*for the benefit of the said children a lump sum of £5,000 to enable (the mother) to purchase a car*". There was no order for costs on this occasion. As part of the deal the mother undertook not to issue any further Schedule 1 application for five years.

The 2018 proceedings (ZC18P04077)

11. On 28th August 2018 the mother issued a further application under Schedule 1, both to vary the 2011 order and for further lump sums, both in relation to N and K. By now she had moved her rented accommodation to a different property in London W6 (where she remains to date).

12. The court's first step, in October 2018, was to require the parties to attend mediation; but by February 2019 this approach had failed and the matter has proceeded ever since as contested litigation. There have been interim hearings on this application (for a variety of purposes) on 22 occasions: 18th October 2018, 29th November 2018, 7th February 2019, 13th May 2019, 14th August 2019, 19th August 2019, 27th August 2019, 6th September 2019, 28th November 2019, 20th January 2020, 3rd March 2020, 18th March 2020, 19th March 2020, 24th March 2020, 27th March 2020, 8th April 2020, 9th April 2020, 6th May 2020, 18th May 2020, 29th May 2020, 25th September 2020 and 20th October 2020. Covid has not helped the process, but is not really to blame for the level of conflict. Many of these interim hearings have been expensive and bruising encounters. Some of them were 'won' by the mother, some by the father, but in a real sense both sides have suffered from the appalling bad feeling and expense generated.

13. In the course of these hearings:-

(i) The court made costs orders against the mother, not to be enforced until conclusion of the proceedings, in the sum of £10,000 on 10th August 2019 (DDJ Willbourne) and £15,668.36 on 27th August 2019 (DJ Hudd).

(ii) The court made two 'LASPO' type lump sum orders against the father, the first for £21,000 on 6th September 2019 (Recorder Castle) and the second for £55,000 on 19th March 2020 (DDJ Morris) and both these sums were in due course paid, notwithstanding a lengthy dispute about them and the necessity of enforcement proceedings.

(iii) DJ Hudd made an order on 27th March 2020 for an increase in the child periodical payments order amounting to an additional £700 per month on the first day of each calendar month from 1st April 2020 to the conclusion of the 2018 proceedings.

(iv) On 1st July 2019 the mother issued an application for <u>interim</u> periodical payments for N on the strength of the fact that the 2011 order had now come to an end as a consequence of N completing her secondary education and on the basis that she would be going into tertiary education in September 2019. On 19th August 2019 DDJ Willbourne dismissed the application on its merits (principally because N's 'A' level results had not, on this occasion been good enough to secure her the university place of her choice) but went on, at the invitation of the father's Counsel, to hold that there was no jurisdiction to make an order because N was now an adult. The order of 19th August 2019 was specifically targeted at the interim application (made on 1st July 2019, after N was 18) rather than the main application (made on 28th August 2018, when N was under 18). The mother then pursued an appeal against the order of DDJ Willbourne. This was in due course heard by HHJ Everall QC. He dismissed the appeal by an order on 29th May 2020 and ordered the mother to pay the father's costs of the appeal pursued before him to be assessed on an indemnity basis (the father has offered to accept £27,471, but the issue of quantum remains unresolved). HHJ Everall described the mother's behaviour in pursuing the appeal as being "*unreasonable to a high degree*". HHJ Everall's decision was that the court had no jurisdiction to hear an application by the mother for the benefit of N, and that this principle applied not just to the interim application of 1st July 2019, but also the main application dated 28th August 2018. The mother appealed further to the Court of Appeal, but failed to obtain permission to appeal, King LJ on 20th October 2020 declining to assist and dismissing the appeal on a 'totally without merit' basis. My reading of her decision note is that she was specifically addressing the merits of the interim application as opposed to any wider point, but the combination of these events has caused the mother not to pursue any further remedy in relation to N on the main application. I note that (in paragraph 52 of his judgment) HHJ Everall suggested that N herself could pursue a revival application under Schedule 1, paragraphs 6(5) and (6); but this course has not, for whatever reason, been taken up.

14. There was then a four day final hearing heard by HHJ O'Dwyer on 17th, 18th, 19th and 20th November 2020. He adjourned the case at the end of the hearing on 20th November 2020 (after hearing full evidence and submissions) with the promise of a reserved written judgment. Even at that stage the delays are costs were such that HHJ O'Dwyer commented on 20th November 2020:-

"This particular case, because of its history, unfortunately has been derailed, and I really have a concern as to the Family Court system and finances, as to how a child is left in this situation with parents having spent close on half-a-million in costs between them, with there being no money on the mother's side and a limited amount of capital on the father's side, and the child's needs not having been met on a regular basis. It is an indictment really of the system: delays, multiple hearings, different Judge, and huge legal costs being built up without limit, even though there's no money to pay them… What I want to do, forgive me, what I need to do is…I am going to come back with a date to give judgment on in this, as soon as I can get it in, because it must be before Christmas, I can't bear the idea that it should be delayed beyond that time, but I must make sure it's in the diary to do that…Thank you. J and L, as I said before, I am so sorry you are in this situation. You have two remarkable children together and I am

very anxious that I can facilitate working together so that your daughters can enjoy the right to be brought up and have experience of both of you really. You both obviously are enormously able people really. This litigation has blighted the entire relationship between your daughters and their father…So I do hope that we can come to a resolution that works".

15. HHJ O'Dwyer is a compassionate and careful judge and I have no doubt that these words were both correct and sincerely expressed; but, unfortunately, events, and in particular HHJ O'Dwyer's subsequent illness, has made a bad situation yet worse. He did not produce the written judgment as promised and the summary below provides a summary of what in fact followed:-

    (i) In January 2021 the parties' Solicitors pushed the court for the production of the written judgment and were told, on 29th January 2021 by a member of HMCTS, "*the judge is aware of the situation and you will be contacted by the court in due course*".

    (ii) The matter was pursued again by the parties' Solicitors in February 2021 and on 9th February 2021 a member of HMCTS wrote: "*Your email has been forwarded to HHJ O'Dwyer. You will be notified by the court after we have received directions from the Judge*".

    (iii) The matter was pursued again by the parties' Solicitors on 16th March 2021: *"We note that it has now been four months since the matter was last before the court…however, we are still awaiting the judgment…It is imperative that there is a Judgement in this matter, especially as the application relates to provision for a child under Schedule 1 of the Children Act. We would be grateful if you could revert to us with your confirmation as to when we can anticipate receiving judgement, as a matter of urgency."* Similar messages followed later in March and in April 2021.

    (iv) On 26th April 2021 the court sent to the parties a message from HHJ O'Dwyer himself which read: "*I deeply apologise for the delays in this. As a result of an ongoing illness I have had to rearrange matters with listing. The judgment will be finished on Wednesday 28th April and I shall set down the Thursday the 29th for the formal hand down. There will be no attendance on that day but I shall set up an early return date if required to ensure there are no further delays thereafter. Please do not hesitate to contact me in the meantime."*

    (v) No judgment emerged and the parties further pursued the court. On 12th May 2021 a member of HMCTS responded: "*I have forwarded your correspondence to HHJ O'Dwyer, and he has responded to say he is still unwell and at present is still not fit enough for work. The Judge has noted this matter, to be dealt with urgently upon his return, and he sends his sincere apologies for delay in dealing with this. We will of course update you with any progress on this upon the Judges return to work."*

    (vi) By May 2021 the mother's legal team began to be worried by the fact that K's 18th birthday was fast approaching. They were concerned that, in view of the

similar arguments which had earlier taken place in relation to N, that the father's team would take jurisdictional points if no order was in place by K's 18th birthday. On 26th May 2021 the mother's Solicitors wrote to the father's Solicitors as follows: "*As you may be aware, an issue was previously taken in respect of the parties' eldest daughter, N, in that Orders were being sought for her subject to her 18th birthday. We understand that the parties' youngest daughter, K, will shortly be turning 18. Given that the judgement is still awaited, please could you confirm that no issue will be taken in respect of K turning 18, the financial provision to be made available to her and that the status quo will remain in place until such time that the judgement is delivered. Given that the judgement is still awaited, please urgently confirm your client's position by 4.00pm on Tuesday 8 June at the latest. If you have not confirmed your client's position before the deadline our client will have no choice but to make an application to court for directions in respect of interim payments pending Judgement. Our client will seek her costs of such an application, exhibiting this chain of correspondence. We will of course update you with any progress on this upon the Judges return to work*."

(vii) The reply received did not satisfy the mother's Solicitors and the Designated Family Judge for the Central Family Court, HHJ Roberts, became involved. An application was duly issued on 15th June 2021. This triggered my first involvement with the case as the matter was urgently listed before me on 18th June 2021 at the request of HHJ Roberts. I heard submissions about the possible complications arising from there not being an order in place by K's 18th birthday and my order records, inter alia, the following:-

"K turns 18 (shortly). There is a dispute about the Court's ability to make orders in respect of K on the applicant's application after that date. The respondent contends that the Court will have no power to make any orders on the applicant's application, but that K may thereafter bring a claim in her own right. The applicant contends that the Court has jurisdiction to make an order on her application, because the application was made before K turned 18.

The Court is unable to indicate when HHJ O'Dwyer is likely to return to work and be able to hand down judgment.

In the event that HHJ O'Dwyer does not hand down judgment before K's 18th birthday, the parties anticipate that K will be encouraged by the applicant to make an application in her own right and that the evidence and submissions that were before HHJ O'Dwyer at the Final Hearing will stand and no fresh evidence or hearing will be required.

The applicant agrees that she will apply for housing benefit forthwith (and send a copy of that application to the respondent's solicitors) in the expectation that the application for housing benefit will have been determined by no later than 4pm on 31 August 2021. Upon the basis of the applicant's agreement…the respondent undertakes that, pending judgment, he will continue to make payments in accordance with the Order of District Judge Simmonds dated 1 February 2011 as amended by the Order of District Judge Hudd dated 27 March 2020. This is on the basis that the sums that the respondent shall pay to

the applicant's landlord shall be reduced by the amount of any housing benefit that the applicant shall be entitled to.

In the event that HHJ O'Dwyer does not hand down judgment by 4pm on 31 July 2021, either party may thereafter restore the matter for directions on 7 days' notice to the other party."

(viii) On 22nd July 2021 HHJ Roberts made an order reciting that she took the view "*that it is not going to be possible for HHJ O'Dwyer to produce a judgment as a result of illness*" and directing me to take over the determination of the case.

(ix) I accordingly held a directions hearing on 28th September 2021 (I note that the parties were offered a hearing by me in August 2021, but the non-availability of various involved people caused this to be put back to September 2021). At the hearing on 28th September 2021 it was agreed between the parties that I would determine the case by hearing the audio tapes and reading the documents of the November 2020 trial, by receiving up to date written submissions from both Counsel and by joining an anticipated application by K, in support of which she would file a statement. It was agreed that it would not be necessary or proportionate for me to hear any fresh live evidence or (save for some limited specific items) to order a fresh round of disclosure. It was agreed that the mother's legal team would advance any propositions necessary for me to deal with K's application, even though they were not formally representing her. A timetable was laid down with a view to closing submissions being sent to me by early December and my delivering a written judgment by the end of the calendar year. All the steps have, in the end, been complied with, including K's own anticipated application dated 20th October 2021. I held another hearing on 13th December 2021 at which various loose ends were tied up to ensure that I had the material I needed in time for a five day slot commencing on 20th December 2021 and straddling Christmas to enable me to complete the task by the end of 2021.

JURISDICTIONAL ISSUE

16. The facts of this case raise an important issue as to how Children Act 1989, Section 15 and Schedule 1 should be interpreted in jurisdictional terms. This has been strongly argued before me, although the arrival on 21st December 2021 in the course of my dealing with the case of the Court of Appeal's judgment in *UD v DN* [2021] EWCA Civ 1947 might, had it arrived much earlier, have helped to resolve some of the arguments. Nonetheless, notwithstanding the circulation of the Court of

Appeal judgment to myself and Mr Thorpe by Mr Feehan on 21st December 2021, I have not heard anything from Mr Thorpe in response to the publication of the judgment, so I still need to resolve the arguments.

17. In considering the issues arising here, and seeking answers to the questions raised by Counsel in their excellent respective submissions, I have considered in particular the following materials:-

    (i) The wording of Section 15 and Schedule 1 themselves.

    (ii) The equivalent provisions in Matrimonial Causes Act 1973.

    (iii) The judgment of Williams J in observed in *DN v UD* [2020] EWHC 627 and the judgment in the Court of Appeal on appeal against the decision of Williams J in *UD v DN* [2021] EWCA Civ 1947 (which was published on 21st December 2021, as I was considering this case).

    (iv) Two judgments of Sir James Munby, in *Re N* [2009] EWHC 11 and *FS v RS and JS* [2020] EWFC 63.

    (v) The judgment of HHJ Everall QC in this case on 6th May 2020 and the comments of King LJ in refusing an application for permission to appeal.

    (vi) An article in the Family Law Journal (*Illegitimate Claims? Schedule 1 Claims for periodical payments by parents of adult children* by Richard Harrison QC and Millicent Benson [2019] Fam Law 505).

18. The overall scheme of Schedule 1 is to make available a financial remedy to secure an appropriate level of financial support for a child whose now separated parents were not married which is commensurate with the support that a child of parents who were married but are now divorced or divorcing could expect to receive. As Sir James Munby observed in *FS v RS and JS* (supra)

    "29. The roots of Schedule 1 to the 1989 Act are ancient, but for present purposes I can start with the Law Commission's 1982 Report (Law Com No 118), Family Law: Illegitimacy, *which led to the enactment of the 1987 Act, re-enacted in this respect as Schedule 1. Amongst the Commissioners who signed the Report was another great family lawyer, Stephen Cretney. The Commission's "central recommendation" (see para 6.3) was that (para 6.2):*

    > *"So far as the law is concerned, all children will have equal rights to financial provision from both their parents … What the law can and, in our view should, do is to remove the wholly distinct procedure relating to illegitimate children, tainted as it is by its historical association with the Poor Law and its overtones of criminality."*

    30. They went on (para 6.6):

"It seems to us … that if unmarried parents separate it is only right that the court should be able to make any appropriate order in favour of a child of theirs, just as it could make an order if the child's parents were in the process of divorce or judicial separation."

31. Elaborating this, they said (para 6.30):

"*We think that the inability of a non-marital child (and only a non-marital child) to obtain a new financial provision order in any circumstances once he has attained the age of 18 would conflict with the basic policy of assimilating the legal position of marital and non-marital children. Although the precise method for application varies, the principle of the present law so far as marital children are concerned is reasonably clear, namely that a child of 18 and over should be able, in specified circumstances, to obtain financial provision from his parents where their relationship has manifestly broken down. We therefore recommend that the Guardianship of Minors Act 1971 should be amended to allow a child who has attained the age of 18 to apply to the court in certain circumstances for an order for periodical payments or a lump sum. The result will be to confer on all children of 18 and over, not just those born outside marriage, a new right to apply at their own instance for financial provision if they are undergoing education or training or if there are special circumstances. The children of divorced or divorcing parents already in effect have rights to apply for financial orders by virtue of the decision in Downing v Downing (Downing intervening) [1976] Fam 288 and we can see no sufficient reason why this right should not be shared by other children whose parents' relationship has broken down (emphasis added)."*

19. Some have argued that any difference between the schemes would amount to unlawful discrimination. For example, Harrison and Benson comment (supra):-

"Any regime for child maintenance which operated to the disadvantage of children of unmarried parents would be discriminatory and liable to be adjudged in breach Arts 8 and 14 of the European Convention on Human Rights. The European Court of Human Rights has repeatedly found measures which, without justification, differentiate between legitimate and illegitimate children to contravene the Convention: see, for example, Inze v Austria (Application 8695/79) (1987) 10 EHRR 394; Mazurek v France (Application No 34406/97) (2000) 42 EHRR 170, para 43; and Camp v The Netherlands (Application 28369/95) (2000) 34 EHRR 144. In the Camp case the court held at para 38: 'According to the Court's case-law, very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention.'"

20. Williams J in *DN v UD* (supra) was not, however, persuaded on the unlawful discrimination point (albeit declining to decide the point definitively). His view (with which I agree) was that the remedies (as between the children of married and unmarried parents) can be different without necessarily amounting to unlawful

discrimination, but that it is appropriate for any ambiguities to be construed purposively with the overall scheme of non-discrimination in mind: see *Pepper v Hart [1993] AC 593.* In explanation he referenced the words of Learned Hand J in *Cabell v Markham* (1945) 148 F 2d 737: "*Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."*

21. An important feature of both schemes is that the obligation of a (separated or divorced) parent is to provide financial support for their children, not just when they are minors, but beyond that if one of the 'extension conditions' (as I shall call them) is satisfied. The extension conditions are that:-

    (i) the child is, or will be, or if an order were made without complying with either or both of those provisions would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

    (ii) there are special circumstances which justify the making of an order without complying with either or both of those provisions.

    This wording is, for all practical purposes, identical as between Matrimonial Causes Act 1973 and Children Act 1989, Schedule 1.

22. The case law has established time limitations on how long this obligation will be extended in favour of a child in continuing education. Most authoritatively, in *Re N* (supra), Munby J (as he then was) commented:-

    "I turn to the question of the longstop. I quite take the point that a parent is entitled to be protected against the child's prolonged or indefinite deferral of attendance at university, but one has to bear in mind that in modern conditions an aspiring undergraduate may choose, or if he has to reapply may be compelled, to have a gap year between school and university or, if he has not had a gap year between school and university, may choose to have a gap year between university and starting employment. In principle, it will often be appropriate in cases such as this to provide that the settlement should at the latest conclude at the point at which the child has had a gap year (whether after school or after university) and finished any first degree course."

23. The two schemes, however, have differences in the statutory provisions as to who can apply for such remedies. Can or should the application be made by the child himself or herself or the parent on behalf of the child?

24. Where a child's parents were married then the parent can make such an application on behalf of the child for as long as one of the extension conditions is satisfied: see Matrimonial Causes Act 1973, sections 23 and 29. In some specified situations the child can make an application himself or herself: see Matrimonial Causes Act 1973, section 27(6A) and (6B) and there seems to be a general power to allow an adult child to intervene in divorce proceedings to force a parent's hand: see *Downing v Downing (Downing intervening)* [1976] 3 All ER 474. The remedy of financial support is thus available to be pursued by either the parent for the benefit of the child or by the adult child himself or herself. It is not apparent that the co-existence of the remedies causes any particular problems for the legal system. It is usual in practice for the divorcing parent to make the application for child periodical payments on behalf of an adult child, but the child may also bring an application providing an extension condition is satisfied.

25. Where a child's parents were not married then the broad scheme of Children Act 1989, Schedule 1 is rather more complicated. The scheme identifies two separate categories of application: by the parent on behalf of the child (mostly under paragraph 1) and by the child (mostly under paragraph 2) and the broad policy appears to be pass on the baton (in terms of making the application) from the parent to the child as the child approaches or has reached adulthood. The way in which the 'baton-passing' is articulated in Schedule 1 is, however, not at all straightforward and contains the following features.

26. First, there appears on the face of it to be a prohibition on a parent making a fresh application on behalf of an adult child for an order under paragraph 1 where the child is already 18 at the date of the application. This prohibition emanates from the definition of 'child' under Section 105 and the inter-relationship of this provision with Schedule 1, paragraph 16. Harrison and Benson (supra) have suggested that a drafting error is involved here:-

"The equivalent provision to para 1 of Sch 1 (expressed in almost identical terms) was section 11B of the 1971 Act. Similarly, s 12 of the 1971 Act allowed the court to make orders which extended beyond a child's eighteenth birthday in the same circumstances now permitted by virtue of para 3 of Sch 1. The word 'child' in the context of ss 11B and 12 was clearly used as an expression of the child's relationship with a parent and thus fell outside the general definition of 'child' under s 20.

Thus, the looser definition of the word 'child' in the 1971 Act meant that there was no impediment upon a parent making an application after the child had turned eighteen provided that the requirements as to education or the existence of special circumstances were met.

So far as we are aware, there is nothing to suggest that in passing the 1989 Act Parliament intended to restrict the power of the courts in the 1971 Act to make orders in respect of children over 18. Section 15 of the 1989 Act suggests the opposite conclusion. It is therefore possible that the failure to include para 1 of Sch

1 within the scope of the extended definition of child under para 16 was the result of an error by those that drafted the Act. Could it be the case that para 16 of Sch 1 definition which extends the definition of the word 'child' for the purposes of para 2, should instead have done so for the purposes of para 1? That possibility is made more likely by the striking fact that the word 'child' does not appear at all in para 2; plainly there was no need to provide a superfluous definition of an absent term."

It is certainly a curious feature of paragraph 16 that the word 'child' does not appear at all in paragraph 2 and I agree that the overall scheme might have sat together more satisfactorily if the definition paragraphs had been drafted differently; but Mr Thorpe strongly suggests that the Act is entirely clear and deliberate in its structure here and it would certainly be a bold decision for a judge at my level to rule that a statute had been wrongly drafted and that the reference to paragraph 2 should be read as a reference to paragraph 1. I note also that the Court of Appeal in *UD v DN* (supra) expressly declined to deal with this question – see paragraph 69 of Moylan LJ's judgment. Accordingly, I shall assume for the purposes of this case that there is a prohibition on a parent making a fresh application on behalf of an adult child for an order under paragraph 1 where the child is already 18 at the date of the application.

27. Secondly, an order made while a child is under 18 can continue for as long as one of the extension conditions are satisfied, i.e. well beyond the child attaining the age of 18: paragraph 3(2). Further, an order made before a child is 18 can lawfully require a payment of a lump sum or a transfer of property which takes place after the child is 18: see *UD v DN* (supra).

28. Thirdly, pursuant to paragraph 1(4), the court may vary a periodical payments order under paragraph 1. On one reading of this provision, such a variation application can be made by the parent after the child concerned has reached adulthood. On another reading (the one adopted by HHJ Everall in his judgment of 6th May 2020 in relation to N) this provision is over-ridden by paragraph 1(5) such that the court cannot make such a variation order once the child concerned has reached the age of 18. I should say at this point that my reading of King LJ's comments of 20th October 2020 in the context of the application for permission to appeal could not be construed as expressly endorsing this particular view of HHJ Everall – though she describes his judgment as "*detailed and careful*" she decided the application on other bases and did not specifically rule on this point. I shall return to this point below.

29. Fourthly, pursuant to paragraph 1(5), the court may "*at any time make a further*" periodical payments order or lump sum order under paragraph 1 with respect to the child concerned, but only "*if he has not reached the age of eighteen*". I shall return below to the significance of this provision which is relied upon by Mr Thorpe in the present case.

30. Fifthly, pursuant to paragraph 6(4), a child of 16 or above may himself apply to vary a paragraph 1 periodical payments order previously made on the application of one of his parents.

31. Sixthly, pursuant to paragraphs 6(5) and 6(6), where a paragraph 1 periodical payments order previously made has expired on a date between the child's 16th and 18th birthdays, the child who is over 16 may apply for its revival, but not from a date earlier than the date of the application made by him. This power does not appear to apply, however, where the original order expires after the child's 18th birthday. If the original order is expressed to cease at the conclusion of secondary education or age 18, whichever is the later (and this is what the standard family order provides) the expiry may very well be after the child has attained 18 and the logic of these provisions in such circumstances is that, if they leave it too late, for a combination of reasons, neither the child nor the parent may have any right to bring an application. I am not aware of any reported case where this difficulty has arisen, and it doesn't arise at present, and it would not generally arise for children whose support as minors is dealt with in the CMS system, but it seems to be a possible lacuna in Schedule 1. This raises another question of when precisely secondary education does cease. Is it the end of the school Summer term when the child takes its 'A' levels (typically in mid to late July) or is it the date when 'A' levels are completed (typically mid-June) or some other, possibly later date (for example, child benefit is paid until 31st August of the relevant year)? This might matter to a child with a birthday in the Summer and, as it happens, both N and K fall into this category, although it does not at present arise for consideration.

32. Seventhly, pursuant to paragraph 2(1) and (2), an adult child who satisfies one of the extension conditions above may make an application for a periodical payments order and/or lump sum order against a parent, but note that such an application cannot be made where, immediately before the applicant became 16, a periodical payments order was in force in relation to him: see paragraph 2(3).

33. Eighthly, an order made under paragraphs 2(1) and (2) may subsequently be varied (see paragraph 2(5)) or a further such order made (see paragraph 2(8)).

34. It is not easy to understand why those drafting Schedule 1 did not simply allow a co-existence of parental and child remedies for children older than 18 (or perhaps 16), but they appear to have deliberately chosen a more complicated 'baton-passing' scheme. As well as the general points I have made above, the scheme certainly has some potentially curious and complicated effects when applied on a close analysis to the unusual facts of the present case, and I want to make the following points:-

(i) The existing periodical payments order in favour of K, i.e. the 2011 order of DJ Simmonds, was in existence when K attained the age of 16 in 2019. The existence of the ongoing order at K's age 16 thus appears, by virtue of paragraph 2(3), to prevent her bringing an application under paragraph 2 for a periodical payments order and a lump sum order.

(ii) The DJ Simmonds order was varied when DJ Hudd made an interim order on 27th March 2020 increasing the quantum of child periodical payments order in relation to K by £700 per month on the first day of each calendar month from 1st April 2020 "*until the conclusion of the present proceedings*". In my view this order had the effect of extending the periodical payments order in relation to K until and including now. By virtue of paragraph 6(4) K has the prima facie right to apply to vary this ongoing periodical payments order. Mr Thorpe has not sought to challenge this assertion, but see below for further discussion.

(iii) In any event, on this basis K has no right to bring an application herself for a lump sum order and her application dated 20th October 2021 must (at best) be treated as having been made under paragraph 6(4) and only relating to periodical payments orders.

(iv) The mother's application in relation to K for a variation of the DJ Simmonds periodical payments order (as later varied) and for further lump sum orders is dated 28th August 2018. At this time K was aged 15. For the reasons described above it has not yet been determined and she has turned 18 in the meantime. At a first reading of paragraphs 1(3) and 1(4) the court can, even now, determine this variation application; but this brings us back to paragraph 1(5)(a). Mr Thorpe suggests, and in this respect has the support of HHJ Everall in his judgment of 6th May 2020, an interpretation of paragraph 1(5)(a) which wholly knocks out the mother's claim. He says that the words "further order" in paragraph 1(5)(a) include the variation of an existing order and thus, once an original order has been made, no variation order and no further lump sum order can be made once the child attains the age of 18. Further, he argues that in this context it is the date of the order which is important and not the date of the application. If he is right on both these points then the mother's entire application should be dismissed.

(v) I have, with all due respect to Mr Thorpe's powerfully presented argument, and also with all due respect to HHJ Everall's carefully considered judgment of 6th May 2020, reached a different conclusion from both of them about paragraph 1(5)(a). In this respect I prefer Mr Feehan's submissions.

(vi) First, in my view a variation order does not fall within the meaning of "further order" in paragraph 1(5)(a). In my view paragraphs 1(3) and 1(4) make it clear that a variation application (as opposed to a fresh application, for example after the expiry of an earlier order) can be pursued at any time.

In my view that includes the period from the child attaining the age of 18 to the child ceasing to satisfy one of the extension conditions. To decide otherwise produces an absurd result as is illustrated by the facts of this case. Mr Thorpe's construction of the paragraph 1(5)(a) prohibition would, it seems to me, apply just as much to an application made by an adult child of over 18 under paragraph 6(4) (because paragraph 6(4) confers on the child the right to make a paragraph 1 order) as it does to the mother's application. In such a scenario nobody would have a right to make a variation application and the order would continue even if everybody thought it should not. My preferred statutory construction, which is in my view consistent with making sense of the statute, but also taking a purposive approach to secure (as far as it is consistent with the clear wording of the Act) similar rights to children of unmarried parents as those held by children of married parents.

(vii) Secondly, it seems to me wrong in principle (and also inconsistent with a purposive approach to the statute) to exclude the mother's right to seek orders which she had at the time of the application on the basis of effluxion of time. This seems particularly unfair where the effluxion of time is no fault of hers. Had HHJ O'Dwyer dealt with the application, as expected, within a few weeks of the November 2020 hearing he would (without argument) have been able to vary the order of DJ Simmonds, if he so chose, right back to the date of the application (see paragraph 6(3)) and right forward to the end of the period when K ceases to satisfy the extension conditions. Further, he would have been able to make such lump sum orders as he thought fit. In my view it would be wrong to deprive the court of those powers, just because of the effluxion of time. In reaching this conclusion I want to express agreement with the views of Williams J in *DN v UD* (supra), in particular the following passages:-

"The effect of Sch 1, para 3 which permits the court to backdate a periodical payments order to the date of the application and to extend it beyond the child's 18th birthday would support the construction that an order for periodical payments can be made for the first time after the child reaches the age of 18 provided that the application was made prior to the child's 18th birthday. The use of the word 'is' in paragraph 3(2)(a) would also support the construction that an order can be made at a time when the child is 18. It seems to me that if the court has the power to make a periodical payments order in respect of a 'child' who has reached the age of 18 where the application was made prior to the 18th birthday that the court would also retain the jurisdiction to make other species of order under para 1. Para 3 is looking at the duration of orders in terms of commencement and end date rather than the jurisdiction of the court to make any order at all. As a matter of logic if educational or special circumstances apply so as to justify the court making periodical payments orders which extend beyond the child's 18th birthday those special circumstance would as a matter of

fact (albeit not of law) be just as relevant to the issue of whether they provided the factual foundation for a capital order. If Parliament had intended that the court should lose the ability to make an order when the child reached the age of 18 in the course of pending proceedings it surely would have addressed the issue. If the court lost the power to make the order it would require the court to then join the child to the proceedings or at least to ascertain whether they wished to then make their own application. I do not think it can be right that procedural delay the fault for which might lie entirely at the door of either the court or of the respondent should have the potential to 'knockout' an application which was legally permissible and which was evidentially sustainable at the time of determination. Such an interpretation would potentially breach both the article 6 ECHR and article 8 ECHR rights of the applicant and the children and would be contrary to their welfare, whether as a primary consideration or simply as a consideration. It could in any event be partially remedied by joining the adult child as a party and deeming an application to have been made by them pursuant to Sch 1, para 2 albeit there would be a more limited range of orders available."

(viii) Although Williams J is discussing here a 'first time' order, in my view the logic of this thinking applies just as much to the circumstances in the present case where we are not dealing with a first order. I do not agree with Mr Thorpe that the wording of paragraph 1(5)(a) provides a clear contrary view from Parliament and construe the ambiguity in favour of upholding the existence of a jurisdiction which would otherwise exist.

(ix) The logic is similar to that applied by Thorpe LJ in the Court of Appeal in *Jones v Jones* [2000] 2 FLR 307 where he said (in the context of applications to expend spousal periodical payments orders under Matrimonial Causes Act 1973, section 31 and where Ward LJ had expressed a tentative view that not only the application must be issued, but also determined before the expiry of the term):-

"(32) This seems to me to be a very straightforward point, and one that is really not capable of much elaboration. I remain of the view that the district judge had the power to make the order that he did in June 1999, precisely because the application invoking the court's statutory power was issued during the undisputed life of the periodical payment order. That is precisely the reason that seemed to me good in 1994 in the days of Richardson v Richardson and it is precisely the reason it seems to me still good, despite the observations of Ward LJ in G v G.

(33) I would only add that were Ward LJ right in his provisional view, there would be considerable practical inconvenience as well as pressure on the court, as the experience of the practitioners related to us by Mr Todd demonstrates. If there is a clear cut-off date for the exercise of some statutory right, the issue of the application is a step of clarity and simplicity easily achieved, which signals to the court and to the other party that a

jurisdiction is invoked. A requirement that only some order of the court would have the effect of extending a pre-existing order might lead to all sorts of strategy and jockeying between the parties into which the court would be inevitably drawn, with the obvious risk of unnecessary applications and the application of unnecessary pressure on the court to give listings in priority to other cases, perhaps more genuinely urgent, in order to save what would otherwise be a guillotined right."

(x) This view has now received Court of Appeal approval in *UD v DN* [2021] EWCA Civ 1947 where Moylan LJ said:-

"I find myself in the same position as Thorpe LJ in that, although we are concerned with a different statutory provision, I also consider that this is a straightforward point which is not capable of much elaboration. In my view, if the application invoking the court's statutory power was issued before the relevant child attained the age of 18, the court retains the power to make an order after the child has attained that age. The court's jurisdiction is based on the relevant child being under the age of 18 at the date of the application. I consider that the language of paragraph 1 is directed to that date and not to the date of the order. As Mr Howard submitted, the court's power is established, as provided for by the opening words of paragraph 1(1), on an application being made by parent.
64. I also consider that there would need to be a clear express provision before a parent could properly be deprived of an accrued, but undetermined, right to financial provision simply because their application remained undetermined at the child's 18th birthday. The court's jurisdiction has been invoked, the right to have that application determined has accrued and, to repeat, it would seem to me to require a very clear express provision to deprive the court of the power to make orders derived from that existing jurisdiction."

(xi) My overall conclusion is that I do have the jurisdiction to hear the mother's variation application of 28th August 2018 in relation to K in its entirety. I can vary further the DJ Simmonds periodical payments order of 2011 (as subsequently varied by DJ Hudd) in relation to K. I may vary it (if I so choose) backwards to the date of the application on 28th August 2018 and forwards to the date at which K ceases to satisfy the extension conditions as interpreted in *Re N* (supra). I may choose to vary it on the mother's application or on K's application (I do not think this distinction makes a great deal of difference in the present case). I consider that I also have the power to award lump sums for K on the mother's application.

(xii) It is also my view (without at all wishing to create more argument between the parties) that the same thing applies in relation to N, although (probably because of the way the judgment of HHJ Everall was expressed) no remedies were in the end pursued by the mother on behalf of N at the hearing in November 2020 or subsequently and no separate application has been made by N under paragraphs 6(5) and (6) or otherwise. The mother repeatedly said in her evidence: "*this is not about N, this is about K*". I shall

proceed in this judgment on the basis that the father will not be obliged to make any provision for N, and shall take this into account in my overall decision, though I cannot but observe that this outcome creates a degree of unfairness as between N and K.

FACTORS TO BE TAKEN INTO ACCOUNT IN DETERMINATION

35. In deciding what orders in fact should be made I remind myself of Children Act 1989, Schedule 1, paragraphs 4 to 6:-

"4(1) In deciding whether to exercise its powers under paragraph 1 or 2, and if so in what manner, the court shall have regard to all the circumstances including—
(a)the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;
(b)the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;
(c)the financial needs of the child;
(d)the income, earning capacity (if any), property and other financial resources of the child;
(e)any physical or mental disability of the child;
(f)the manner in which the child was being, or was expected to be, educated or trained.

5(1)Without prejudice to the generality of paragraph 1, an order under that paragraph for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses—
(a)incurred in connection with the birth of the child or in maintaining the child; and
(b)reasonably incurred before the making of the order,
to be met.
…
(5)An order made under paragraph 1 or 2 for the payment of a lump sum may provide for the payment of that sum by instalments.

6(1)In exercising its powers under paragraph 1 or 2 to vary or discharge an order for the making or securing of periodical payments the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order."

36. In construing these statutory provisions there are some common themes in the case law (for example *Re P* [2003] 2 FLR 865) which are adequately summarised in this extract from the *Dictionary of Financial Remedies* (2021 edition):-

"In deciding what provision to make the court must have regard to all the circumstances of the case including the income, earning Children Act 1989 Schedule 1 Applications 15 capacity, resources and needs of the parents and the

relevant child together with any physical or mental disabilities of the child. The welfare of the child is not, by virtue of the statute, either the court's paramount or the court's first consideration, but welfare will have 'in the generality of cases, a constant influence on the discretionary outcome' and the child is 'entitled to be brought up in circumstances which bore some sort of relationship to the father's current resources and the father's present standard of living' with the caveat that 'the court must guard against unreasonable claims made on the child's behalf but with the disguised element of providing for the mother's benefit rather than for the child'. 'No great significance should be attached to the issue of whether a pregnancy was planned or otherwise'. The duration of the parents' relationship is not in itself a relevant factor, but may be relevant to the extent that a child has over time become accustomed to a particular standard of living which affects a reasonable assessment of his needs".

37. Another authority which does not appear to have been cited in the case by anybody is *CB v KB* [2019] EWFC 78 where Mostyn J suggested: ""*I suggest that in every case where the gross annual income of the non-resident parent does not exceed £650,000, the starting point should be the result of the formula ignoring the cap on annual gross income at £156,000*".

OPEN POSITIONS OF THE PARTIES

38. I remind myself that the current order of DJ Simmonds has been subject to various changes arising from the children growing older and for RPI inflation and rent increases since 2011. As far as I can ascertain from the evidence available to me, the figures currently stand as follows:-

    (i) The payments for N ceased when she left school in Summer 2019. She commenced a course at university in September 2020, but there is currently no maintenance being paid by the father to her or for her benefit and has not been since Summer 2019. For the reasons I have explained above it has been assumed in the November 2020 hearing that she was no longer part of the case, but (for the reasons set out above) I do not think this was necessarily correct. In this respect it could be said that the father has had something of a windfall.

    (ii) The payments for K have reached £1,122 per month as a result of RPI inflation (though this figure is due for RPI adjustment in the next few days and the RPI level currently stands at 4.6%). This figure has added to it the £700 per month added by DJ Hudd, at least until the conclusion of these proceedings, to make a current total of £1,822 per month or £21,864 per annum. It may be said that the DJ Hudd variation to some extent compensates the mother for the N windfall.

    (iii) The rent on the mother's property currently stands at £23,940 per annum (£1,995 per month). This is subject to the Universal Credit point, which I discuss further below.

(iv) Accordingly, the father's current obligation (subject to the Universal Credit point) is to pay £45,804 per annum (£3,817 per month).

39. I do not have very accurate costs estimates in this case, but the evidence I do have suggests that the amount of money spent on costs in all the litigation between the parties over 20 years in general and in particular since the August 2018 application has been horrendous and wholly disproportionate to the size and nature of the dispute:-

(i) In very broad terms the father has spent a total of c. £600,000 to £700,000 over the twenty years of litigation on legal costs, including c. £250,000 on the current application by November 2020 and perhaps c. £300,000 now.

(ii) I have not been given figures for the equivalent spending by the mother over twenty years, but the figures for the current application are not dissimilar to those of the father. They were c. £260,000 by November 2020 and must be in the region of £300,000 by now. Although this is not very clearly broken down in the papers, I think the reality is that she simply has not paid quite a portion of these costs and has relied upon lawyers having sympathy with her position and taking a risk on whether they would ever actually be paid.

(iii) Any objective observer would be bemused and horrified as to how it has happened that c. £600,000 has been incurred in this application in costs in argument over child support; but the fact is that it has happened. The combative attitude of both of the parents and their legal teams are, in my view, the main cause of this, but (having now heard the tapes of all the oral evidence in this case, and possibly with the benefit of hindsight) I think some of the case management decisions in this case could have been much tighter. I do not think it was helpful, for example, for permission to have been given to Mr Thorpe to cross-examine the mother for nearly a day and a half and to pursue a lot of avenues in relation to past battles which were strongly felt but, in my view, ultimately pretty unhelpful to resolving the issues in the case. I note also that there was never an FDR in this case, and although I dare say that the trenchant position of the parties may have undermined that anyway, I am thinking that one should perhaps very rarely assume that this is the case.

40. On 23rd March 2020 the father offered the mother a lump sum of £150,000 on the basis that:-

(i) this 2011 order would continue unchanged for K until she ceased tertiary education; and

(ii) there would be an order under Children Act 1989, section 91(14) preventing all future applications by the mother without leave of the court.

41. This was rejected by the mother who, in a letter dated 18th May 2020 offered the following compromise:-

(i) The father should pay a series of lump sums totaling £36,172.75 made up of the following constituent parts:-

(a) £12,000 to enable her to purchase a car;

(b) £7,657.92 to enable K to purchase various educational equipment;

(c) £3,200 to enable K to receive tuition to enable her to retake her Mathematics GCSE;

(d) £5,913.83 to pay for various expenses incurred on the mother's credit card for K; and

(e) £7,401 to pay for various replacement furniture for the mother's home.

(ii) The father should pay child periodical payments up to the conclusion of K's tertiary education up to first degree level, including one gap year, the quantum being made up of two elements:-

(a) a basic sum of £30,000 per annum (£2,500 per month), increasing by RPI inflation year on year, and during tertiary education 50% of this should be paid directly to K and 50% to the mother as a roofing allowance;

(b) a rental element consisting of £23,940 per annum (£1,995 per month), increasing with any rent rises in the mother's property up to a maximum cap of £2,500 per month.

(iii) In addition the father should pay child periodical payments in the form of a carer's allowance ending on K commencing tertiary education in the sum of £10,000 per annum (£833.33 per month), increasing by RPI inflation year on year.

(iv) In addition the father should pay child periodical payments for private tuition ending on K ceasing secondary education in the sum of £4,998 per annum (£416.50 per month), increasing by RPI inflation year on year.

(v) I note that the total of all these proposed periodical payments was £68,938 per annum (£5,744.83 per month).

42. In a trenchantly worded letter dated 6th November 2020 the father's Solicitors withdrew all previous offers and made the following further offer:-

(i) There should be no lump sum orders.

(ii) The 2011 order of DJ Simmonds should remain in place (with DJ Hudd's uplift falling away). This order was expressed to end when K ceased secondary education.

(iii) N and K should be told they were free to contact the father if they wanted further assistance. With all due respect to the father's legal team, the idea that the onus would be placed on N and K to approach their father directly on an informal basis with the expectation that an amicable discussion would ensue was really quite unrealistic on the facts of this case, as HHJ O'Dwyer observed in the course of the evidence in the case.

43. In fairness to Mr Thorpe, at the end of the November 2020 hearing he produced a draft order in which he articulated his case in a rather different way than the 6th November 2020 letter, I think picking up on some of the comments which had been made in the course of the hearing by HHJ O'Dwyer. In this draft order he increased the offers above the 6th November 2020 offer to the effect that his open position was now that:-

(i) the rent portion of the 2011 order (paragraph 2(ii) of the order) should be extended to K's 21st birthday save that the mother should be expected to apply for housing benefit/universal credit and the father's obligation is only to pay the shortfall;

(ii) the other portion of the 2011 order (paragraph 2(i) of the order, not including the DJ Hudd uplift) should be extended to the end of K's tertiary education (not including a gap year) and 50% of these sums should be paid directly to K and 50% retained by the mother as a roofing allowance and RPI inflation uprating should continue to apply;

(iii) from now until K commences tertiary education the father will pay £200 per month to her to support her personal expenditure;

(iv) in the event that K attends tertiary education she should take advantage of available student grants and loans, but separate negotiations should take place directly between K and her father about such additional support necessary to take her to a reasonable level;

(v) the father would pay for a new car for K up to a cost of £9,000 provided that the payment was made directly to the car dealer (rather than to the mother or K); and

(vi) the father would pay for a new Macbook and i-Pad for K.

FINANCIAL POSITION OF THE PARTIES

44. It is relevant for me to consider the financial position of the parties as it is now and also as it was when earlier orders were made.

45. This exercise is to an extent handicapped by the litigation chronology in a number of ways. We have a good picture of how things were in 2005 from the judgment of DJ Berry from December 2005. There was no real disclosure in 2011 (nor do I have any Forms D81 from that time) and so we are a little in the dark as to the situation then, save that it was logically a staging post on the journey between 2005 and the present. We have a fair amount of disclosure up to November 2020, but, by agreement, there has been only a limited amount of post-November 2020 disclosure. Despite these shortcomings, I think it is reasonably possible from the mass of material in the bundle to gain a broad but sufficiently accurate picture of the parties' finances as they developed over the years of this dispute and as they are now. The following is an attempt to summarise the position.

The mother

46. The judgment of DJ Berry from December 2005 describes the mother's position at that time as follows:-

    (i) The mother lived in rented accommodation in London W6 which had a rent of £9,060 per annum (£755 per month).

    (ii) She worked part-time as a post-natal support consultant earning c £2,000 per annum net.

    (iii) She received state benefits consisting of child benefit at c £1,500 per annum and Tax Credits at c £6,000 per annum.

    (iv) She had a significant amount of personal debts at c. £100,000 (including outstanding legal costs).

    (v) The mother was the primary carer for two then very young children who had no contact with their father.

    (vi) DJ Berry held in 2005 that it was the mother's fault that the 2001 scheme for purchasing a property had failed and that purchasing a property was no longer a feasible option on the figures as it was then. The mother has not sought to revive this issue, save to draw attention to the different living standards of the two households. It was common ground at the November 2020 hearing that there was no suggestion that a property would be purchased for the mother.

47. Bringing her position up to date as best I am able on the information provided, her position has moved on to the following:-

(i) The mother continues to live in rented accommodation at a different address in London W6 which has a rent of £23,940 per annum (£1,995 per month). Although the father has criticised the mother for giving up a protected tenancy in favour of an assured shorthold tenancy, it does not appear that in the event this has made much difference to the present case in quantum terms. In any event the mother had strong adverse views about the conditions of the earlier property and my view is that, within reason, she was entitled to move to a property of her choice at a broadly comparable rent. Having heard her evidence as to why she moved property I make no criticism of her in this regard, in particular in the context of the standard of the father's own home.

(ii) The mother continues to be the primary carer for N and K, though they are now both adults:-

(a) N left school in Summer 2019, had a gap year and now attends university. She has some health issues, but these do not seem to be impeding her current academic progress. I have little information about her personal or financial situation, but the mother said in her oral evidence that N has taken out student loans. I do not know at what level these loans have accrued, but it is of course fairly common amongst students in the current era to have such loans.

(b) K left school in Summer 2021. She suffers from a range of debilitating illnesses and conditions, including Chronic Fatigue Syndrome /Myalgic Encephalomyelitis (CFSME), Postural Orthostatic Tachycardia Syndrome (POTS) and General Anxiety Disorder. The symptoms include fatigue, sleep disturbance, poor concentration, headaches and joint and muscle pain. These are described in the written evidence, including in the SJE expert reports of Mr David Vickers (a Consultant Community Paediatrician), who has made the following comments:-

"K is likely to recover in the longer term, but it is not possible to be certain that this will happen, merely that it is the most likely outcome…it is more likely her recovery will be measured in years as opposed to months…there is no recognised cure for CFSME, but there are a number of treatment approaches that may help manage the condition…I do not think the issue of whether funding should be ensured for tertiary education is one that lies within the area of medical expertise other than to note that…it does remove anxiety about affordability…it is helpful for K to have care by an adult, but equally she should be encouraged to be independent as much as she is able. This does however mean that K needs to be able to call upon the help of an adult as and when it is needed…K has a chronic health

condition, which can fluctuate in its severity. As such she does need care over and above the level provided to a normal child. In particular, if her symptoms increase, she may require extra support with normal activity. K…increasingly will be developing her independence, and as such her ability to look after herself. To do this most effectively the establishment of routines and developing her skills in self management of her symptoms are important. It is likely recovery is assisted by self management, as K, as the person with the condition, is most aware of the impact of activities or events on the level of her symptoms. The nature of K's condition means that she is likely at times to be dependent on others to support her in both managing her illness and undertaking daily activities. It is still therefore for K to have support of an adult, but equally she should be encouraged to be independent as much as she is able".

I have listened to his oral evidence and my view is that, overall, he restated his written evidence and nothing very significant came out of the cross-examination and I have no reason to disagree with anything which he said.

(c) Despite these difficulties K gained three 'A' levels in Summer 2021 (a B in Psychology, a C in English and a C in Biology). She could have gone to one university in September 2021 to study English with Philosophy; but chose instead to do some retakes and try to get a place at another university to read Psychology. Her statement suggests that the absence of the resolution of this case with the consequent shortage of funding has prevented her enrolling for the retake course and this "*is adding to my mental and physical health challenges*". As a result of this she may choose do a one year foundation course at another university from September 2022 before commencing an undergraduate course in September 2023. Although not inevitable, I think it is likely on a balance of probabilities that K will enter tertiary education in September 2022 in some form or other and she is likely to take three or possibly four years to attain a first degree.

(d) K would also like to recommence counselling sessions, which she says she can no longer afford and she has set out some detailed schedules of her likely costs at University.

(e) There is still no contact between the children and the father and, sad though it is to read, the tone of K's recent statement of 20th October 2021 suggests that it would be naïve to believe there is any likelihood of meaningful contact commencing any time soon, if ever.

(iii) The mother has become unemployed and says that she cannot work for the foreseeable future because she has to support K with her health difficulties. If K recovered she might be able to earn £25,000 to £30,000 per annum gross, or

possibly a little more, but this is not on her immediate horizon and she has vehemently adhered to her position that her first duty is to K and that K is really quite ill at present. Having heard the mother's evidence I accept that K's difficulties provide a reasonable explanation for the mother's decision not to work at present. There is a reasonable hope that this will in due course change, but probably at least not until K is properly launched in tertiary education.

(iv) The mother has an eight year old car with c 40,000 miles on the clock worth perhaps (on the mother's case in November 2020) c. £1,500. It is described by K as unreliable.

(v) The mother continues to receive state benefits, but the nature of these has changed since August 2021. Her child benefit ceased at the end of August 2021 when K turned 18 and left school. Since August 2021 the mother has also ceased to receive Personal Independence Payments and a Carer's Allowance for K (although I believe that K does receive some benefits in this respect these are not recorded in her October 2021 statement) but has instead received Universal Credit at the rate of £2,215 per month, £1,920 per month of which is attributable to rent (leaving a rent deficit of £75 per month). I note that if the mother did obtain work she would lose her Universal Credit, not necessarily £ for £, but certainly significantly. A child periodical payments order would not affect her Universal Credit. It is important that I do not structure the order in a way which unduly inhibits the mother from returning to the workplace. When K is no longer in education she will have to support herself in any event.

(vi) The mother had a significant amount of personal debts. They are not clearly defined in the papers, but they are huge in the context of her general financial position, but the most substantial ones by far are monies owed to her own lawyers (more than £100,000, perhaps in the region of £150,000 to £200,000) and what the mother owes the father in unpaid costs orders (more than £130,000 plus accruing interest in unpaid costs orders - Mr Thorpe has suggested that the total is in excess of £200,000, though they are highly unlikely ever to be enforced in practice). She has other non-costs-related debts (a figure was not very precisely put on them, but my impression is that they were less than £10,000). HHJ O'Dwyer noted sympathetically during submissions the mother's difficulties in coping with this "*terrible drowning debt*", although the reality is that most of her debt arises out of this litigation.

(vii) DJ Berry held that it was the mother's fault that the 2001 scheme for purchasing a property had failed and that purchasing a property was no longer a feasible option on the figures. This decision is not in issue before me.

The father

48. The judgment of DJ Berry from December 2005 describes the father's position at that time as follows:-

(i) The father lived on his own in a terraced house owned by him in Chiswick worth £550,000, subject to a mortgage of £420,000.

(ii) He owned a second property in London worth £585,000, subject to a mortgage of £331,000 and with a significant latent CGT liability.

(iii) He worked in the world of finance and earned a basic salary plus bonus and stock option package producing an income of c £200,000 per annum net.

(vii) He also had a significant amount of personal debts, at c. £100,000 (including outstanding legal costs).

49. Bringing his position up to date as best I am able on the information provided, his position has moved on to the following:-

(i) The father is now married and lives with his wife at an undisclosed address in a house worth £4,000,000 to £4,500,000, subject to a mortgage of c. £2,500,000. I note that, at some stage between 2005 and 2018, the father increased his mortgage from c. £420,000 to c. £2,500,000, although there is very little information in the papers about how and why this happened nor what were the father's wife's involvement with this nor why this was needed. The net equity is therefore £1,500,000 to £1,800,000. His wife has a potential 50% claim to this property, but it is not clear to me that the property is in joint names (his 2018 Form E suggests otherwise when it says "*my share is 100%*").

(ii) He continues to own the second property in London, now worth £1,150,000 to £1,500,000, subject to a mortgage of c. £629,000 and with a significant latent CGT liability such that the net equity is c. £300,000 to £500,000. This property is let, producing a rental income of c. £20,000 per annum net.

(iii) He continues to work in the world of finance earning a basic salary plus bonus and stock option package. The evidence is that his earned income is at a similar level to what it was in 2006, c. £200,000 to £250,000 per annum net, depending on the level of bonus. My impression is that his income varies from year to year, but has generally been within this bracket.

(iv) I have noted above the decision of Mostyn J in *CB v KB* [2019] EWFC 78. This is sometimes regarded as a useful mathematical starting point from which to make an assessment of what somebody earning above the maximum CMS figures should be paying by way of child maintenance. This is complicated by the facts of this case in a number of ways. We don't have

a very accurate up to date figure for the father's gross income. In any event it does seem to move about as his performance bonuses vary. Further, he has four children to support from two households (neither of which is his own household and only two of whom he has contact with). Further, two of the children are at University and one is at a fee-paying school, for which the father makes payments in lieu of direct periodical payments. With all those caveats it is interesting to note, but probably not of overwhelming significance, that on the basis of a mid-way position on earnings the father's total income (from earnings and rent) is c. £245,000 per annum net or (using At a Glance tables) c. £444,000 per annum gross and that 15% of £444,000 per annum is c. £66,600 per annum. (In noting this figure I also acknowledge that the percentage is slightly different in lower income brackets, but we are dealing in broad figures in this context).

(v) The father now has a higher level of personal debts, mostly legal costs related, at c. £400,000, the majority of which are to his wife and to his Solicitors. The debts owed to his Solicitors will plainly have to be paid and may involve some re-mortgaging on his properties.

CONCLUSIONS

50. I have now listened to the oral evidence and submissions from the November 2020 hearing and have considered the large numbers of documents in the bundle plus a number of documents sent separately and not in the bundle, totaling more than 1,500 pages. The bundle includes seven statements from the mother and six from the father, a quite old Form E from both of them and numerous other documents which are to a greater or lesser extent relevant to my deliberations.

51. As I have said above, I consider that I have basic jurisdiction to make such awards as I think fit by way of lump sum or periodical payments for K. I can make orders for money to be paid directly to K or for monies to be paid to the mother for K's benefit. I propose to make both child periodical payments orders and lump sum orders.

52. I have reached the conclusion that K meets the extension conditions by reason of the fact that she is, on a balance of probabilities, currently in a gap year and likely to attend tertiary education in some form or another in September 2022 and therefore "*will be… receiving instruction at an educational establishment*". Accordingly, there is substantive as well as basic jurisdiction to make child periodical payments orders and/or lump sum orders. In my view it will be a good thing for K to be encouraged to continue her education into the tertiary level.

53. I have not been persuaded that K's medical circumstances yet bring her into the category of cases where I should make a finding that there are "special circumstances" within the meaning of the second part of the extension conditions. I reach this conclusion in the context of the expert diagnoses and prognoses of Mr Vickers set in the context of all of the facts of this case. I accept that K is suffering at present from the illnesses and complaints identified by Mr Vickers and I accept that this currently engages both K and the mother in a high degree of time and effort to keep life on track. It is, however, a reasonable hope and expectation that K will move forwards into tertiary education from September 2022 and that her condition will gradually strengthen and recover over the period of tertiary education so that when she completes it she will be independent of the mother. The mother herself accepted in her oral evidence that independence is the sought after goal.

54. For these reasons my order will be expressed to continue until K ceases tertiary education up to a first degree level. Given that she is having a gap year now, I do not think it would be appropriate for my order to extend into another gap year at the end of tertiary education. For avoidance of doubt tertiary education should be construed as including a foundation course if this is what happens. The father should be kept up to date from time to time as to K's progress and if (though this is hopefully unlikely) decisions are made by K which take her outside the education part of the extension condition (for example, that she makes a decision not to pursue or continue with tertiary education) then, subject to any further order, the provision should come to an end.

55. I propose to make a child periodical payments order to take effect on 1st January 2022 and be payable in advance on the first of each calendar month thereafter and which shall be recorded to be both on the mother's application and on K's application (lest there be further jurisdictional arguments). I propose to order that the payments shall for the time being be paid to the mother for the benefit of K, but that from the month that K commences tertiary education 50% of all payments shall be paid to K directly and 50% shall be paid to the mother for the benefit of K. This division is a reflection of the fact that, even when K enters tertiary education, she will need the mother to be able to provide a home for her and to look after her when she is there. This division will not apply to the rent element of the order.

56. I have decided not to backdate the orders, although I recognise that I have the power to do so. I have factored into my decision for orders going forward the sequence of events from the application in August 2018 to date.

57. I propose to make some lump sum orders on the mother's application. I shall make clear whether they should be paid to the mother for the benefit of K or directly to K.

58. I have considered all the evidence as to what the mother reasonably needs in the context of her caring for K and what K reasonably needs for her own use. I have considered the resources available to the mother and also the resources available to

the father. I am satisfied that all the orders I propose to make are affordable by the father in the context of his income and general financial situation. I am also satisfied that they are fair in the context of needs and all the circumstances of the case. I have factored into my thinking the existence of all the outstanding costs orders which have never been paid by the mother and are never likely to be, but agree with Mr Feehan that (whatever is the culpability of the mother for these orders) they should not directly prevent the mother receiving sums for the benefit of the children. I have factored into these figures the fact that the father is unlikely to be making any contribution to N – there is no evidence that he has done so far – and it may be appropriate for the mother and/or K to direct some monies to N, but I do not propose to impose any particular arrangement on them. I do not propose to make any separate carer's allowance for the mother, but I have factored into the figures the obligations that the mother currently has to care for K, though these may diminish in due course.

59. My order will require the father to pay child periodical payments as follows:-

    (i) The father will pay child periodical payments amounting to £2,500 per month (£30,000 per annum) from 1st January 2022.

    (ii) This figure will be increased on 1st January 2023 and each 1st January thereafter by CPI inflation.

    (iii) The father will also pay an additional sum at the end of each calendar month calculated by reference to the following formula. The figure will be 2/3 of the difference between the rent actually paid by the mother for her accommodation and the amount received by way of Universal Credit. On the present figures that will be a fairly small sum, 2/3 of £75 = £50 per month, but I recognise that it could rise if the mother returns to work. My order will recite that the mother will be expected to take all lawful steps to seek the maximum amount of state benefits to meet her rental costs. The mother will be obliged to provide evidence on an ongoing basis of her receipt of Universal Credit and her monthly rental payments. My order will record that the amount paid under this element of the order will be capped at £1,500 per month in any circumstances. This cap figure will also be increased on 1st January 2023 and each 1st January thereafter by CPI inflation.

60. My order (on the mother's August 2018 application) will require the father to pay lump sum payment orders as follows:-

    (i) The father will make a lump sum payment directly to K by 31st January 2022 of £5,000. It will be up to K as to how she chooses to spend this money, but I have in mind that she may wish to purchase some computer equipment and/or invest it in extra re-take tuition and/or invest it in further counselling sessions. I do not expect there to be any additional lump sums

payable when K commences tertiary education so she should keep this in mind as she is deciding how to spend the money.

(ii) The father will make a lump sum payment to the mother for the benefit of K by 31st March 2022 in the sum of £9,000 to enable her to purchase a replacement motor car. The father shall be entitled to require that this sum is paid directly to a car dealer/supplier for the purchase of a motor car of the mother's choice. The purpose of this payment is to ensure that the mother has a reliable car for the remainder of K's dependency on her.

(iii) The father will make a lump sum payment to the mother for the benefit of K by 31st May 2022 in the sum of £6,000. It will be up to the mother to decide what she does with the money – she may use it to enable her to meet her non-costs-related debts, which I am satisfied on the evidence have been incurred in relation to past spending on the children, alternatively to replace some broken furniture in her home, or something else – but is intended to be for the benefit of the children and my intention is that it should not be enforced against by the mother's creditors.

(iv) It will be seen from the dates of these orders that I have staggered them in order to give time to the father to make money available to pay them.

(v) Interest will run at the court judgment debt rate in the event of the late payment of any of these sums.

61. My provisional but firm view is that there will be no inter partes order as to costs. Neither party has wholly succeeded in achieving what they wanted and, in my view, neither side is more to blame than the other for the huge costs incurred on this application. Further, in so far as I was tempted to make an order in favour of the father I would have to reach the conclusion that the mother has no way of paying it and in so far as I was tempted to make an order in favour of the mother I am conscious about the large existing unenforced and unenforceable outstanding costs orders in the other direction.

62. I do not propose to make an order under Children Act 1989, Section 91(14). Absent consent to this (which is not forthcoming) I am not satisfied that the facts have reached the appropriate level to pass the test for the making of such an order.

63. I would be grateful if Counsel between them could draft an order which follows this judgment. I am not entirely sure whether the mother is still instructing lawyers, but in so far as she is not then I would ask Mr Thorpe to take the lead on the drafting front, but also to liaise directly with the mother. I will expect to receive an agreed

draft order, or alternatively a written explanation as to why a draft cannot be agreed, by 7th January 2022. This should be sent directly to me by email.

His Honour Judge Edward Hess
Central Family Court
30th December 2021

…

Followed by

…

SUPPLEMENTAL WRITTEN JUDGMENT

OF HIS HONOUR JUDGE EDWARD HESS

(Handed down by email on 4th March 2022)

64. I am dealing with the latest of a number of financial applications under Children Act 1989, Schedule 1 arising from the relationship between two parents, namely:-

(iii) J (herein referred to as 'the mother'); and

(iv) L (herein referred to as 'the father').

65. This supplemental judgment is given in relation to the issues of costs and publication of the initial judgment.

66. The lengthy sequence of facts, including the twenty year litigation chronology, and the substantive decisions made by me, can be seen in my initial written judgment dated 30th December 2021 and I do not propose to repeat them here.

67. In paragraphs 38 to 43 of my initial written judgment I set out in detail what the parties' respective open positions were and also how much each had spent in costs in the current application and more widely (the figures for which were truly horrifying).

68. In my initial written judgment I made the following comments about costs (which were intended to be firm, but provisional):-

"There will be no inter partes order as to costs. Neither party has wholly succeeded in achieving what they wanted and, in my view, neither side is more to blame than the other for the huge costs incurred on this application. Further, in so far as I was tempted to make an order in favour of the father I would have to reach the conclusion that the mother has no way of paying it and in so far as I was tempted to make an order in favour of the mother I am conscious about the large existing unenforced and unenforceable outstanding costs orders in the other direction".

69. There was some delay in Counsel responding to my judgment in terms of drafting and costs submissions (both had other commitments which understandably delayed their respective detailed responses), but in the end Mr Thorpe on behalf of the father indicated that he wished to pursue an inter partes costs order against the mother. This has led to exchanges of trenchant and lengthy further submissions from Counsel (Mr Thorpe's initial document is dated 17th January 2022, Mr Feehan's response document is dated 25th February 2022 and Mr Thorpe's reply arrived earlier today, 4th March 2022) and I now need to make a final decision on costs.

70. It is common ground than in dealing with the costs issues the general 'no order for costs starting point' and bar on considering without prejudice offers imposed by FPR 2010 Rules 28.3(5) and 28.3(7)(b) respectively does not apply in relation to applications under Children Act 1989, Schedule 1: see FPR PD28A, paragraph 4.2(b)(i). In other words, this is a clean sheet case and, in making decisions on costs, I am entitled to see, and take into account, without prejudice offers.

71. The headline point, and in my view the only significant new point, in Mr Thorpe's submissions on costs, is that he draws my attention to a without prejudice offer made by the father on 23rd March 2020, which I had (for obvious reasons) not seen when I wrote my initial judgment. The offer reads as follows:-

"Our client wishes to bring this matter to a conclusion as soon as possible. The legal fees incurred on both sides already are disproportionate, and this will get even worse unless matters can be resolved. Accordingly our client makes the following proposal, to bring these proceedings to a complete conclusion:

1. That the 2011 Order of District Judge Simmonds be varied such that the term of maintenance for K, and the term of the rental payments on your client's property, be extended until K's 21st birthday.

2. In respect of N, the 2011 Order be varied such that our client will continue to pay the child maintenance for N during any period of full-time tertiary education, limited to one undergraduate degree and not including any gap year. This maintenance will be paid as to one-third to your client as a roofing allowance and two-thirds to N directly.

3. No order on your client's other applications including for lump sums, variation of maintenance for N and so on.

Should N and K attend university, they will be treated in the same way as the farher's other children and be expected to take out student loans to fund tuition fees.

As this letter is made on a without prejudice save as to costs basis, in the event that it is not accepted, but the proposal reflects the final order made, this letter will be produced when the question of the costs of these proceedings falls to be decided".

72. Mr Thorpe argues that this offer was very significant because:-

"The cost to F of the proposal was £50,000 net p.a. It is submitted that, in light of the history set out above, the criticism of F for having engaged in a gladiatorial contest is misplaced. From the outset he sought mediation and that having failed, he sought and M was ordered to actually state what it was that she required. She did not. F therefore made a 'blind' offer not knowing what M sought. That proposal clearly provided for both M's household and both girls at university – even specifying that this should continue until K was 21 irrespective of whether she continued in education. That offer is far greater than the order that the court has made."

"It is submitted that the failure of M to accept an offer that provided her and the children with £50,000 p.a. in support was extraordinary".

73. Mr Thorpe argues that the wife should have accepted that offer in March 2020 and that, if she had, a good deal of litigation costs could have been avoided and the mother would have done better in broad terms than she has done under my order. He suggests that a substantive costs order should be made against the mother in favour of the father and, even if such an order cannot be enforced, he will be able to use it as a shield if further applications are ever made (which is by no means impossible, for example if K does not make the expected recovery in her health and it is contended that 'special circumstances' apply).

74. Mr Feehan has responded by making a large number of points, but the thrust of his submissions on the without prejudice letter is perhaps captured in the following passage:-

"F goes on in his skeleton argument to assert that his without prejudice offer should have been accepted and that it was greater than the order finally made. Attached to this submission is a run of all correspondence aimed at settling this matter throughout 2020. The court is invited to peruse it. M gives clear reasons for her inability to accept F's offers and is clear also as to what she seeks. The letter of 23 March 2020 offers nothing more than the status quo as at 2020 of £1050 per child, according to the order of DJ Simmonds of 2011 but uprated for inflation. That sum is offered for K until she is 21 (no gap year) and for N until she finishes tertiary education. It is a total of £2.1k per month. There is no offer of lump sums. The court will be aware that in relation to rent payments M accepted well in advance of the final judgment that she would make an application for benefits to assist with rent, that was not sought by F prior to the final hearing and her willingness to take that reasonable step should not be used to mount an argument that the 23 March offer was greater in terms of provision that that made

by this court. The final order of this court was for £2.5k per month and £20k in lump sums. There is an initial term to the end of tertiary education but there is no bar and there is provision on the face of the order for a further order which may extend provision (which can only be in the special circumstances that K's needs require it). That order for K alone beats F's offer by nearly £40,000 over 4 years. F may say that is de minimis, but to K and M it is a lifeline to a more reasonable existence. Reference is made to 'K alone' in the previous paragraph because, as is now clear, N should never have been excluded from that claim. It is a simple fact that a vast amount of the costs incurred in this case arose because of F's unprincipled and erroneous campaign to avoid responsibility for N, for whom he still makes no provision. Had either DDJ Willbourne or HHJ Everall QC made the correct decision, there would undoubtedly have been further provision for N which would have increased even further the gap between the court order and the 23 March Calderbank offer….As set out above, there is an elephant in the room of costs in this case that cannot go unremarked, albeit F seeks to avoid it. Huge costs in this case were awarded against M in relation to the jurisdiction point that this court has now found was ruled upon erroneously by both DDJ Willbourne and HHJ Everall QC. From the author's memory those costs total around £70k; a more precise figure can be found if required. They should never have been awarded against M and were used throughout the proceedings to paint her as vexatious and unreasonable. M will have to consider her position in relation to those having received the judgment of the Court of Appeal in UD v DN and the judgment of this court…That point has a corollary. Of the many hearings in this case, only two (DDJ Willbourne and DJ Hudd of 27 August 2019) went against M. In all other hearings she achieved substantially what she set out to achieve and had orders made in her favour that F fiercely opposed and/or had to have enforced against him by further applications. Costs of those hearings were reserved so that those matters could be addressed at this stage."

75. I am minded to agree with Mr Thorpe, to an extent, that the without prejudice offer of 23rd March 2020 does throw a slightly different light on what it is appropriate to say about the father's litigation conduct. Looking at the letter in isolation from all else that has happened, I do feel able to express the view that it is a great pity that this letter did not prompt a serious negotiation in which the finer detail of the proposal was addressed. My earlier expression of regret that there was never an FDR in this case is strengthened by knowing about this without prejudice offer – perhaps this should be a lesson to judges to be very reluctant indeed to allow a case to proceed without an FDR.

76. On the other hand, I have not been persuaded that it is appropriate to move from this proposition to the position where an inter partes costs order is justified. In this context I would make the following points:-

    (i) The terms of the without prejudice offer do not match in structure my order and it is quite difficult to compare the two in precise mathematical terms. For example: I have made provision during one pre-university gap year, the offer letter does not; I have made a different ruling on the roofing allowance; it is not clear to me what would have happened under the offer when K was 21.

(ii) The offer made no provision for lump sums. I have made orders for £20,000 worth of lump sums.

(iii) Notwithstanding the secret existence of the without prejudice offer, the father did instruct his lawyers to engage in highly combative litigation in his open position (as I have described in my initial written judgment) and this has caused (amongst other things) the unfortunate difference of treatment as between N and K. It is, I think, not unfair for me to criticise the open positions taken, notwithstanding the existence of a different without prejudice position.

(iv) I think Mr Feehan makes some strong points about the reserved costs orders on the interim hearings and on the costs orders against the mother which (if I am correct about the law) may not have been justified.

77. In the end, after careful consideration, there is nothing in the costs submissions which has caused me to change my provisional view and I propose to make no order as to costs and I will simply adapt the existing order to state this.

78. I have carried out an anonymisation process in the draft sent with this judgment and, absent any comments on anonymisation details, propose to place this version on BAILII.

His Honour Judge Edward Hess,
Central Family Court
4th March 2022