



Neutral Citation Number: [2021] EWCA Civ 1947

Case No: B6/2020/1179

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**  
**MR JUSTICE WILLIAMS**  
**ZC18P04013**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21 December 2021

**Before:**  
**LADY JUSTICE KING**  
**LORD JUSTICE MOYLAN**  
and  
**LORD JUSTICE NEWEY**

**UD**  
**-and-**  
**DN**  
**(Schedule 1, Children Act 1989;**  
**Capital Provision)**

**Appellant**

**Respondent**

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**Christopher Pocock QC and Katherine Kelsey (instructed by Hall Brown Solicitors) for the**  
**Appellant Father**  
**Charles Howard QC and Laura Moys (instructed by Freemans Solicitors) for the**  
**Respondent Mother**

Hearing date: 16 June 2021  
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**Approved Judgment**

**Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on Tuesday 21 December 2021.**

**Lord Justice Moylan:**

1. The father appeals from the order made under Schedule 1 of the Children Act 1989 (“the CA 1989”) by Williams J (“the Judge”) on 7 July 2020. He sought permission to appeal in respect of a number of the provisions in the order but I only granted permission in respect of the settlement of property order made in favour of two of the parties’ children.
2. The order required the father to settle a property in London (“the family home”) in trust for the benefit of the parties’ two younger children, then aged 19 and 14. The trust period was defined as the period starting with the establishment of the trust and ending on the first to occur of a number of events including the date on which the youngest child attained the age of 18 or 6 months after they completed full-time tertiary education.
3. The challenged provision in the order provides that, at the end of the trust period, 6.5% of the gross sale price or market value of the family home “shall be held on trust for the benefit of the children ... absolutely”.
4. There are a number of grounds of appeal but, in summary, it is contended:
  - (a) that any order for financial provision, made on an application by a parent under paragraph 1, Schedule 1 of the CA 1989, must be made before the relevant child attains the age of 18, because the court has no power to make an order under paragraph 1 once the child has attained the age of 18;
  - (b) that the court does not have power to make a property transfer order or lump sum order to a person who is a child at the date of the order, but who will be aged over 18 when it takes effect or will be paid; and
  - (b) that, in any event, the judge was wrong to make an order under which the children would receive capital provision when they were adults because there were no special circumstances justifying such an award in this case.
5. The point argued under (b) does not seem to have been raised below. It appears, as submitted by Mr Howard QC, that it was accepted that the court had jurisdiction to make an order in the above terms, the issue being whether it was justified in this case. Further, in my view, the order made by the Judge is a settlement of property order and not a transfer of property order. Nevertheless, I propose to deal with it, briefly, when setting out my view of the merits of the respective grounds of appeal.
6. The father is represented by Mr Pocock QC and Ms Kelsey and the mother is represented by Mr Howard QC and Ms Moys. They all also appeared below.

Background

7. The background history is set out in detail in the judgment below, which is reported as *DN v UD (Sch 1 Children Act: Capital Provision)* [2020] EWHC 627 (Fam). I will, therefore, only set out a brief summary.

8. The mother and the father were in a relationship between 1996 and 2017/2018. They have three children. At the date of the hearing below, the eldest was 22 and, as referred to above, the younger two were 19 and 14 (I will call them DD, TD and GD, as in the judgment below). The father also has three children from other relationships including SD aged 33 and ED aged 20 at the date of the hearing below.
9. The mother moved with her three children to England in 2010. They lived at the family home which was valued for the purposes of the proceedings at approximately £10 million. In late 2017, the father gave DD £607,000 to enable him to purchase a property in London. This had been found at a previous hearing to be a gift.
10. In February 2018 the mother issued proceedings under Schedule 1 of the CA 1989. At that date DD, TD and GD were aged respectively 20, 17 and 12. The proceedings were determined by the Judge in his judgment of 29 January 2020 and order of 7 July 2020. By the date of the order, and also in fact the judgment, the middle child was aged 19. As referred to above, the family home was settled on trust for the benefit of the two younger children. The father was also ordered to pay approximately £200,000 to the mother for the purchase of a car and for other expenses. Periodical payments were ordered at the rate of £200,000 per year until TD completed full-time tertiary education and then at the rate of £160,000 per year until GD attained the age of 18 or ceased full-time tertiary education. There was also an order for school fees.
11. As part of her application, the mother sought outright capital provision for the two younger children. This claim was advanced on an unusual basis in that, essentially, it was said that, as set out in the skeleton argument for the final hearing below, the children “should be in the same financial position as [DD] *qua* the provision of a first home and not disadvantaged as a direct result of F’s egregious behaviour”. It was argued that “[b]ut for F’s conduct ... and M’s appropriate decision to protect the children by seeking protective orders against F, F would have purchased homes for each child equivalent to that bought for [DD]”. It was also said that the father’s conduct towards the children and the mother “means that he will not meet his parental responsibilities towards the children” making it “appropriate” for the court to make an order which would “enable them to purchase a first home in their own right”. It was submitted that there was no requirement for special circumstances but, if there was, “this is in any event such a case, given the level of abuse and trauma suffered by the children”.
12. During the course of the hearing below, and as later reflected in his judgment, the Judge raised the issue of whether, once the children became adults or ceased their education, they would be “vulnerable to the financial muscle which the father is able to deploy”. The Judge later questioned whether, if he “concluded that there was a risk of [GD] being subjected to coercive behaviour by the father in the future and the only way to protect her against that was to give her financial independence”, he could properly make an order for capital provision in her favour.
13. The father applied for permission to appeal in respect of the settlement of the family home (and its contents) rather than an alternative, cheaper, property; the provision of that property by way of a trust rather than a lease; the rate of periodical payments; and the order for the payment of a lump sum of £80,000 to enable the mother to refurbish a property of hers in Russia. I refused permission to appeal in respect of all these grounds.

Judgment below

14. The judge set out the issues the subject of this appeal. The first was:

“18. As a result of the mother's open offer I also have to consider whether there should be an outright provision of capital for a home for each of the children whether by way of settlement, property adjustment order or lump sum on a sale of the family home (either the London Apartment or any alternative home provided for by my order) and, if so, in what sum.”

In her open offer, the mother had proposed that the family home should be settled on, what was called, “a conventional Schedule 1 trust” and that, at the end of the trust term, the younger two children should each receive, outright, a housing fund (of £950,0000 plus indexation) from the proceeds of sale of the property.

15. The jurisdictional issue, namely whether, on an application made by a parent under paragraph 1 of Schedule 1, any order has to be made before the relevant child attains the age of 18, was addressed from [34]. It was submitted on behalf of the father, at [37], that “the court has no jurisdiction to make an order in respect of a child who has reached the age of 18 unless it is an application which falls within Sch 1, para 2” (i.e. an application made by a child who is over the age of 18). The mother countered, at [36], that “the power to make one of the ‘menu’ of orders is triggered at the point of application and from that point on the court has power to make interim and final orders”.
16. On the latter, jurisdictional, issue, the Judge concluded that the court has power to make an order under Schedule 1, on an application made by a parent, provided the relevant child or children are under the age of 18 at the date of the application. His reasons were as follows:

“42. 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. This would still encompass both income and capital. If I am wrong in my conclusion that the proper interpretation of Sch 1 is to allow the court to make an order under paragraph 1(2)(a-e) on the mother's application I would deem an application to have been made by TD for periodical payments and a lump sum in any event. I see no injustice to the father in so doing and I am satisfied that this is what TD would want, he obviously working on the basis that it has been unnecessary for him to make such an application given he was included within the mother's application and no application or submission has been made prior to the final hearing to prevent the court making any orders for his benefit.”

In summary, the Judge concluded, at [43], “that provided the application is made before the cut-off date it seems to me that the court, having acquired jurisdiction to make orders under Sch 1, para 2 retains it until disposal of the application”. I would add that the Judge concluded, at [49], that it was not open to him to make orders in favour of DD as he was aged over 18 at the date of the application. There is no appeal from this latter decision.

17. On the issue of financial provision for children aged over 18, the Judge quoted from the line of authorities which have addressed the manner in which the court should exercise its powers under Schedule 1 in favour of adult children. These included Scarman LJ's (as he then was) judgment in *Chamberlain v Chamberlain* [1975] 1 WLR; Hale J's (as she then was) judgment in *J v C (Child: Financial Provision)* [1999] 1 FLR 152; and Munby J's (as he then was) judgment in *Re N (A Child) Financial Provision: Dependency* [2009] 1 WLR 1621. The Judge then analysed the “net effect” of the authorities:

“85. The net effect of all of the authorities is clear. Absent special or exceptional circumstances capital orders which provide a benefit beyond minority or the cessation of tertiary

education should not be made. It is equally clear that what can amount to special or exceptional circumstances is restricted. Matters relating to changing societal attitudes, the wealth of a parent, or the like will not suffice. Disability creating an ongoing need for support might. The absence of a parent playing any supporting role for their child might. The appellate courts have recently eschewed glosses upon statutory language. In this case the identification of exceptional or special circumstances warranting the making of outright capital orders for the benefit of children does not seem to me to amount to a gloss but rather is an application of the statutory powers based on principles which emerge from case law. The power to make outright capital transfers exists but will only be deployed in limited circumstances and where the evidence justifies it. It seems to me that what one is focusing on is the child and whether there is something about this child or this child's situation in particular vis-à-vis that parent that creates a situation which exceptionally (i.e. as an exception to the usual rule) generates a need for the child to be provided with capital which will be of benefit to them as an adult possibly for many years.”

18. The Judge set out the mother’s case in support of her application for long-term capital provision for the children as follows:

“158. The mother submits that I should identify this as an appropriate case to use the statutory powers which are undoubtedly provided by Sch 1 to make capital provision for the children even though the benefit will endure long after they leave university. The fact that the statute permits property transfers and settlements recognises the possibility that an order will have effect well into adulthood and long past dependency in its strict financial sense. Mr Howard submits that there are a number of features in this case which justify the court making an award. In particular he relies upon the following:

- i) The children have been damaged by their father's actions and the findings made by Recorder Genn as to his manipulation and control, particularly in respect of housing, demonstrate there is a real risk of him seeking to control them in the future through finances.
- ii) When the maintenance comes to an end and the luxurious lifestyle that has been provided for them terminates they will be vulnerable and need protection from the possibility of coercion and control.
- iii) The father has set up SD and ED in Russia and will no doubt seek to do the same with these children. If they do not comply he will wash his hands of them as he has now done with DD.

iv) He clearly contemplated providing homes for them. Not only did the father provide a home for DD but he told Recorder Genn that he was contemplating purchasing a home for TD. The children should not lose out on the possibility as a result of the dispute between the mother and the father and the mother's decision to seek to protect herself and the children from the father.

v) The reality is that the responsibilities for these children will now be met solely by the mother and thus this is the sort of case that Lord Justice Scarman identified.”

19. The father’s case in response was as follows:

“160. Mr Pocock on behalf of the father submits that this is simply not in the category of cases where a capital award which might benefit the child post dependency is possible. Although he accepts that the case law identifies exceptional circumstances where such provision might be made this was referable to matters such as long-term disability. In addition he submits that the court cannot make an order when the child is an adult and providing for GD once she is after 18 or for TD now he is over 18 is impermissible. Both the jurisprudence and the purpose lying behind the Sch 1 provisions make clear that the court's powers are targeted at children who are dependent adults. Hence there is no reported example of the court making long-term capital provision for a child which extends into their independent adulthood. It is entirely inappropriate to seek to dictate to the father what dispositions of his money he should make to his children during his lifetime. If he wishes to provide a home to them that is a matter for him; equally if he does not wish to do so he should not be obliged to do so.”

20. The Judge, at [161], saw “considerable force in” the father’s submissions because:

“the circumstances in which capital provision can be made which will benefit a child into adulthood will be very limited indeed. All of the jurisprudence supports this approach and confirms the rationale for it.”

However, he discerned from the authorities that “in some circumstances where the court identifies some continuing *dependency* such an order can be contemplated” (my emphasis). He did not consider that “dependency” was narrowly defined but that, at [161]: “Dependency connotes some form of vulnerability or need continuing from childhood into adulthood which can be remedied by capital provision”. The judge then applied this approach to the facts of his case. I set out his analysis in full.

“161. ... I am satisfied on the evidence that I have read and heard that both TD and GD carry with them a vulnerability arising from their childhood which will endure into their adulthood. The children have seen a psychotherapist and the preliminary report

was available to Cafcass. It is quite clear that both TD and GD need therapeutic support as a consequence of the father's abuse. Quite how one comes to terms with your father threatening to slit your throat or your mother's throat and threatening to throw you out of your home I am unsure. Long experience in children's cases and the research into the long term effects of abuse on children (see amongst others the report of Drs Sturge and Glaser [2000] Fam Law 615) suggests to me that whilst these children may be able to get on with their lives they are likely to carry the emotional scars in some shape or form for a very long time indeed. This is a product of the abuse that they have been subjected to by the father. Another component of this is the ongoing risk that the father presents. He is used to getting his own way and determining what his family does. He was quite clear in his evidence that he hopes or even expects the children to return to his fold when the scales fall from their eyes and they see that he was the victim of the mother's manipulation rather than vice versa. That of course is a complete inversion of the findings made by Recorder Genn and my own conclusions. That he says he forgives the children rather than seeking their forgiveness encapsulates his unrepentant rejection of the real substance of the findings made by Recorder Genn.

162. I therefore conclude that it is more probable than not that the father will in due course seek to resume a relationship with the children and will seek to persuade them to join him and his business in Russia. He is likely to approach that on the basis that he is the wronged party with the expectation that the children will realise the wrong their mother has done. That of course is completely contrary to their reality. His track record of using his financial muscle to seek to control was most evident in his actions in relation to the family home in December 2017 and January 2018, but his behaviour towards DD over the £607,000 and in relation to the investor visa monies in August 2016 are further examples of him exerting control in relation to financial matters. It therefore seems to me more probable than not that when the children do reach adulthood and do not willingly return to his fold that they are likely to face some sort of financial ultimatum from their father. At that point they will be peculiarly vulnerable as the maintenance will have come to an end and they will have lost their long-term home in the London Apartment. At that point they will be at their most vulnerable to the exertion of financial control whether directly or indirectly via the mother who will also be vulnerable at that point. I therefore consider that their vulnerability or potential dependency upon their father results in a clear need for financial and emotional protection. This protection can only be provided by giving them a sufficient degree of financial independence from the father to allow them to withstand the sort of pressure that is likely to be brought to bear upon them through some sort of financial ultimatum and

which the emotional abuse they have sustained makes them so vulnerable to. That, I am satisfied, amounts to an exceptional circumstance which justifies the making of a capital award which will endure beyond their minority, beyond their dependency whilst in education and into an indeterminate future. Only by giving them the means to say no to their father's exertion of financial control can they be properly protected and provided for in the future. I'm quite satisfied that this is a legitimate use of the Sch 1 provisions. I do not consider that the existence of a non-molestation order, even if it extends long into the future, will address the issue. I ask myself rhetorically, if this situation does not amount to an exceptional circumstance justifying their deployment what, other than physical disability or clear lack of capacity, would? Thus I consider that they need and that their welfare justifies the provision of a 'financial ultimatum' (FU) fund to enable them to deal with this probable scenario.”

The Judge had summarised his reasons for making an award during the course of the hearing as being because “the children would be vulnerable to the father imposing a financial ultimatum on them”.

21. The basis of his award can also be seen from what the Judge said during the subsequent hearing which took place to deal with the terms of the order and other consequential matters. During that hearing, the Judge commented that, if the father had died before the expiry of the trust term, “the whole basis for the financial ultimatum fund falls away” because the children would no longer be “vulnerable to the father imposing” such an ultimatum on them.
22. Further, when refusing permission to appeal the Judge explained, at [32], in response to the submission that the capital award was wrong because it was “based on the vulnerability of the children when there was no medical evidence”:

“My conclusion was not underpinned by ... a medical evaluation of the children’s vulnerability. It was based on an assessment of the entirety of the evidence relating to the behaviour of the father, the vulnerability of the mother and children in the light of the findings that had been made and my assessment that in the future there was a real possibility or likelihood that the father would seek to manipulate the then adult children by deployment of his financial muscle.”

23. The Judge then determined, at [163], that the “appropriate capital award” would be approximately £650,000, being broadly equivalent to the sum “which enabled DD to find independence from his father by the provision of a sum which allowed him to buy a flat”. This equated to “roughly 6.5%” of the value of the family home.

#### Appeal Submissions

24. The parties’ respective cases on this appeal mirrored the submissions made to the Judge, as summarised in the passages I have quoted above.

25. Mr Pocock submitted that the jurisdiction under paragraph 1 of Schedule 1 has to be exercised when the relevant child *is* under the age of 18 at the date when the order is made. He relied on the fact that paragraph 1 refers, throughout, to “child” which is defined in section 105 of the CA 1989 as, “subject to paragraph 16 of Schedule 1, a person under the age of eighteen”. Paragraph 16 defines a child, for the purposes of Schedule 1, as including, “in any case where an application is made under paragraph 2,” the person making the application. He also pointed to the difference in the definition in the Matrimonial Causes Act 1973 (“the MCA 1973”) in that section 52 contains no reference to age when defining “child” and “child of the family”.
26. He made, essentially, the same submission in respect of the second ground of appeal, namely that the court has no jurisdiction to make a property transfer order or lump sum order which will, respectively, take effect or be paid when the child is over the age of 18. This is, again, because paragraphs 1(2)(c) and (e) of Schedule 1 provide that such orders are to be made either for the benefit of a *child* or to a *child*.
27. In respect of the Judge’s substantive order, Mr Pocock relied on a number of authorities including: *Chamberlain v Chamberlain*; *A v A (A Minor: Financial Provision)* [1994] 1 FLR 657; *Philips v Peace* [1996] 2 FLR 230; *J v C*; and *Re N*. He submitted that it is well established that, absent special or exceptional circumstances, orders are not made which would provide a child with financial provision when they are adult and not in full-time education. In this case, there were no such circumstances which could justify the Judge’s outright award of capital. Rather, Mr Pocock submitted, the Judge’s award “hinged on” his assessment as to how the father might seek to issue some sort of “financial ultimatum” to the children and was not based on some need arising from or related to the children’s own circumstances which created a continuing dependency.
28. He also submitted that the Judge’s conclusions in respect of how the father might act towards the children in the future were made without any evidence having been adduced on this matter. There had been no evidence about what the Judge described, at [162], as “some sort of financial ultimatum” from the father. This was something alighted on by the Judge only during the course of the parties’ final submissions. There had been no exploration of such an eventuality during the course of the evidence. There was also no evidence directed to the Judge’s related conclusion, at [162], namely that the “emotional abuse [the children] have sustained makes them so vulnerable to” this “sort of pressure”.
29. Mr Pocock related the absence of any evidence to the way in which the mother had advanced her case before the Judge (as referred to in paragraph 11 above). There was no evidence as to any supposed “financial ultimatum” because this was not relied on by the mother. Her case was based on the assertion that, but for the father’s conduct, he would have purchased a home for the younger children and that they should be “in the same financial position as DD”. Likewise, there was no evidence as to the emotional or psychological health of the children when adults because this was not the way in which the mother’s case was advanced. There was, therefore, no evidence, including no expert evidence, directed to how the children had been affected by the father’s conduct or the issue, as described by the Judge, of their “vulnerability”. The Judge, at [161], simply took judicial notice of “the long term effects of abuse on children” based in part on the report by Dr Sturge and Dr Glaser which was first mentioned in the judgment. That report dealt with contact and did not provide any evidence of the needs of the children in this case.

30. In so far as there was any expert evidence, it was provided by two Cafcass reports filed in connection with earlier, different, applications. Mr Pocock relied on the fact that neither contained any evidence as to the children's mental health. Neither suggested that either of the children was suffering or likely to suffer a long-term vulnerability. Indeed, what was said in the reports did not support any such conclusion. In the second report, GD was said to be "a confident and friendly young woman" and it referred to her having "many protective factors in her life" which "outweigh the adversity [she] has experienced and contribute to her resilience". Accordingly, in addition to his submission that the Judge's order was an unprincipled use of Schedule 1 because "vulnerability" does not equate to "dependency", Mr Pocock submitted that the Judge's conclusion, at [162], that these factors meant the children had "a clear need for financial and emotional protection" was unsupported by any evidence.
31. In respect of the mother's reliance on conduct, Mr Pocock pointed to the fact that conduct is not one of the factors mentioned in paragraph 3 of Schedule 1. In respect of her reliance on the purchase of a property for DD, Mr Pocock pointed to the Judge's description of the purchase, in the chronology at [128], as an example of a "spontaneous and extraordinarily generous" gesture by the father. This, he submitted, provided no basis on which to order the provision of a similar sum for the purchase of accommodation for the younger two children when adult.
32. Mr Howard submitted, in respect of the issue of jurisdiction, that paragraph 1 of Schedule 1 gives the court power to make an order "*On* an application made by a parent ... of a child" (my emphasis). Accordingly, he submitted, the jurisdiction to make an order is engaged at the date of the application and does not depend on the date of the judgment or order. Provided the application is made by a parent of a *child*, the jurisdictional requirements are satisfied. He also relied on the power, under paragraph 3, to backdate an order for periodical payments to the date of the application which, he submitted, supported the conclusion that it is the application which founds the court's jurisdiction.
33. Mr Howard referred us to passages in the Law Commission's 1982 Report, *Family Law, Illegitimacy* (Law Com. No. 118) ("the 1982 Report"), in particular at [6.29] (which I set out below). He also pointed to the practical difficulties which would arise, with one parent potentially seeking to delay the proceedings and the other seeking to procure a decision or order. This would, he submitted, be in the interests of neither justice nor the proper administration of justice.
34. As to the second ground of appeal, Mr Howard submitted that this was a new point which had not been raised below. It had been accepted that the court had power to make the order made by the Judge, the issue being whether he should. Further, Mr Howard submitted that the father's case misstates the effect of the Judge's order. It is a settlement of property order which takes effect immediately in that the family home is settled on the terms outlined in the order. The children's respective absolute interests are contingent on them surviving the trust period but the order is still one that has immediate effect and gives them an immediate benefit under the settlement.
35. Mr Howard also submitted that, in any event, the court has power to make capital orders which will provide for a child after he has attained the age of 18 or ceased full-time education. Mr Howard accepted that the "judicial 'trend'" was not to make such orders but, he submitted, the statute does not contain any such limitation and gives the court a

wide discretion. To impose such a “requirement” would be inconsistent with the wording of paragraph 3 of Schedule 1 (Duration of orders for financial relief) which expressly only applies to orders for periodical payments and not to orders for capital provision. In support of this submission, he relied on the 1982 Report, at [6.6], which states that:

“it could well be particularly desirable to give the court power to make what would often be intended to be a once-and-for-all settlement in those cases where the father intends to have no further relationship with the child. Just as courts lean against making substantial capital orders in favour of the children of a marriage, so we would not expect these additional powers to be frequently exercised; but they could be useful in some circumstances.”

36. In respect of the Judge’s substantive order, Mr Howard submitted that the Judge, at [85], had correctly summarised the effect of the law applicable to “outright” capital orders benefitting adult children including that, “Absent special or exceptional circumstances capital orders which provide a benefit beyond maturity or the cessation of tertiary education should not be made”. Mr Howard submitted that “special circumstances” is a broad category which is not confined to physical or mental disability nor does it require that the adult child is “dependent”. He pointed to Johnson J’s observation in *T v S (Financial Provision for Children)* [1994] 2 FLR 883, at p. 889, “I do not think that the category of ‘special circumstances’ should be necessarily always so limited” and Munby J’s observation in *Re N*, at [69], that “the case law is not rigid”.
37. The Judge was, therefore, entitled to place appropriate weight on the effect on the children of the father issuing a “financial ultimatum”, as described by him in his judgment. There was, Mr Howard submitted, “a real likelihood that the father would seek financially to manipulate the children”. This was capable of comprising a special circumstance which justified an award which would provide for a child when an adult.
38. As to the father’s submission that the Judge’s conclusions were not supported by any evidence, Mr Howard submitted that the mother’s case had been based on the matters set out by the Judge, at [158] (quoted at paragraph 18 above). There had been no specific expert evidence but, he submitted, there was a wealth of evidence that the children were vulnerable to the continuing risk of financial control and abuse from the father. Accordingly, the Judge had been entitled to use the discretionary powers of Schedule 1 to make the challenged provisions in his order for the reasons he set out in his judgment. Mr Howard emphasised that this was a discretionary decision and relied on the high threshold before this court will interfere with the exercise by a Judge of a discretionary power.

#### Legal Framework

39. Schedule 1 of the CA 1989 governs applications for financial provision for children. The relevant provisions are as follows.
40. Paragraph 1 deals with applications made by a parent.

“(1) On an application made by a parent, guardian or special guardian of a child, or by any person who is named in a child arrangements order as a person with whom a child is to live, the court may make one or more of the orders mentioned in sub-paragraph (2).

(2) The orders referred to in sub-paragraph (1) are -

(a) an order requiring either or both parents of a child -

(i) to make to the applicant for the benefit of the child; or

(ii) to make to the child himself,

such periodical payments, for such term, as may be specified in the order;

(b) an order requiring either or both parents of a child -

(i) to secure to the applicant for the benefit of the child; or

(ii) to secure to the child himself,

such periodical payments, for such term, as may be so specified;

(c) an order requiring either or both parents of a child -

(i) to pay to the applicant for the benefit of the child; or

(ii) to pay to the child himself,

such lump sum as may be so specified;

(d) an order requiring a settlement to be made for the benefit of the child, and to the satisfaction of the court, of property -

(i) to which either parent is entitled (either in possession or in reversion); and

(ii) which is specified in the order;

(e) an order requiring either or both parents of a child -

(i) to transfer to the applicant, for the benefit of the child;  
or

(ii) to transfer to the child himself,

such property to which the parent is, or the parents are, entitled (either in possession or in reversion) as may be specified in the order.

- (3) The powers conferred by this paragraph may be exercised at any time.
- (4) An order under sub-paragraph (2)(a) or (b) may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order.
- (5) Where a court makes an order under this paragraph -
  - (a) it may at any time make a further such order under sub-paragraph (2)(a), (b) or (c) with respect to the child concerned if he has not reached the age of eighteen;
  - (b) it may not make more than one order under sub-paragraph (2)(d) or (e) against the same person in respect of the same child.”

It can be seen that orders are made “for the benefit of the child” or “to the child”; that periodical payments orders may be varied under sub-paragraph (4); and that further orders can be made under sub-paragraph (5). I would note that, under sub-paragraph (4), there is no limitation on *when* an application to vary can be made. I would also note that, under sub-paragraph (5), the court has power to make a further order under (2)(a), (b), or (c) provided the child “concerned ... has not reached the age of eighteen”.

- 41. Paragraph 2 provides that, “on an application by a person who has reached the age of 18”, the court can make orders for periodical payments and lump sums (only), subject to the same requirements as set out in paragraph 3(2) (as set out below).
- 42. The duration of orders is dealt with in paragraph 3.

“(1) The term to be specified in an order for periodical payments made under paragraph 1(2)(a) or (b) in favour of a child may begin with the date of the making of an application for the order in question or any later date or a date ascertained in accordance with sub-paragraph (5) or (6) but -

- (a) shall not in the first instance extend beyond the child's seventeenth birthday unless the court thinks it right in the circumstances of the case to specify a later date; and
- (b) shall not in any event extend beyond the child's eighteenth birthday.

(2) Paragraph (b) of subparagraph (1) shall not apply in the case of a child if it appears to the court that -

- (a) the child is, or will be or (if an order were made without complying with that paragraph) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(b) there are special circumstances which justify the making of an order without complying with that paragraph.”

43. As referred to above, in section 105 of the CA 1989 child is defined as: “subject to paragraph 16 of Schedule 1, a person under the age of eighteen”. Paragraph 16 of Schedule 1 provides:

“In this Schedule “child” includes, in any case where an application is made under paragraph 2 or 6 in relation to a person who has reached the age of eighteen, that person.”

44. We were also referred to the provisions of the MCA 1973 dealing with financial awards to or for the benefit of children. These include the power to make both financial provision orders (which include lump sums) under section 23 and property adjustment orders (which include property transfer and settlement of property orders) under section 24 to or for the benefit of a child of the family. The terms “child” and “child of the family” are both defined in section 52 without reference to age.

45. Section 29 of the MCA 1973 includes provisions in respect of orders for periodical payments to the same effect as paragraph 3 of Schedule 1. In addition, section 29(1) provides:

“(1) Subject to subsection (3) below, no financial provision order and no order for a transfer of property under section 24(1)(a) above shall be made in favour of a child who has attained the age of eighteen.”

A financial provision order includes an order for a lump sum. Section 29(3) provides that subsection (1) “shall not apply” if, in simplified terms, the child is in education or training or there are “special circumstances”. There are no similar provisions in Schedule 1.

46. The provisions of Schedule 1 contain one express limitation on the power to make lump sum orders under paragraph 1, as set out in paragraph 1(5)(a), but, otherwise, there are no provisions which expressly limit the power to make a capital order to or for the benefit of a child including, for example, that the benefit thereby provided must not extend beyond the child attaining the age of 18 or any other age. In contrast, the duration of an order for periodical payments is expressly limited as referred to above. However, as set out in the judgment below, there is a long line of authorities to the effect that the power to order capital provision is limited.

47. I start with *Chamberlain v Chamberlain* in which Scarman LJ said, at pp. 1564 H/1565 B, when allowing an appeal from an order made under the Matrimonial Proceedings and Property Act 1970 (“the 1970 Act”), giving children a beneficial interest in the family home:

“Equally, I think the judge erred in settling the house so that the beneficial interest at the end of the day became that of the children in equal shares. The order the registrar made provided for the care and upbringing of the children in the house until they

should finish full-time education. I think that that was an appropriate order. There are no circumstances here to suggest that any of the children had special circumstances which required them to make demands on their parents after the conclusion of their full-time education. The capital asset, the house, was acquired by the work and by the resources of their parents, and provided that the parents meet their responsibilities to their children as long as the children are dependent on them, this seems to me an asset which should then revert to the parents. Accordingly, I think the judge was wrong to order a settlement and that the registrar was right to divide the house in the way he did, beneficially between husband and wife, and to provide that at the end of the education of the children the house could be sold and the proceeds divided between the parents.”

I would also note that the term, “special circumstances”, was used in section 8(3) of the 1970 Act, the predecessor of what is now section 29(3) of the MCA 1973.

48. Mr Howard sought to rely on Scarman LJ’s proviso in respect of parents having met “their responsibilities to their children”, an observation quoted by Dunn LJ in *Griffiths v Griffiths* [1984] 3 WLR 165. It seems to me clear that Scarman LJ was referring, as he said, to parents meeting those responsibilities while the children *are* dependent. It is also clear from later authorities that this observation has not been interpreted as contradicting Scarman LJ’s principal conclusion about the need for “special circumstances” before orders are made for adult children who have completed their full-time education. This was how it was applied by Dunn LJ when he rejected a submission that the husband’s share in the former matrimonial home in that case should not be used to pay a lump sum for the minor children. He determined that this was justified because, at p. 171 H, “the husband has not met his responsibilities towards his children, because he has neither paid nor offered to pay any sum at all to the children or for their benefit since he left the matrimonial home”. This was crucially in the context of the children still being minors.
49. This was also how it was applied in *Lilford (Lord) v Glynn* [1979] 1 WLR 78 in which the Court of Appeal set aside an order that a parent settle a sum for the benefit of a child of the family for life. It is relevant to note that this, and the above decisions, were made when the relevant legislation, the Matrimonial Proceedings and Property Act 1970 (section 5(2)) and the MCA 1973 (section 25(2), prior to its amendment by the Matrimonial and Family Proceedings Act 1984), contained similar provisions to the effect, in simplified terms, that the court should use its powers:

“as to place the child ... in the financial position in which the child would have been if the marriage had not broken down and each of those parties [to the marriage] had properly discharged his or her financial obligations and responsibilities towards him.”
50. This provision could well be what Scarman LJ had in mind when he referred to parents meeting their “responsibilities”. This provision could also be said to make the observations in these cases, about when the court should order financial provision for adult children, even more powerful. It is certainly clear from what Orr LJ (who was

also on the constitution in *Chamberlain v Chamberlain*) said in his judgment in *Lilford (Lord) v Glynn*, at p. 85 C/D, that he considered that the court's powers should only be exercised in limited circumstances:

“There being expressed restrictions on the powers of making financial provision in the shape of periodical payments, lump sum payments, or transfers of property in favour of children who have already attained 18, it could not be right, in our judgment, for the court to exercise the power to order a father to settle funds so as to make provision for the payment of income to the child during the whole life of the child.”

Then, after referring to the wording of section 25(2), he added, at p. 85 E/F:

“Whatever the precise meaning of that phrase a father - even the richest father - ought not to be regarded as having “financial obligations [or] responsibilities” to provide funds for the purposes of such settlements as are envisaged in this case on children who are under no disability and whose maintenance and education is secure”

51. In *Kiely v Kiely* [1988] 1 FLR 248, Booth J, when sitting in the Court of Appeal, made clear, at p. 252, that, absent special circumstances “*relating to the children*” (my emphasis), “the provisions of the 1973 Act make it clear that the statutory scheme is to enable the court to make proper financial provision for children as children or dependants”.
52. Hale J summarised the position in *J v C*, at p. 155 (as quoted by the Judge, at [72]). After referring to the limited powers previously available to the court “to make provision for the children of unmarried parents”, she said:

“Those limitations were removed and a wider range of orders was provided for in the Family Law Reform Act 1987. This implemented two Law Commission reports on illegitimacy. The object of those reports was to remove the differences in the legal positions of children. The underlying principle was that children should not suffer just because their parents had, for whatever reason, not been married to one another.

Equally of course they should not get more. There is a long line of authority, beginning with *Chamberlain v Chamberlain* [1973] 1 WLR 1557, and continuing with *Lilford (Lord) v Glynn* [1979] 1 WLR 78, (1978) FLR Rep 427 and *Kiely v Kiely* [1988] 1 FLR 248, that children are entitled to provision during their dependency and for their education, but they are not entitled to a settlement beyond that, unless there are exceptional circumstances such as a disability, however rich their parents may be.”

This was cited with approval by Thorpe LJ in *Re P (Child: Financial Provision)* [2003] 2 FLR 865, at [37]. I would also add that what Hale J had in mind is clear from what she said, at p. 163, about the form of the order in that case:

“So, to sum up, £70,000 is to be settled on trust to provide a house in which T can live, as can her mother and her two half-sisters. There may have to be further discussion as to the terms of that settlement. However, I have some first views. As far as the duration of the settlement is concerned, although periodical payments under the schedule are limited initially to end at the age of 17, they can of course extend for as long as the child is in full-time education or if there are other exceptional circumstances. It has become quite common practice for capital settlements of this nature to be limited until the child reaches the age of 21 or finishes full-time education, whichever is the later, and, indeed, the sensible provision was made in at least one of these cases for it to be 6 months after the end of full-time education. In my view that would be the sensible provision in this case.”

53. Munby J, after an extensive analysis of the law, summarised the position pithily in *Re N* when he said, at [78]

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

54. We were taken to some passages in the 1982 Report. These included a passage, at [6.29], which dealt with the court’s power to make financial provision orders in favour of an adult child and drew attention to the difference between the court’s powers in respect of marital and non-marital children:

“However, whether or not a child can be the beneficiary of a financial provision order when he *is* already over 18 *at the time* that the first application is made will depend upon the legislation under which the application is made. Thus if the application is made in divorce proceedings or in matrimonial proceedings in the magistrates’ court a new order can be made for a child over 18. In contrast if the application is made under the guardianship legislation no such order can at present be made. Neither is such an order possible under the Affiliation Proceedings Act 1957.” (emphasis added)

55. This was relied on by Mr Howard and certainly indicates that the Law Commission considered the relevant date was the date of the application. It is also relevant that the draft bills attached to the 1982 Report and to the Law Commission’s second report in 1986, *Family Law, Illegitimacy* (Law Com. No. 157) both gave the court power to make financial orders, “on the application of either parent of a child”. This was the wording

used in s. 11B of the Guardianship of Minors Act 1971 Act as inserted by s. 12 of the Family Law Reform Act 1987.

56. The 1982 Report also referred to the case of *Downing v Downing (Downing Intervening)* [1976] Fam 288. I deal with the case further below, but I would note at this stage that the Law Commission referred to this case to support the proposition that “a new order can be made for a child over 18” in divorce proceedings.

#### *Determination*

57. I propose to deal with each of the grounds of appeal, as set out in paragraph 4 above, in turn.
58. (a) Does the court have power to make an order under paragraph 1 of Schedule 1 when the child, the subject of the application, has attained the age of 18 between the date of the application and the date of the proposed order?
59. The argument as advanced on behalf of the father is a novel argument in that it does not appear to have been raised or considered before. The fact that it is novel does not, of course, mean that it is without merit but it does suggest that, if it is valid, it has been overlooked during the 30 years since the CA 1989 was enacted. It also appeared that the submission was directed to the date of the order and not the date of the judgment. If the submission is correct, it would also seem necessary to consider the effect of rule 29.15 of the Family Procedure Rules 2010 which (as with CPR rule 40.7) provides that a judgment takes effect from the date it is given.
60. This submission would have, what I regard as being, the surprising effect that a properly constituted application could be defeated by the effluxion of time. This might arise for a number of reasons, including those beyond the control of the applicant such as the court being unable to determine the application before the child attains the age of 18. Mr Pocock sought to deflect this outcome by pointing to the right of a child who has attained the age of 18 to make an application in their own right under paragraph 2 of Schedule 1. This does not, with respect, meet the point about the loss of a substantive right by a *parent* because a child might not be willing to bring a claim; an award, if made, is made *to* the child and not to the parent; and, although it might be possible to address this by way of a lump sum, by paragraph 3(1), the term of an order for periodical payments can only begin “with the date of the making of the application”.
61. We were referred to no authority on this point, no doubt because, as referred to above, this appears to be an argument which has not previously been deployed. A similar argument was, however, deployed in respect of an application by a former spouse for an extension of the term of an order for periodical payments under section 31(1) of the MCA 1973 in *Jones v Jones* [2001] Fam 96. It was contended on behalf of the former husband that any order had to be made before the expiry of the term specified in the order because, under section 31(1), the court only has “power to vary ... the order” and once the term had elapsed there was no order. This argument was based in part on comments made by Ward LJ in *G v G (Periodical Payments)* [1998] Fam 1, at p. 16, a case in which an application for an extension had been made *after* the term had expired. He said:

"Practitioners should, therefore, note that unless there is a specific direction in the order under section 28(1A), the order can be extended beyond the term only provided that the application is made before the term expires. Although no argument has been addressed to us, I incline to the view that it is essential not only that application be made but that an order be made before the expiration of the term. There is no reason why the district judge of the day may not make an interim order of nominal periodical payments to preserve the position pending inter partes argument. Further, given the draconian effect of all relief being lost if the term is not extended before it expires and given the real possibility that years after the order had been made, a wife being without legal advice might overlook the urgency of a variation application, then if it is not a section 28(1A) case, it may be advisable specifically to provide for nominal periodical payments to be made after the expiration of any term."

62. In *Jones v Jones* Thorpe LJ referred to his own, first instance, decision of *Richardson v Richardson* [1994] 1 WLR 186 and rejected the husband's case for the following reasons, at pp. 104/105:

"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* [1994] 1 WLR 186 and it is precisely the reason it seems to me still good, despite the observations of Ward LJ in *G v G (Periodical Payments)* [1998] Fam 1.

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. So I am in no doubt at all that in the present case the district judge was right to reach the

conclusion that he did and the judge should not have been persuaded by Mr Todd's advocacy to the contrary view.”

63. 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 18<sup>th</sup> 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.
65. I also consider that further support for this interpretation, if required, is provided by the wording of paragraph 3(2). This stipulates, I repeat, that the inhibition on making a periodical payments order, under paragraphs 1(2)(a) or (b), which extends beyond a child's 18<sup>th</sup> birthday:

“shall not apply in the case of a child if it appears to the court that -

(a) the child *is*, or will be or (if an order were made without complying with that paragraph) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(b) there *are* special circumstances which justify the making of an order without complying with that paragraph.” (my emphasis)

The use of the words “is” and, to a lesser extent, “are” support the conclusion that a first order can be made under paragraphs 1(2)(a) or (b) when the child is 18.

66. The similar provisions in section 29 of the MCA 1973 would seem to have formed part of Payne J's reasoning in *Downing v Downing* for concluding that an initial order could be made in divorce proceedings in favour of an adult child. He was dealing with an application made by a child aged 19 to intervene in her parents' divorce proceedings and for an order for financial provision, when neither of her parents had made or proposed to make an application. Her application had been dismissed by the District Registrar for lack of jurisdiction and she appealed to the High Court. Her appeal was allowed by Payne J who determined that the court had power to make an order in favour of a child over the age of 18 either on the application of a parent or on the application

of a child. In the course of his judgment, at p. 293, he made the following observations in respect of section 29 of the MCA 1973.

“The effect of subsections (1) and (3) must surely be that a financial provisions order may be made in favour of a child who has attained the age of 18 if the child is receiving instruction at an educational establishment. That is precisely this case, and it seems to me to follow that there is jurisdiction to hear such an application.

Two important questions, however, remain: (1) by whom can the application be made; and (2) should a financial provision order be made in the circumstances of this case.

As to (1) either parent could ask for an order against the other that financial provision be made for the child. This is the effect of section 23 of the Act of 1973 and rule 68 of the Matrimonial Causes Rules 1973. But it would be necessary for the applicant's father or mother to obtain the leave of the court under rule 68 (2). Since neither parent wishes to make such an application and since the child's right to financial provision is sanctioned by the Act procedure must be found. The answer seems to be provided by rule 72 (2).”

The observation in respect of the right of either parent to apply for an order for the benefit of a child aged 18 might be obiter but it provides further support for the conclusion I have reached on this issue. I would also just note that reference was made to rule 68 because, no application having been made in the petition, leave was required to make an application.

67. Thorpe LJ also identified the very “considerable practical inconvenience as well as pressure on the court” which would equally result if the father’s submissions in the present appeal were right. As Thorpe LJ said, the issue of the application provides “a clear cut-off date for the exercise of” the statutory powers.
68. Accordingly, contrary to the father’s first ground of appeal, I consider that the court has power to make orders under Schedule 1 to or for the benefit of a relevant child if the application is issued before that child attains the age of 18.
69. I should make clear that this is the only point I am addressing because we have not had to consider whether the court might have such a power in respect of an application made by a parent in respect of a child who is aged over 18 at the date of the application.
70. (b) The second ground is similar to the first in that it is submitted that the court does not have power to make a property transfer order or a lump sum order to or for the benefit of a person who will be aged over 18 when it takes effect or will be paid.
71. I, first, repeat what I have said above, namely that, in my view, the order made by the Judge is a settlement of property order and not a transfer of property order. Further, as submitted by Mr Howard, the order in this case took effect when it was made, even if

the children's contingent interest in the family home would only be realised at the end of the trust period.

72. Secondly, it would, in my view, be very surprising if the court did not have power to make an order for some form of capital provision which gave a benefit to or for a child when an adult, if there were special circumstances, such as disability, which justified making such an order. The authorities referred to above clearly demonstrate that the court has power to make an order for financial provision which will benefit a child when he/she is over the age of 18, if the child is in education or training or there are special circumstances. It would be a very odd result if the court could make orders for periodical payments in such circumstances but could not make any of the other orders. For example, an order for secured periodical payments could be very similar in its effect to a settlement of property order. It would also be a very odd result because, under paragraph 3 of Schedule 1, a lump sum order can be made in favour of a child over the age of eighteen. It would make little sense to read Schedule 1, as a matter of jurisdiction, as meaning that a lump sum order, which would provide a financial benefit for a child over the age of 18, could not be made on the application of a parent but had to await the child attaining that age.
73. It would also be inconsistent with one of the purposes of the statutory scheme, as explained by Hale J in *J v C*, namely to remove the distinction between the rights available to marital children and those available to non-marital children. As referred to above, section 29(3) of the MCA 1973 permits the court to make a lump sum order and a transfer of property order in favour of a child "who has attained the age of 18" if there are special circumstances.
74. Such a conclusion is, conversely, in my view consistent with the provisions of paragraph 1(5)(a) of Schedule 1 which stipulate that the court can "at any time make a further ... order" for periodical payments or a lump sum "if [the child] has not reached the age of eighteen". The order must be made before the child is 18 but there is nothing to suggest that the financial provision made has to cease when the child is 18.
75. (c) The third ground challenges the Judge's decision to award the children a deferred, absolute interest in the family home. As Mr Howard submitted, the question we have to address is whether, on the evidence before him and in the particular circumstances of this case, the Judge was right to make that award.
76. Despite Mr Howard's submissions to the contrary, it is, in my view, clear that such power as there is to order financial provision in favour of an adult child who is not in education or training is limited to "special" or "exceptional" circumstances. It is also clear, for example from what Booth J in *Kiely v Kiely*, that these are circumstances "relating to the children". They must be circumstances, such as a physical or mental disability, which create a financial need.
77. In the present case, with all due respect to the Judge, it is clear to me that there are no special or exceptional circumstances which could justify the settlement he made in favour of the children.
78. During the course of the hearing before him, the Judge made plain, as set out in his judgment, that his concern was that the father would not make financial provision for the younger children, in the same way in which he had for DD, "without there being

some quid pro quo from the children”. This observation was, in part, based on his view that wealthy fathers would or should make provision for their adult children, in the same way that the father in this case had for his older children. This can be seen from the Judge’s response to submissions made by Mr Howard about the support which the father had provided for his older children and that “absent coercive control ... with a man of the father’s wealth, he would help [the younger two children] get on the housing ladder”. The Judge responded that “with most of those fathers ... in most cases one would expect a father to make that sort of provision. I think the question here is whether he will make that provision without there being some quid pro quo from the children”.

79. This was, therefore, not based on the children having any continuing financial need as dependent adult children but, rather, it was inverted, in the sense that the Judge doubted that the father would provide financial support in the way that, he considered, most wealthy fathers would and in the way in which this father had for his older children without “some quid pro quo”. This was explained by the Judge in his substantive judgment, at [162], as “some sort of financial ultimatum” from the father to induce or persuade them to “return to his fold”; and in his further judgment, at [32], as the father seeking “to manipulate the then adult children by the deployment of his financial muscle”. This was why the Judge commented that, if the father had died in the meantime, “the whole basis for the financial ultimatum fund falls away”.
80. With all due respect to the Judge, seeking to protect children from financial pressure or “manipulation” that a parent might seek to exert does not begin to come within the scope of a “special” or “exceptional” circumstance which would justify the outright capital award which the Judge made or, indeed, any award. As can be seen, this element of the Judge’s assessment was not based on the children having a continuing need for financial provision, or on (to quote again from *Kiely v Kiely*) some circumstance “relating to the children”, but on the father’s prospective behaviour.
81. To be fair, the Judge appears to have appreciated this because he sought to connect the father’s prospective behaviour to, what he described as, the children’s “vulnerability”. This can be seen when the Judge said, at [161], that:

“Dependency connotes some form of vulnerability or need continuing from childhood into adulthood which can be remedied by capital provision. I am satisfied on the evidence that I have read and heard that both [children] carry with them a vulnerability arising from their childhood which will endure into adulthood”.

The Judge then referred to the children needing “therapeutic support as a consequence of the father’s abuse” and to:

“Long experience in children’s cases and the research into the long-term effects of abuse on children (see amongst others the report of Drs Sturge and Glaser [2000] Fam Law 615) suggests to me that whilst these children may be able to get on with their lives they are likely to carry the emotional scars in some shape or form for a very long time indeed. This is a product of the abuse that they have been subjected to by the father.”

The Judge's award was, however, not based on the children needing therapeutic support, as a financial need. It was based more generally on the children's "vulnerability" which seems, in turn, to have been based on his general observations as to the long-term effects of abuse.

82. The Judge sought, at [161], to support his decision to award the children an interest in the family home by interpreting the use of the word "dependency" in the authorities as connoting "some form of vulnerability or need continuing from childhood into adulthood which can be remedied by capital provision". In my view, this does not support his decision because it is far too broadly expressed a proposition and one which does not accurately reflect the effect of the long line of decisions dating back to *Chamberlain v Chamberlain*. Whilst I certainly accept the Judge's observation, at [161], about "the long term effects of abuse on children", I do not accept that a judge can derive from that a "vulnerability" or "need" which justifies any specific financial award under Schedule 1. The Judge was clearly aware that evidence was required dealing with the circumstances of this case. This is, no doubt, why he referred, at [161], to the younger children needing therapeutic support and the children being "likely to carry emotional scars in some shape or form for a very long time indeed".
83. I make clear that I accept, of course, the emotional and psychological damage caused to children by parental abuse. The harmful effects of such abuse are well established. However, the general observations made by the Judge are not sufficient to establish any specific consequences for the children in *this* case which would support the exercise of the powers under Schedule 1 to make a financial award. As Mr Pocock submitted, there was no evidence as to the children's mental health in the future, which is why the Judge said that his decision was "not underpinned by, as it were, a medical evaluation of the children's vulnerability". Further, as Mr Pocock also submitted, the only expert evidence in the case from the Cafcass report did not, I might add thankfully, provide any support for these children having any identified long term mental health or other difficulties which demonstrated, or would support a finding of, a continuing financial need.
84. I would also add that there was no evidence, even, that the children would be susceptible to manipulation or control by the father or of any specific "emotional scars" to which the Judge referred. This was made apparent when, during the course of the appeal hearing, Newey LJ asked Mr Howard where was the evidence which supported these findings. Mr Howard was, frankly, unable to point to any.
85. There was, in summary, no evidence which would support the conclusion that there was, in this case, a "special" circumstance relating to the children which justified an award in their favour as adults.
86. Accordingly, I have concluded that, on the evidence before him and in the particular circumstances of this case, the long-term capital provision made by the Judge's order was not justified and must be set aside.

**LORD JUSTICE NEWHEY:**

87. I agree.

**LADY JUSTICE KING:**

88. I also agree.