IN THE FAMILY COURT AT BRIGHTON **No. 1623-2330-0557-0728**

B E T W E E N :

Before:

HHJ Farquhar

AP v TP (Pension Enforcement) [2025] EWFC 190 (B)

AP

Applicant

- and -

TP

Respondent

Ms Sophie Kay (instructed by Stowe Family Law LLP) for the **Applicant**

The **Respondent** did not attend and is unrepresented

Hearing date: 27 March 2025
Judgment handed Down following written submissions: 13th June 2025

JUDGMENT

1. The issue for the Court to consider in this case is what order to make following a Pension Sharing Order having been ordered by consent in April 2023 but which has

yet to be implemented. The reason for the order not being implemented is due to the lack of engagement by the Respondent. The Applicant is now in a position whereby he is aged 70 and wishes to retire but is not able to afford to do so as he is not able to access his pension without the Pension Sharing Order (PSO) being implemented. The Applicant now seeks an order to set aside the Pension Sharing Order pursuant to the Thwaite jurisdiction as it would be inequitable not to do so.

2. The Respondent has not attended this hearing or provided the court with any assistance in keeping with her actions since the order was made in April 2023. I heard the matter on 27th March 2025 and then provided further time for the Applicant to provide further written submissions. I am grateful to counsel, Ms Kay for the clarity of her submissions.

3. The Original Order.

4. The D81 dated January 2023 sets out the position of the parties as follows. They were married in March 2015 and separated in February 2020. The Decree Nisi was granted in November 2020. At that stage the Applicant was aged 68 and the Respondent was 46. There were two children of the family (although not the biological children of the Applicant) who were aged 17 and 23. The agreement that was reached occurred after the parties had attended a FDR and they had also had the benefit of a Pensions On Divorce Expert (PODE) report.

5. The equity in the family home was £675,000 (held jointly) and the Applicant had a further £108,000 capital and the Respondent £77,000. The Applicant also held pensions with total cash equivalents of £373,000 (the Aviva pension being in the region of £193,000) as against the £8,270 in the name of the Respondent. The income of the Applicant was stated as £3,869 per month and the Respondent was in receipt of child support in the sum of £266 per month. There was a note setting out the position of the parties within the D81 stating, "*Both parties are imminently due an inheritance. The Applicant's inheritance is expected to be in the region of £220,000 and the Respondent's is expected to be in the region of £250,000*." It was added that, "*The financial settlement meets both parties future housing needs when considering the substantial inheritances both parties are to receive shortly*" and "*The husband is*

imminently due to retire and will be reliant upon pension income. The wife is in receipt of state benefits and will obtain employment in the future should her health permit her to do so."

6. The Order which was agreed through solicitors on both sides and approved by the Court was for the former family home to be sold with the net proceeds of sale being divided as to 47% to the Applicant and 53% to the Respondent. There was also a 48.94% Pension Sharing Order in relation to the Applicant's Aviva pension. The final Consent Order was approved on 6th April 2023.

7. What has occurred since the Order was Approved?

8. There have been significant difficulties in enforcing the order both in relation to the pension share and also the sale of the property. The Respondent was residing in the property but apparently vacated in September 2023. There have been applications concerning the sale of that property due to the Respondent's non-cooperation, and orders have been made for the Applicant to have sole conduct of the sale and to be reimbursed for the costs of carrying out work on the property (in the region of £47,000) together with the costs of the applications. I make no further mention of that issue, but it is simply set out to indicate that the Respondent did not engage with the sale process or the litigation whatsoever.

9. In terms of the pension share order, the timeline appears to be as follows:

    a. Order approved on 6th April 2023.
    b. 8th May 2023 - Letter from Aviva to the Respondent's solicitors who stated on 19th May 2023 that they now no longer act for the Respondent.
    c. 22nd May 2023 – Applicant's solicitors write directly to the Respondent highlighting the need for the Respondent to provide to Aviva their pre-implementation form and information as to the pension scheme into which the PSO should be sent, it not being possible for there to be an internal transfer.
    d. Aviva have confirmed that they sent the Pre-Implementation forms to the Respondent at the former matrimonial home on 8th May 2023, 11th July 2023, and 11th September 2023.
    e. The Applicant filed an application on 24th July 2023 including a request for

"*An order requiring the Respondent to comply with the implementation of the Pension Sharing Order pursuant to paragraph 16"*.

f. 8th September 2023 - Order of Deputy District Judge Jabbour including at clause 14 "*The respondent must complete and return the forms required to effect the pension sharing order by no later than 4 PM on 5 October 2023*."

g. 24th November 2023 - the Respondent sends an email stating that she "*has been in contact with Aviva to implement the pension order*."

h. On 8th June 2024, the Applicant filed an application seeking, "*An order for the Pension Sharing Order to be varied to nil given the respondent's continued failure to complete and return to the pension provider the forms required to effect the Pension Sharing Order.*"

i. Further letters from the Applicant's solicitors to the Respondent setting out what information was required were sent to her on 9th November 2023, 18th October 2024 and 19th November 2024.

j. 30th September 2024 - the Respondent spoke to Aviva by telephone when it was confirmed to her that she must provide the information set out above.

k. 30th September 2024 - the Respondent stated that there is, "*no need for the pension application as I will copy you into correspondence with Aviva to show the pension sharing order has been implemente*d".

l. 18th October 2024 - Order of Deputy District Judge Nicholes including at paragraph 12 "*The pension company confirmed to the applicant's solicitors at 16:00 hours on 17 October 2024 that the respondent has not implemented or complied with the pension sharing order made on 6 April 2023. The respondent has not provided them with the necessary information or filed the correct forms*." Further at clause 17 "*The respondent must complete and return the forms required to effect the pension sharing order by no later than 4 PM on 8 December 2024.*"

10. Can the Court be satisfied that the Respondent has notice of these proceedings?

11. In cases of non-engagement of a party it is always important for the court to be satisfied that the non-engaging party does in fact have notice of the proceedings as otherwise their failure to comply with orders or attend hearings may not be deliberate. The rules as to service are set out within FPR r6 which I do not intend to set out in

full. In many cases it can be a finely balanced issue as to whether there has been compliance with the rules, but it is certainly not the position in this case as the Applicant has gone to extraordinary lengths to ensure that the Respondent is fully on notice of all that has occurred.

12. I do not intend to set out all of the steps that have been taken to ensure that the Respondent is on notice but simply set out the following:

    a. The documents that require signing were all sent to the former matrimonial home prior to September 2023 when it is understood the Respondent vacated the property.
    b. The evidence shows that the Respondent has been in contact with the pension provider and is aware of what steps are required.
    c. Following the order of 10th February 2025, a Certificate of Service has been filed. This confirms that all of the relevant documents have been served upon the Respondent at the last known address provided and also by email and WhatsApp.
    d. A 'DWP Order' has been granted to obtain the Respondent's address – this provided the former matrimonial home as the relevant address.
    e. The Applicant has engaged a Private Investigator in an attempt to locate the Respondent. Their report confirmed that the Respondent was registered as living at her mother's address.
    f. The Applicant has filed a statement setting out all of the steps taken to obtain an address for the Respondent. This sets out that the Respondent has responded to certain messages received stating that she would take all the necessary steps required for the PSO and also providing her telephone number.
    g. A message was sent from the Respondent's email address on 17th October 2024 which was stated to be sent by a named third party stating that the Respondent could not attend the forthcoming hearing as she was housebound and unable to deal with the proceedings personally.
    h. Calls have been made to the Respondent's phone number and not picked up.
    i. The Applicant has seen the Respondent's car parked outside her mother's house and documents have been served to that address.
    j. The Applicant has noticed that post for the Respondent which had been sent to

the former matrimonial home has been collected.

13. In short, I am entirely satisfied that the Respondent has received notice of all of the applications and hearings in this case. There is no evidence to support any vulnerability and the Applicant is not aware of any from when the parties were together. This is a case in which I am satisfied that the Respondent is simply refusing to engage with the proceedings, although the motivation for this is not known.

14. What are the options open to the Court?

15. The present situation cannot possibly be permitted to continue. The Applicant is aged 70, is not in the best of health and wishes to be able to retire. If he retired now, he would not be able to draw down on his Aviva pension whilst it is subject to a non-executed Pension Sharing Order. That pension is the largest one that he holds and would amount to a significant percentage of his income on retirement. The Applicant has also not been able to receive the capital to be released from the sale of the former matrimonial home due to the non-engagement of the Respondent.

16. The simplest solution is obviously for the Respondent to fill in the appropriate papers, but that has not occurred to date and there is no indication that this position will alter in the near future.

17. The following options have been posited:

    a. Vary the PSO by reducing the percentage to 0%.
    b. Setting aside the PSO.
    c. Varying the order to a Pension Attachment Order.

18. Vary the PSO to 0%.

19. At the hearing on 27th March 2025 this was the solution which was suggested would be appropriate on behalf of the Applicant. This was on the basis that if there was a 0% PSO then the Respondent would not be required to fill out any forms as no payment would be made to her and no alternative pension fund would need to be nominated to

receive the funds.

20. The power to vary a PSO is set out within Matrimonial Causes Act 1973 at s.31(2)(g). this was set out by HHJ Hess in **T v T [2021] EWFC B67** :

> *'45. It is undoubtedly the case that a pension sharing order can (in limited circumstances) be varied by the court under Matrimonial Causes Act 1973, section 31(2)(g). The limited circumstances are, in particular, that the application to vary must have been made before the pension sharing order took effect and before Decree Absolute has been pronounced: see Matrimonial Causes Act 1973, section 31(4A)(a).*

21. As at the date of the hearing in March 2025 it was understood that the Decree Absolute/Final Order had not been granted and consequently the Court had jurisdiction to vary the PSO. However, shortly after the hearing it was discovered that Decree Absolute had in fact been pronounced and consequently there was no jurisdiction to vary the order as originally sought. I have subsequently checked the date of Decree Absolute and I note that it was as long ago as January 2021. This option is therefore no longer pursued.

22. Set Aside the PSO.

23. The Court has deemed that this application has been issued. This is now the preferred route of the Applicant as a variation cannot be pursued.

24. It is argued that the Court has the ability to set aside the PSO under the ***Thwaite*** jurisdiction. In ***Thwaite v Thwaite [1981] 2 FLR 280*** Ormrod LJ described the jurisdiction as:
"*Where the order is still executory, as in the present case, and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the applications, it would be inequitable to do so*"

25. The Applicant refers me to ***WZ v HZ [2024] EWFC 407 (B)*** as a case in which a PSO was set aside. This was decided by a District Judge and as such (just as with a judgment from a Circuit Judge) cannot be cited as a precedent as such, but simply as

an example of what has occurred.

26. The Court of Appeal considered the matter in ***Bezeliansky v. Bezelianskaya [2016] EWCA Civ 76*** where McFarlane LJ (as he then was) stated at para 39:
"*...given that this is a case about an executory order, it is not necessary to engage any further with the Appellant's wider submission regarding the test where the jurisdiction may arise in other circumstances. In any event I agree with Mr Chamberlayne that the circumstances justifying intervention are likely to be met where an order remains executory as a result of one party frustrating its implementation."*

27. There has been considerable debate as to the extent and indeed the availability of the Thwaite jurisdiction. In particular, Mostyn J has considered that the jurisdiction is very limited and set out the following in ***BT v CU [2021] EWFC 87*** :

[64] An application to set aside an executory order under the Barder *doctrine is explicable as an exercise of appellate powers, now replaced by a specific rule permitting the power to be exercised at first instance. An application to set aside an executory order based on fraud, or mistake, can be explained as a separate cause of action. These are surely the only legitimate exceptions to the statutory prohibition on variation of the amount of capital settlements.*

[66] If this route were available, then it means that many Barder *cases, including* Barder *itself, will have been tried, and in most cases dismissed, applying a set of principles far more rigorous than those required under the executory order doctrine. This is because most* Barder *cases, including* Barder *itself, concern orders which are executory. It would therefore seem, if the proponents of the executory order doctrine are correct, that the entire litigation in* Barder *itself, all the way to the House of Lords, was conducted on a completely wrong footing.'*

28. This is in stark contrast to the position set out by Moor J in ***Hersman v Alexandra Caroline de Verchere [2024] EWHC 905*** :

"*The second point in relation to jurisdiction is the power of the court to make orders "working out and enforcing" earlier financial remedy orders. Again, I have no doubt*

whatsoever that the court has such jurisdiction. It would be a very surprising and unjust omission if such a power did not exist. It would be a cheat's charter and encourage non-compliance or obstruction with legitimate court orders. Fortunately, the Court of Appeal has confirmed that the jurisdiction exists to enable a judge to do so, where the order remains "executory"; in other words, it has not, as yet, been complied with. In the case of Bezeliansky v Bezelianskya [2016] EWCA 76, the Court of Appeal dismissed an appeal from me, when I had done just that. McFarlane LJ said, at paragraph [37]:-

"It is plain to me that Moor J was entirely correct in holding that the authority of Thwaite v Thwaite [1982] Fam 1 to the effect that 'an executory order can be varied in the way that (counsel) invites me to do' was entirely sound and the appellant's submission that the judge was wrong in his interpretation of this authority is completely unsustainable.""

29. In ***Rotenberg v Rotenberg [2024] EWFC 185*** Peel J was satisfied that the Thwaite jurisdiction was still good law:
*"Although doubt has been expressed by Mostyn J as to the existence of the Thwaite jurisdiction in **SR v HR [2018] EWHC 606 (Fam)**, I have not heard argument on the point and am inclined to accept, for the purposes of this case, that the jurisdiction does indeed exist, although it should be used sparingly. The essence of the jurisdiction is that the court may adjust an executory order (i.e before it has been complied with) if it would be inequitable not to do so, most commonly where there has been a significant and necessarily relevant change of circumstances since the order was made*."

30. I have been referred to the analysis of the Thwaite Jurisdiction of HHJ Reardon in ***H v W [2023] EWFC 120*** at paragraphs 46 to 59 in which she refers to a number of the authorities that I have set out above. I find myself in full agreement with the decision of HHJ Reardon which I do not set out in full but summarise as follows:
    a. It would be strange if the Family Court offered no remedy for the disadvantaged spouse in cases in which the other spouse had deliberately frustrated the order.
    b. The essence of Thwaite is fairness.

c. However, in exercising the jurisdiction the court is not approaching the situation with fresh eyes. Thwaite itself, Bezeliansky and L v L [2008] 1 FLR 13 all refer to making an adjustment from the terms of the final order not because it is fair to do so, but because in the light of events since the order it would be inequitable not to do so

31. The reference to L v L refers to the judgment of Munby J (as he then was) when he stated:
"Merely because an order is still executory the court does not have, any more than it has in relation to an undertaking, any general and unfettered power to adjust a final order – let alone a final consent order – merely because it thinks it just to do so. The essence of the jurisdiction is that it is just to do so – it would be inequitable not to do so – because of or in the light of some significant change in the circumstances since the order was made."

32. The test was set out by Lieven J in Kicinski v Pardi [2021] EWHC 499 as follows:
"*The first question in deciding whether to exercise the Thwaite jurisdiction is whether there has been a significant (and necessarily relevant) change of circumstances since the order was entered into; and the second question is whether, if there has been such a change, it would be inequitable not to vary the order. For myself, I do not find the words "cautious" and "careful" particularly helpful. There are two requirements to the use of the jurisdiction and their application will ensure that the Thwaite jurisdiction is used with care. There is no additional test or hurdle set out by the Court of Appeal in Bezeliansky which is the case that binds me."*

33. Applicability to this case.

34. **Has there been a significant and relevant change of circumstances since the order was entered into?** The order itself was a Consent Order at a time when both parties were represented. It is clear from the documentation that there was full co-operation by both parties as all the relevant information had been provided by each of them and the D81 and Consent Order, together with Pension Sharing Annex fully completed. That is in stark contrast to the total non-engagement of the Respondent which has been evidenced since the order was granted.

35. The non-engagement has related to all aspects of the order, both in relation to the former matrimonial home, which has required many applications and orders to enforce as well as the PSO. I am satisfied that this amounts to a significant change since the date of the order was granted. As at that date it would have been anticipated that the parties would simply complete the requisite forms (not an onerous task) and the pension share could have been fully implemented in a matter of months. The impact of the Respondent's repeated failures to do so are highly significant to the Applicant (and Respondent).

36. I do not intend to consider whether the ***Barder*** test would have been satisfied as I am content that the Thwaite jurisdiction is an alternative approach and not one to be considered on Barder principles.

37. **Would it be inequitable not to vary (set aside) the order?** If the order is set aside in the manner sought by the Applicant, then it will have a seriously adverse impact upon the Respondent. In rough terms the PSO would provide the Respondent with a pension with a cash equivalent of £94,454 (that is 48.94% of £193,000). That is a sizeable asset in the overall finances of these parties and the Court would be slow to remove that from the Respondent. It was obviously considered to be an important element of the overall settlement at the time of the agreement.

38. On the other hand, the Applicant is now aged 70 and is in limbo as he is not able to retire without having access to this element of his pension. It is stated that these proceedings are having a detrimental impact upon the Applicant's wellbeing and that they have been distressing and costly. He was admitted to hospital as recently as January 2025 and is desperate to move on with his life.

39. This Court cannot possibly condone the behaviour of the Respondent in frustrating the order of the Court. The order would not have been approved in the form that it was if it was known that the Respondent was not going to permit it to be implemented. In short, I am satisfied that it would be inequitable not to set aside the order, bearing in mind the impact it is having upon the Applicant, despite the adverse effect upon the Respondent.

40. In so doing, however, I am conscious of the possible unfairness to the Respondent as she will be losing out on a substantial benefit. Should there be some 'prid pro quo' for the setting aside of the PSO? In normal circumstances I would state that such a position would be fair and that it would be appropriate if there was jurisdiction so to order. This could be achieved by an alteration of the respective shares in the proceeds of sale of the former matrimonial home. However, there is no application for this to occur and the jurisdictional basis for the same does not exist. The reality is that the intransigence of the Respondent is the sole cause of this situation and as such I am satisfied that it would be inequitable to do anything other than setting aside the PSO.

41. The Respondent must be given one last opportunity to perform her obligations under the PSO and must be warned in very stark terms as to the impact of her failure to do so. The time scale must be short, and I am satisfied that 28 days is sufficient. I will order that the email and letter that is sent to her must include the following message in bold and it must be reproduced on the order itself:

    "IMPORTANT INFORMATION
    Ms X, this order sets aside the Pension Sharing Order which it was agreed you would receive in April 2023. This will result in you losing the benefit of approximately £94,000 worth of pension benefits. This will not occur if you comply with the order to fill out the form provided by the pension provider and the other information requested within 28 days. If you do not provide this information your ability to obtain this pension benefit will be lost forever."

42. Vary the PSO to a Pension Attachment Order.

43. This option was raised by me at the hearing in March 2025. I enquired as to whether this may be a possible method of ensuring that the Applicant may be able to draw down his pension but permit the Respondent to receive an element of that pension, at least for the period that the Applicant continues to receive it.

44. Ms Kay has addressed this matter fully in her subsequent written submissions and I accept her arguments that a Pension Attachment Order would not be an option open to the Court. I do not need to set out my reasoning in full save to say the following:

a. There has been no change in circumstances that would bring the Thwaite jurisdiction on such an application.
b. It would require the clean break order to be set aside and such an outcome could not be proportionate to the issue faced by the Court, especially when it is considered that the difficulties have all arisen due to the behaviour/inactivity of the Respondent.
c. There is no application to set aside the clean break and both parties sought such orders throughout.
d. It was always envisaged by the parties that this would be a clean break and that was a fundamental basis of the agreement.

45. It follows that a pension attachment order is not an option for the Court in this scenario.

46. Costs

47. There have already been costs orders made against the Respondent in these proceedings in the sums of £4,589.80 and £8,529.60. In default of the Respondent making such payments, they are to be deducted from her share of the proceeds of sale.

48. There have been substantial costs incurred since the October 2024 hearing. The total sought now is in the further sum of £30,116.22. These costs cover a D11 application, two hearings and further work subsequent to the last hearing in preparing written submissions etc.

49. I fully accept that the conduct of the Respondent has been woeful, and that the Applicant was forced to make these applications. There is no doubt that a costs order is fully warranted. The only question is one of quantum. There was an application filed for the PSO to be varied and the hearing before me was conducted on the basis that this was the order sought by the Applicant. It now transpires that the Court had no jurisdiction to consider such an application due to Decree Absolute having been pronounced some 3 years earlier. This is a point that should have been understood by or on behalf of the Applicant. It cannot be right that the Respondent should bear the

element of costs relating to such work.

50. I accept that the hearing was still required and that a position statement would still have needed to be prepared but there is no doubt that significant work was put into considering the application to vary the PSO. There are further issues which must be considered such as whether it was required for the solicitor to attend the hearing before me (nearly £2,000 sought) on a case involving almost exclusively legal argument. Overall, I consider that there must be a substantial reduction in the costs sought but I will order that the Respondent is to pay £20,000 inclusive of VAT towards the costs of the Applicant. These are to be paid within 21 days and if not paid, are to be deducted from the Respondent's share of the proceeds of sale.

His Honour Judge Farquhar
13th June 2025.