

Six down – two to go!

14.20 or so >14.55:

Applying the lessons of recent cases, what can you achieve for your clients over the quantum and duration of maintenance orders?

James Pirrie



From this day forward,
for richer for poorer ...
till death do us part ...
and this is my solemn
vow...
...With this Ring I thee
wed, with my body I
thee worship, and with
all my worldly goods I
thee endow....

1) The romantic persuasion

2) The "feminist" argument



"Baroness Deech cited a letter from a senior judge which warned against "the crude and amateurish reform of the delicately calibrated law of financial provision following divorce".

"Baroness Deech deemed the remark "narcissistic",

If there is one thing that stops women getting back on their feet and being treated seriously and equally at work, it is the assumption throughout the legal system that once a woman is married she is somehow disabled and incapable ever of managing on her own for the rest of her life."
"My Bill...would bring England and Wales into line, not only with Scotland but with most of western Europe and most of the American states in splitting matrimonial assets and curbing life-long maintenance."

A paradigm

He earns 500k net, age 50 ...
 pps at 120k > £100 a year
 Watch the capital build up ...
 ... which ignores any additional pension contributions etc

Year	2008	2019	2020	2023	2026	2029	2030	
his age	50	52	52	55	60	63	62	
b/f		244,300	494,496	1,396,383	3,067,829	5,435,267	8,911,979	4,396,212
earning	500,000	500,000	500,000	500,000	500,000	500,000	500,000	
ch support	-40,000	-40,000	-20,000					
maintrnce	-120,000	-120,000	-120,000	-100,000	-100,000			
own needs	-100,000	-100,000	-100,000	-100,000	-100,000	100,000	100,000	
leaves	240,000	494,496	794,496	1,636,383	3,067,829	5,435,267	8,911,979	
interest	0.00	4,800	9,636	32,728	67,558	76,705	96,259	
c/f	244,300	494,496	794,496	1,669,114	3,465,267	5,911,979	4,396,212	



3) The moral hiatus

K v L [2012] 1 WLR 306, 313C/D:
 "... the law does not abjure all discrimination. On the contrary it is of the essence of the judicial function to discriminate between different sets of facts and thus between different claims. What is outlawed is discrimination on the ground of superficial differences which, on analysis do not reflect substantive differences

4) The business imperative ...

Keen to leave your rich husband?
 Come to London, divorce capital of the world
 ... Guardian Feb 2015



James Pirrie
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5) ... None of our business



- The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what, until comparatively recently, would have been recognised as the typical nuclear family.
- All of this poses enormous challenges for the law, as indeed for society at large. Many of these changes have given rise to profound misgivings in some quarters. We live in a society which, on many social, ethical and religious topics, no longer either thinks or speaks with one voice. These are topics on which men and women of different faiths or no faith at all hold starkly differing views. All of those views are entitled to the greatest respect but it is not for a judge to choose between them. The law must adapt itself to these realities; but much of that is and must be a task for Parliament.

Sir James Mundy, 20.3.2018 Lecture to Law School University of Edinburgh

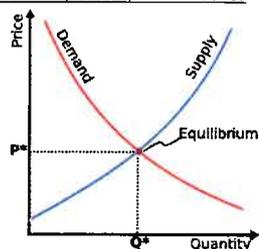
The current grail?

The lowest point of economic independence avoiding hardship that is undue?

- Replace "price" with E_p/a ,
- "quantity" with a timescale
- "demand" with needs,
- "supply" with payee resources

And equilibrium becomes the point of "independence without hardship that is undue", perhaps the latest question we have set ourselves.

But note the compelling attack on this prevailing economic methodology eg in "Doughnut Economics" Kate Raworth ... Will we realise in some years that this was the wrong direction of travel on which to have embarked anyway?



The accretion of law ...

The steady build over time, incredible change whilst all of our cases have dripped down on us: eg

- Wachtel
- Abolition of tax relief on maintenance
- Child support formulae ...

Imagine trying this argument in 2018:



142. I have found the outcome in *Parlour* more difficult. Whilst Mr. Mostyn's global percentage [ie the same percentage shares of income as for capital] has the attractive neatness of matching the level of capital distribution, I am less sure that an arbitrary figure calculated without reference to section 25A will necessarily produce a fair result in four years.



Hardly ancient history – 2004, within the scale of many of the cases still being quoted.

Conflict of principles?

- This is difficult ... there seem to be two principles:
 - Marriage is a partnership of equal entitlements
 - Until it isn't and then there is the drive towards independence heedless of hardship (unless 'undue', whatever that means).
- It offers a brutal-seeming future for the "I committed my all to this" spouse; but
- In the detailed approach to the case, is there more than meets the eye? eg around
 - Departure from equality
 - Budgets including stockpiling for retirement
 - Departure from Duxbury assumptions in the first round?



<https://www.judiciary.gov.uk/wp-content/uploads/2018/04/guidance-on-financial-needs-divorce-2nd-edition-april-2018.pdf>

is it useful to look back at the cases from the perspective of

- FJC, guidance on needs; and
- (In particular Moylan LJ) in *Waggott*?



Each provide a profound review of the law on periodical payments; and so looking through their eyes as to what remains visible of those earlier accretions may be of profound value in clarifying the state of the law in 2018.





We will also touch on variations, when the approach seems to be different ...

Scrappier summary reflects the diversity that the case will then have become.

The Sternbergian interlude?

The question? *Applying the lessons of recent cases, what can you achieve for your clients over the quantum and duration of maintenance orders?*

Structure from here:

1. What are the series of questions the court should address before making a pps order;
2. Is it different on a variation? If so what are those steps ...
3. To make it easier – a quick structure on capitalising a variation application pps and thus:
4. What are the tactical key points to assist dealing with these claims?

Making appropriate periodical payments orders – case May 2016		
1	What are the principles on which we should give our clients guidance? Are our clients aware of the "each case on its facts" principle? "a matter of discretion" approach. With regard to the 2008 encouragement of a discretionary approach.	B-D
2	Should there be an award of maintenance?	G
3	Subject to the rigour and the firmness of respecting autonomy unless: - Child needs	
4	- Verify applicant has a genuine need (a different lecture) - The ultimate objective is to give each party an equal start on the road to independent living. - The objective is independence, where achievable.	J-K
5	Sharing: - Sharing does not apply to maintenance. There is no goal of economic parity after the marriage. - Uncontested sharing of the marriage account (as in the applicant's favour) may be ordered for need and effect the parties' financial position.	M, P Q-R
6	Capitalisation: - Usually marriage generated needs. - Referenced to standard of living and duration of that standard and a high standard can mean "needs generously assessed" – elasticity of "needs". - Balanced with evidence to achieve a clean break, which is why there will often be "no capitalisation". - Referenced to duration of provision. - Proportionate. - No limit to the quantum of the award. - Split into "basic budget" & "discretionary", where income is bonus money.	S-U
7	Needs	X-2000
8	Referenced to standard of living and duration of that standard and a high standard can mean "needs generously assessed" – elasticity of "needs".	2000-2
9	Balanced with evidence to achieve a clean break, which is why there will often be "no capitalisation".	AL
10	Referenced to duration of provision.	AL
11	Proportionate.	AL
12	No limit to the quantum of the award.	AL
13	Split into "basic budget" & "discretionary", where income is bonus money.	AL
14	As regards the applicant's resources: - An evidence based approach as to what the applicant's future spending needs will be. - Capital resources to be assessed by the applicant to meet needs in the future.	A...2017 C10C2
15	There is a duty to consider the termination of claims.	2014E
16	Where the court awards periodical payments it must consider whether to make them for a term.	2014E
17	Where the court awards periodical payments it must consider whether to make them for a term.	2014E

The 25 steps of a periodical payments award – P2

Or maintenance kerplunk

<https://www.youtube.com/watch?v=74AlAq1qaQ8>

All of this might boil down to the following:

1. Think – *really* think – early on (probably pre form E) about:
 1. The different aspects of the applicant's need
 2. The opportunities for the applicant to achieve financial independence
2. Be structured & logical and gather the evidence
3. Be resolute
 1. The Judge – and the other side - may know the law less well than you
 2. Insist on findings on your evidence and determination of your arguments.
4. With ongoing orders
 1. Record any findings / expectations
 2. Wrap up well with the client –
 3. prepare for round 2.

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Including

page	
2	Making a periodical payments order – 25 considerations
3-5	Statutory elements
6-25	Case quotes
26-28	The start of tips and traps for PPs cases
29	Varying an order 19 considerations
31-40	Case quotes on variations
41	A cleaner map for capitalisation cases
42	Tips for case management on variations.

Making *spousal Periodical Payments orders – circa May 2018*

1	What are the principles on which we should give our clients guidance? <i>Are our senior courts tending towards the "each case turns on its own facts" "all a matter of discretion" approach? With scant guidance & predictability. But the FJC encourages a disciplined approach.</i>		B-D E
2	Should there be an award of maintenance Yes if fair;	S25	G
3	Subject to pre-nup and the fairness of respecting autonomy unless - Child's needs - Leaving applicant in a situation of real need [a different lecture]		
4	What is the purpose of function of maintenance • The ultimate objective is to give each party an equal start on the road to independent living. • The objective is independence, where achievable.		J-K
5	Sharing • Sharing does not apply to maintenance. There is no goal of economic parity after the marriage. • Unequal sharing of the marriage acquest (ie in the applicant's favour) may be justified by needs and where the earning party can replenish		M, P Q-R
6	Compensation		S-U
7	Needs • Usually marriage generated needs ...		X-AOi&iii
8	• Referenced to standard of living and duration of that standard and a high standard can mean "needs generously assessed" – elasticity of "needs"		AO- Z V AA
9	• Balanced with aspiration to achieve a clean break, which is why there will often be "the gentle transition"		AB
10	• Referenced to duration of provision		AD
11	• Proportionate		AC
12	• No line by line analysis of the budget		AF
13	• Split into 'basic budget' & 'discretionary', where income is bonus heavy?		
14	As regards the applicant's resources: • An evidence based approach as regards the applicant's future earnings		AL -AN7
15	• Capital resources to be amortised by the applicant to meet needs? It depends.		Q-BC>
16	There is a duty to consider the termination of claims	S25A(1)	
17	Where the court awards periodical payments it must consider whether to make them for a term:	S25A(2)	
18A	The term being that sufficient to enable the party to adjust		
18B	... and adjust without hardship that is undue		
19	The court can impose such term as it thinks fit • It has to consider a term • Where evenly-balanced prefer a term over a joint lives order	S28(1)	AOv
20	The court may consider prohibiting extension of the term • Where evenly-balanced prefer extendable terms	S28(1A)	AOxi
21	• The extending of a term will probably reference the intent of the original order • (or perhaps the Fleming test of exceptional justification)		AY
22	<i>The court can also prohibit further applications under s23(1)(a) or (b)</i>	S25A(3)	
23	Consider stepped orders (& interrelationship with 13?)		BA
24	Capitalisation of award ("Duxbury 2") ... cash-flow modelling?		BC > esp.BE
25	Stockpiling		BH

PERIODICAL PAYMENTS CIRCA MAY 2018

The statutory elements:

[25 Matters to which court is to have regard in deciding how to exercise its powers under ss 23, 24 and 24A

- (1) It shall be the duty of the court in deciding whether to exercise its powers under [section 23, 24, 24A](#) or [24B](#) above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.
- (2) As regards the exercise of the powers ... *in relation to a party* to the marriage, the court shall in particular have regard to the following matters—
 - (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;
 - (e) any physical or mental disability of either of the parties to the marriage;
 - (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
 - (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
 - (h) *in the case of proceedings for divorce or nullity of marriage, ...* the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

(the 'tailpiece' removed by the Matrimonial and Family Proceedings Act 1984)

And so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities to the other.

(Note too the introduction of pension sharing ... a game changer as regards the clean break)

- (3) As regards the exercise of the powers ... *in relation to a child of the family*, the court shall in particular have regard to the following matters—
 - (a) the financial needs of the child;
 - (b) the income, earning capacity (if any), property and other financial resources of the child;
 - (c) any physical or mental disability of the child;
 - (d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;
 - (e) the considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c) and (e) of subsection (2) above.

[25B Pensions

- (1) The matters to which the court is to have regard under [section 25\(2\)](#) above include—
 - (a) in the case of paragraph [\(a\)](#), any benefits under a pension arrangement which a party to the marriage has or is likely to have, and
 - (b) in the case of paragraph [\(h\)](#), any benefits under a pension arrangement which, by reason of the dissolution or annulment of the marriage, a party to the marriage will lose the chance of acquiring, and, accordingly, in relation to benefits under a pension arrangement, [section 25\(2\)\(a\)](#) above shall have effect as if 'in the foreseeable future' were omitted.

25A Exercise of court's powers in favour of party to marriage on decree of divorce or nullity of marriage

(1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under [section 23\(1\)\(a\), \(b\) or \(c\), 24, 24A or 24B](#) above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

(2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party

(3) Where on or after the grant of a decree of divorce or nullity of marriage an application is made by a party to the marriage for a periodical payments or secured periodical payments order in his or her favour, then, if the court considers that no continuing obligation should be imposed on either party to make or secure periodical payments in favour of the other, the court may dismiss the application with a direction that the applicant shall not be entitled to make any future application in relation to that marriage for an order under [section 23\(1\)\(a\) or \(b\)](#) above

28 Duration of continuing financial provision orders in favour or party to marriage, and effect of remarriage [or formation of civil partnership]

- (1) Subject in the case of an order made on or after the grant of a decree of a divorce or nullity of marriage . . . to the provisions of [sections 25A\(2\)](#) above and [31\(7\)](#) below, the term to be specified in a periodical payments or secured periodical payments order in favour of a party to a marriage shall be such term as the court thinks fit, except that the term shall not begin before or extend beyond the following limits, that is to say—
- (a) in the case of a periodical payments order, the term shall begin not earlier than the date of the making of an application for the order, and shall be so defined as not to extend beyond the death of either of the parties to the marriage or, where the order is made on or after the grant of a decree of divorce or nullity of marriage, the remarriage of[, or formation of a civil partnership by,] the party in whose favour the order is made;

(1A) Where a periodical payments or secured periodical payments order in favour of a party to a marriage is made on or after the grant of a decree of divorce or nullity of marriage, the court may direct that that party shall not be entitled to apply under [section 31](#) below for the extension of the term specified in the order

31 Variation, discharge etc of certain orders

- (1) Where the court has made an order to which this section applies, then, subject to the provisions of this section and of [section 28\(1A\)](#), the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.
- (2) This section applies to the following orders, that is to say—
- (a) any order for maintenance pending suit and any . . . interim order for maintenance;
- (b) any periodical payments order;
- (c) any secured periodical payments order;
- (d) any order made by virtue of [section 23\(3\)\(c\)](#) or [27\(7\)\(b\)](#) above (provision for payment of a lump sum by instalments);
- [(dd) [pension rights]
- (e) any order for a settlement of property under [section 24\(1\)\(b\)](#) or for a variation of settlement under [section 24\(1\)\(c\)](#) or (d) above, being an order made on or after the grant of a decree of judicial separation;
- [(f) any order made under [section 24A\(1\)](#) above for the sale of property..
- (2A) Where the court has made an order referred to in subsection (2)(a), (b) or (c) above, then, subject to the provisions of this section, the court shall have power to remit the payment of any arrears due under the order or of any part thereof.

...

5) Subject to subsections (7A) to (7G) below and without prejudice to any power exercisable by virtue of subsection (2)(d), (dd) [, (e) or (g) above or otherwise than by virtue of this section, no property adjustment order or pension sharing order shall be made on an application for the variation of a periodical payments or secured periodical payments order ... under [section 23](#) above, and no order for the payment of a lump sum shall be made on an application for the variation of a periodical payments or secured periodical payments order in favour of a party to a marriage ...

...

(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen, and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates, and—

(a) in the case of a periodical payments or secured periodical payments order made *on or after the grant of a decree of divorce or nullity of marriage*, the court shall consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made or secured only for such further period as will in the opinion of the court be sufficient [(in the light of any proposed exercise by the court, where the marriage has been dissolved, of its powers under subsection (7B) below) to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments;

..

(7A) Subsection (7B) below applies where, after the dissolution of a marriage, the court—

- (a) discharges a periodical payments order or secured periodical payments order made in favour of a party to the marriage; or
- (b) varies such an order so that payments under the order are required to be made or secured only for such further period as is determined by the court.

(7B) The court has power, in addition to any power it has apart from this subsection, to make supplemental provision consisting of any of—

- (a) an order for the payment of a lump sum in favour of a party to the marriage;
- (b) one or more property adjustment orders in favour of a party to the marriage;
- (ba) one or more pension sharing orders;
- (c) a direction that the party in whose favour the original order discharged or varied was made is not entitled to make any further application for—
 - (i) a periodical payments or secured periodical payments order, or
 - (ii) an extension of the period to which the original order is limited by any variation made by the court.

We can survey the court's approach to those provisions with the benefit of

- The Family Justice Council (President- approved "Guidance on financial needs on divorce"); and
- Lord Justice Moylan's survey of periodical payments from Waggott [2018] EWCA Civ 727, Seeing which are the cases that to these industry leaders have stood the test of time.

Finally in green are a few obvious quotes that help to fill in the gaps

A	<p><u>1)fairness ... 2)non-discrimination ... 3)sharing ... 4)compensation... 5)need ... 6)clean break</u></p> <p>68. The present case engages with a number of principles which underpin the exercise by the court of its discretionary powers under the 1973 Act. I propose to address the following principles - non-discrimination; sharing, compensation, need; and clean break – by reference principally to the way in which they have been considered in previous authorities. In referring only to these principles, I do not, of course, overlook that the court's objective is to achieve a fair outcome having taken into account all the relevant circumstances of the case.</p>
B	<p style="text-align: center;"><u>Guidance & Interpretation</u></p> <p><u>Consistency</u></p> <p>3. This is important because of the obligation on the courts to achieve, what Lord Nicholls in <i>Miller v Miller; McFarlane v McFarlane</i> [2006] 2 AC 618 ("<i>Miller</i>") (para 6) referred to as, "an acceptable degree of consistency of decision from one case to the next".</p> <p>119. The overarching question, as Mr Turner rightly identified, is whether the award made by the judge was fair. However, to provide an answer to this question requires more than the simple, almost pantomime, response of, "Yes, it is" or "No, it isn't". The answer needs to have a principled basis of sufficient substance to explain why any specific award is to be regarded as fair or unfair. That is why I have spent some time in this judgment addressing the applicable principles. This is not, of course, the same as saying that the application of those principles will lead to one answer. Discretion and evaluation remain important elements which will inform the judge's determination. However, as referred to at the outset of this judgment, as with all judicial powers which have these elements, it is incumbent on the courts to seek to provide sufficient clarity as to the relevant legal principles and the manner in which they should be applied so that the outcome in any specific case can be identified as being within a reasonably circumscribed range of potential awards.</p> <p><u>Textual analysis is impermissible</u></p> <p>66. During the course, in particular, of Mr Turner's submissions, it sometimes seemed as though the court was being invited to undertake a detailed textual analysis of what has been said in some of the cases, notably <i>Miller</i>, in a manner similar to that which might be applied when the court is required to interpret a statute. I would question whether such a detailed scrutiny is apt and properly reflects the differences between the drafting process for a judgment and that for a statute and their different roles in the administration of justice. I would also mention that, even in the interpretation of statutes, the court can take a broad purposive approach.</p> <p>67. Further, in the context of financial remedy applications, the court is giving guidance. Guidance can, of course, be given with a degree of specificity but, it is perhaps obvious to say that, one cannot expect judgments to be written in the expectation that they will be analysed as though they were statutes. This is not to suggest that precedents cannot create binding authority. The issue I am addressing is how those precedents are interpreted and applied.</p> <p><i>A mis-match between this and the Law Commission's pleas for consistency and provision for guidance reflected in the introduction to Guidance on "financial needs" on divorce?</i></p>
E	<p style="text-align: center;"><u>Fundamentals</u></p> <p>Guidance can be taken from Parliament's deliberate removal of "the tailpiece" to the original section 25 "to exercise those powers as to place the parties, so far as is practical and having regards to their conduct, just to do so, in the position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial</p>

obligations and responsibilities towards the other" So we know that this is no longer the guidance ... what is the guidance now?

G fairness

68. ... I do not, of course, overlook that the court's objective is to achieve a fair outcome having taken into account all the relevant circumstances of the case.

...

H The yardstick

72. I start by referring briefly to *White v White* in which the "yardstick of equality" was developed as a "general guide". In particular, it is relevant to note that the yardstick was to be applied to the division of the parties' "available assets": Lord Nicholls p.605F/G.

I Forget the yardstick

P10 para 13: The importance of addressing needs rather than pursuing equal sharing of assets in lower value cases was addressed by Baroness Hale in Miller, McFarlane ... 136. ... but the House was careful to point out (see p605f) that the yardstick of equality did not inevitably mean equality of result. It was a standard against which the outcome of the section 25 exercise was to be checked. In any event, except in those cases where the present assets can be divided and each can live independently at roughly the same standard of living, equality of outcome is difficult both to define and to achieve. Giving half the present assets to the breadwinner achieves a very different outcome from giving half the assets to the homemaker with children. ... 142 ... an equal partnership does not necessarily dictate an equal sharing of the assets. In particular it may have to give way to the needs of one party of the children. Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution ... Recognising this is one reason why English law has been so successful in retaining a home for the children ... 144 In general it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living.

J The objective of independence

P12para 15: The Law Commission [concludes] that the objective of financial orders made to meet needs should be to enable a transition to independence, to the extent that that is possible in the light of the choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home and the continued shared responsibilities (importantly child care). We acknowledge the fact that in a significant number of cases, independence is not possible usually because of age but sometimes for other reasons arising from choices made during the marriage.

K Summary (Per Charles J in G v G [2012] EWHC 167 (Fam))

136. What I take from this guidance on the approach to the statutory task is the objective of achieving a fair result (assessed by reference to the words of the statute and the rationales for their application identified by the House of Lords):

i) is not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households), but

ii) is met by an approach that recognises that the aim is independence and self sufficiency based on all the financial resources that are available to the parties. From that it follows that:

iii) generally, the marital partnership does not survive as a basis for the sharing of future resources (whether earned or unearned). But, and they are important but:

a) the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties,

- b) the length of the marriage is relevant to determining the period for which that level of lifestyle is to be enjoyed by the payee (so long as this is affordable by the payor), and so also, if there is to be a return to a lesser standard of living for the payee, the period over which that transition should take place,
- c) if the marriage is short, this supports the conclusion that the award should be directed to providing a transition over an appropriate period for the payee spouse to either a lower long term standard of living than that enjoyed during the marriage, or to one that is not contributed to by the other spouse,
- d) the marriage, and the choices made by the parties during it, may have generated needs or disadvantages in attaining and funding self sufficient independence that (i) should be compensated, and (ii) make continuing dependence / provision fair,
- e) the most common source of a continuing relationship generated need or disadvantage is the birth of children and their care,
- f) a continuing relationship generated need is often reflected in a continuing contribution to the day to day care of the children of the relationship, that contribution being recognised by the continuing financial contribution of the paying spouse (which is a continuing contribution to the day to day care of the children),
- g) the choices made by the parties as to the care of their children are an important factor in determining how that care should be provided and shared both by reference to day to day care and the funding of the independent households, and
- h) the provisions of s. 25A must be taken into account.

As to points (e), (f) and (g), s. 25(1) provides that when the court is having regard to all the circumstances of the case first consideration is to be given to the welfare while a minor of a child of the family, and in my judgment this is a clear indicator that the impact of the manner in which that welfare has been, and is to be, promoted has particular weight.

Non-discrimination

L

69 ... Lord Nicholls said in *White v White* [2001] 1 AC 596, 605B/C:

"In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles"

70. However, because it appeared at times that Mr Turner was submitting, simply, that any future financial differences between the parties could or would constitute discrimination, it is relevant to repeat what Wilson LJ (as he then was) said in *K v L* [2012] 1 WLR 306, 313C/D:

"... the law does not abjure all discrimination. On the contrary it is of the essence of the judicial function to discriminate between different sets of facts and thus between different claims. What is outlawed is discrimination on the ground of superficial differences which, on analysis do not reflect substantive differences

Sharing

M

No principle of sharing post separation income

121. First: (i) is an earning capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has an entitlement to share?

122. In my view, there are a number of reasons why the clear answer is that it is not.

123. Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in *Jones v Jones*.

124. Looking at its impact more broadly, it would apply to every case in which one party had earnings which were greater than the other's, regardless of need. This could well be a very significant number of cases. Further, if this submission was correct, I cannot see how this would sit with Lady Hale's observation in *Miller* that, even confined to "(i)n general", "it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation" (para 144) or her observation as to the effect of "(t)oo strict an adherence to equal sharing" (para 142).

125. Additionally, it would inevitably require the court to assess the extent to which the earning capacity had accrued *during* the marriage. This would require the court to undertake the exercise to which there are the powerful objections referred to by Wilson LJ in *Jones v Jones*. Where would the court start and by reference to what factors would the court determine this issue?

126. Mr Turner had no answer as to what factors would determine either the percentage of any award or its duration. He made general submissions (as summarised in paras 51 and 52 above) but was unable to articulate any principles by which, for example, the court (i) should determine the percentage division of the income which is, of course, only generated by actual work (the "unforgiving minute" referred to by Mostyn J in *B v S*, para 76); (ii) should determine how long the relevant earned income should be deemed to continue (would it be based on some notional "retirement" date considered to be "fair" or would it require a factual determination?); or (iii) should determine whether any changes in employment were reasonable (if resulting in a lower income) or were, or were not, sufficient to make the new job of a different "character" to the earning capacity claimed as having been developed during the marriage (see para 28 above). This lack of clarity supports the conclusion that to apply the sharing principle in this way would significantly undermine the "important aspect of fairness" referred to by Lord Nicholls (para 3 above), namely to achieve an "acceptable degree of consistency of decision". This is in part because this branch of the road to achieving a clean break would be devoid of clear signposts.

127. I also consider that the passage, relied on by Mr Turner from Lady Hale's speech in *Miller* (para 154), cannot bear the weight he seeks to put on it, not least because Lady Hale began that paragraph by saying:

"There is obviously a relationship between capital sharing and future income provision. If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision".

These words, and the other passages referred to above, are inconsistent with Mr Turner's submission.

128. In my view *Miller* and the subsequent decisions referred to above, in particular *Jones* and *Scatliffe*, do not support the extension of the sharing principle to an earning capacity. The sharing principle applies to marital assets, being "the property of the parties generated during the marriage otherwise than by external donation" (*Charman v Charman (No 4)*, para 66). An earning capacity is not property and, in the context advanced by Mr Turner, it results in the generation of property *after* the marriage.

When is the end point of the marriage

N

92. In *Rossi v Rossi* [2007] 1 FLR 790 (para 24.4) Mr Mostyn QC (as he then was), whilst acknowledging "an element of arbitrariness", proposed that he "would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation". This was because this period was "too close to the marriage to justify categorisation as non-matrimonial". Charles J in *H v H* [2007] 2 FLR 548, did not agree with this approach, and, as set out in the headnote, awarded the wife "declining percentages" of the husband's bonuses for the three years after the year of separation. The rationale for this "could be classified as either compensation or sharing" (para 111). In addition, in *CR v CR* [2008] 1 FLR 323, Bodey J gave "primary recognition to the wife's reasonable requirements" but also took into account, as a "subsidiary factor" to needs, that "the husband was assisted towards his high likely future earnings by (the wife's) past contributions ..." (para 103). Accordingly, "in the pursuit of overall fairness" an additional capital sum could be awarded to "reflect large imbalances of future earnings".

O

Share ... fair? ... need/compensation

84. In *Scatliffe v Scatliffe* [2017] AC 93 (para 25) Lord Wilson JSC concluded that:

"... in an ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then ask whether, in the light of all the matters specified (in the statute), the result of so doing represents an appropriate overall disposal. In particular it should ask whether the principles of need and/or of compensation, best explained in the speech of Baroness Hale in the *McFarlane* case [2006] 2 AC, paras 137-144, require additional adjustment in the form of transfer to one party of further property, even of non-matrimonial property, held by the other".

P No goal of economic parity

83. In *VB v JP* [2008] 1 FLR 742 (para 59) Sir Mark Potter P addressed the effect of the end of the partnership in terms which were endorsed by Thorpe LJ in *Hvorostovsky v Hvorostovsky* [2009] 2 FLR 1754 (para 37) and by Ryder LJ in *H v H* (para 40). Quoting from *VB v JP*:

"... on the exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ('sharing') unless and to the extent that consideration of her needs, or compensation for relationship-generated disadvantage so require. A clean break is to be encouraged wherever possible".

The fact that this observation has been approved twice by the Court of Appeal is clearly significant to the outcome of the present case.

Q Unequal sharing

81Lady Hale addressed the issue of earning capacity she did so by noting that (para 142):

"Too strict an adherence to equal sharing and the clean break can lead to a rapid decrease in the primary carer's standard of living and a rapid increase in the breadwinner's. The breadwinner's unimpaired and unimpeded earning capacity is a powerful resource which can frequently repair any loss of capital after an unequal distribution."

132. This does not mean that the manner in which the need principle is applied to the sharing award is inflexible, no more that the application of the need principle is itself inflexible. The cases referred to above (para 115) demonstrate the latter point. Further, as Wilson LJ observed in *Jones* (para 27), an earning capacity can be "relevant to a fair distribution of the assets pursuant to the *sharing* principle". It can be taken into account when the court is deciding whether the capital should be amortised in full, in part or not at all and when deciding what assumed rate of return to apply.

R *P14: Needs may well and commonly do, provide a justification for a departure from equal sharing.*

Compensation

S Don't explore motivations in compensation claims

32. As to the claim based on compensation, this regrettably led to an exploration of the reasons for the wife not returning to paid employment after the family moved in 2001. Because this claim is based on "advantage" and "disadvantage", it is perhaps not surprising that parties can be led into arguing that what is now asserted to have advantaged one party was not an advantage achieved due to the actions of the other party; or that what is now said to have been a disadvantage was a choice freely and willingly adopted by that party during the marriage and contrary to the wishes of the other party or vice-versa. I consider the issue of compensation further below but, at this stage, I confine myself to saying that, in my view, it was unnecessary and inappropriate for the parties to engage in this factual debate. I would suggest that, absent reliance on conduct (which will only exceptionally have any relevance), the court is looking at the financial consequences of what happened during the marriage and those alone.

T Compensation addresses loss of claimant not the benefit of the payer

93. I now turn to the compensation principle. Lord Nicholls referred to this in *Miller* as being (para 13),

"aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Thus the wife suffers a double loss; a diminution in her earning capacity and the loss of a share in her husband's enhanced income."

Later (para 28) he described the principle as applying "when one party's earning capacity has been advantaged at the expense of the other" (para 28). When specifically addressing periodical payments, Lord Nicholls stated that they could be ordered "for the purpose of affording compensation" (para 32).

"It would be extraordinary if this were not so. If one party's earning capacity has been advantaged at the expense of the other party during the marriage it would be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them. It would be most unfair if absence of capital assets were regarded as cancelling his obligation to pay compensation in respect of a continuing economic advantage he has obtained from the marriage."

We were also taken to paragraphs at the end of Lord Nicholls' speech where he applied the principles to the case of *McFarlane*. He said, for example, that the wife was entitled to "an award of compensation in respect of the significant future economic disparity" (para 93). Further, this element of her claim was "not directly affected by the use she makes of her resources" (para 99).

...

95. ..., it is Mr Turner's case that this principle has been misunderstood and it also applies when *and* to the extent that the husband's earning capacity has benefited by reason of the relationship.

...

98. ... There would clearly be significant conceptual and evidential difficulties if Mr Turner was right and the court had to determine whether and, if so, the extent to which a spouse's earning capacity was the product of marital endeavour.

...

139. ... I do not accept Mr Turner's submission that the compensation principle is to be applied not only when the applicant has sustained a financial disadvantage in his or her prospective career but also when the respondent has sustained a financial benefit. In my view it is clear from *Miller* that compensation is for the "disadvantage" sustained by the party who has given up a career. I appreciate that it is based in part on the other party's career having benefited but I regard that as an assumption rather than an evidential issue which has to be determined, in part because of the difficulty of undertaking any such exercise. In practice it is a claim which appears very rarely to have been established and I do not intend to encourage any more extensive or expensive exploration of the issue. However, as a necessary factual foundation the court would have to determine, on a balance of probabilities, that the applicant's career would have resulted in them having resources greater than those which they will be awarded by application of either the need principle or the sharing principle. Further, the court must separately determine whether, and if so how, this factor should be reflected in the award so as to ensure that it is fair to both parties.

u

Mostyn J in *SA v PA (Pre Marital Agreement: Compensation)* [2014] 2 FLR 1028 EWHC 392 (Fam) at [36]:

"I think that the principles concerning a compensation claim can properly be expressed as follows:-

- i) It will only be in a very rare and exceptional case where the principles will be capable of being successfully invoked;
- ii) such a case will be one where the court can say without any speculation, i.e. with almost near certainty, that the claimant gave up a very high earning career which had it not been foregone would have led to earnings at least equivalent to that presently enjoyed by the respondent;

iii such a high earning career will have been practised by the claimant over an appreciable period during the marriage. Proof of this track-record is key.

iv) once these findings have been made compensation will be reflected by fixing the periodical payments award (or the multiplicand if this aspect is being capitalised by Duxbury) towards the top end of the discretionary bracket applicable for a needs assessment on the facts of the case. Compensation ought not to be reflected by a premium or additional element on top of needs based award."

Need

V Save in the exceptional kind of case exemplified by McFarlane a periodical payments claim (whether determined originally or on variation) should in my opinion be adjudged (or settled), generally speaking, by reference to the principle of need alone. Of course needs are elastic in concept and there is much room for the exercise of discretion in their assessment..." Mostyn J para 79 B v S (Financial Remedy: Marital Property Regime) [2012] EWHC 265 (Fam)

Marriage-generated needs

X P14 ... marriage typically creates a relationship of interdependence; dependence is commonly created by the presence of children; potentially long term dependence can be created by decisions for one party to discharge family obligations at the expense of the development of employment potential; it is generally right and fair that relationship generated needs should be met by the other party if resources permit

11. This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.

P15 Lord Wilson reiterated that 'financial needs' must have been generated by the relationship with the other party if they are to justify an order for financial remedies: "*It is a dangerous fallacy ... that the current law always requires rich men to meet the reasonable needs of their ex wives ... he is not an insurer against all hazards... In order to sustain a case of need at any rate if made after many years of separation a wife must show not only that the need exists but that it has been generated by her relationship with her husband* [Miller, McFarlane para 138 Lady Hale... but it is important to note that this case was concerned with a late application made many years after the parties had divorced ... See however *Mills v Mills* in which the court of appeal allowed an appeal against the judge's decision to reduce the level of the wife's periodical payments 13 years after the divorce on the basis the wife still had unmet needs which were not the result of any financial mismanagement by her but were not otherwise obviously referable to the marriage but which the husband nevertheless had the means to meet.

... This in turn requires an assessment to be made of his or her 'income or earning capacity' including that which it would be reasonable to expect that party to take steps to acquire (s.25(2)(a).

Whose needs

Y Para 40: where resources are limited, the needs of the applicant – still typically the wife, with whom any children of the family may continue to make their primary home – will predominate. However, both parties will still need a home and an income and the financial means to maintain contact with any children of the family and share in their care. And so even in such modest or small money cases, a balance must be struck to ensure that any order is fair. A failure to consider the financial needs of both parties may render an order unfair and so liable to be set aside on appeal.

What needs?

Z P17 The main needs in most cases are for housing and present and future income; future income typically includes a need for income in retirement; the court will assess the level and duration of need

as a question of fact; the court will decide whether the needs can best be met by capital or income provision ...

... in cases involving more financial resources and higher marital standard of living 'needs' can be met at a higher level than would otherwise be possible.

Need will be measured by assessing available financial resources;

The court will strive to stretch finite resources

Where resources are modest the children's needs may predominate;

Need will be measured by assessing the standard of living during the relationship, generally the longer the relationship's duration the more important this factor will be;

A party may be expected to suffer some reduction in standard of living having regard to the overall objective of a transition to independence;

To measure need and the ability to meet it, both parties will be expected to present appropriately detailed budgets to court.

P18, The term "needs (generously interpreted)" has gained acceptance to assist determination in higher resource cases ... 23 There has been some judicial discussion of appropriate terminology to refer to "need" ... More recent caselaw has adopted the expression "need (generously interpreted)". Some judges have again criticised this as an impermissible judicial gloss liable to create its own confusion ... Other phrases have been used such as the suggestion that "fairness can properly be achieved through meeting one party's reasonable requirements fully and generously assessed" [KvL[2010] EWHC1234 at 45 per Body J ... But the key point which these expressions perhaps convey is that in cases involving more financial resources and higher marital standard of living, "needs" can be met at a higher level than would otherwise be possible.

(para 27) In an appropriate case, typically a long marriage and subject to sufficient financial resources being available, courts have taken the view that the lifestyle (ie standard of living) the couple had together should be reflected as far as possible in the sort of level of income and housing each should have as a single person afterwards. So too it is generally accepted that it is not appropriate for the divorce to entail a sudden and dramatic disparity in the parties lifestyles. In a modest or small money case, this may be unattainable or financial provision (eg periodical payments) may only be ordered for a fixed term. By contrast where there are sufficient financial resources available, it may be fair (and so appropriate) for the court to sanction a continuation of the 'lifestyle choices' made during the marriage.

AA

Balancing need and clean break

P35 Baroness Hale in Miller, McFarlane "The court has to take some account of the standard of living enjoyed during the marriage: see section 25(2)(c). The provision should enable a gentle transition from that standard to the standard that she could expect as a self-sufficient woman.

(para 34) ... as the Law commission observed: 'the transition to independence, if possible may mean that one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living unless he or she can afford to do so from his or her resources'

and in SS v NS (Spousal Maintenance) [2014 EWHC 3183, Mostyn J reasoned as follows "It is a mistake to regard the marital standard of living as a lodestar. As time passes, how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence."

And in BD v DF [2016]EWHC 594 Moylan J observed ... it may well not be fair for the applicant spouse to have his or her needs provided for at this level either at all or for longer than a defined period (ie not for life) due, for example, to the length of the marriage. ... The use of standard of living as the benchmark emphatically does not mean that ... needs are to be met at that level either at all or for more than a defined period (of less than life)

AB

Balancing provision and duration

And in AB v FC [2016]EWHC 3285 Roberts J observed ... "it has to be borne carefully in mind that there is an inter-relationship between the level at which future needs will be assessed and the period during which a court is likely to find those needs should be met by the paying former spouse. The longer the period, the more likely it is that the court will decline to assess those needs on the basis of a standard of living which replicates that enjoyed during the marriage. In my judgment those principles apply in this case equally to the assessment of W's housing and income needs. "

[An echo of what she had said in Juffali v Juffali [2016 EWHC 1684

79. Thus, what I collect from these decisions are the following principles:-

(i) The first consideration in any assessment of needs must be the welfare of any minor child or children of the family.

(ii) After that, the principal factors which are likely to impact on the court's assessment of needs are: (i) the length of the marriage; (ii) the length of the period, following the end of the marriage, during which the applicant spouse will be making contributions to the welfare of the family; (iii) the standard of living during the marriage; (iv) the age of the applicant; and (v) the available resources as defined by section 25(2)(a).

(iii) There is an inter-relationship between the level at which future needs will be assessed and the period during which a court finds those needs should be met by the paying former spouse. The longer that period, the more likely it is that a court will not assess those needs on the basis throughout of a standard of living which replicates that enjoyed during the currency of the marriage.

(iv) In this context, it is entirely principled in terms of approach for the court to assess its award on the basis that needs, both in relation to housing and income, will reduce in future in an appropriate case.

AC It is not line by line analysis of the budget

39. Thorpe LJ observed in *Purba v Purba* [1999] EWCA Civ 1739 that ... the judge is not to go through these budgets item by item but stand back and ask what is the appropriate proportion of the husband's available income that should go to support the wife"

AD Proportionality

Page 24 "Before requiring payments to meet need, the court will stand back and consider what portion of the payer's resources should fairly go to the payee.

AR v AR (Treatment of Inherited Wealth) [2012] 2 FLR 1 (Moylan LJ):

"[71]... in my judgment the court's task when addressing this factor is not to arrive at a mathematically exact calculation of what constitutes an applicant's future income needs. It is to determine the notional annual income which, in the circumstances of this case, it would be fair for the wife to receive. Further in a case such as this the wife is entitled to have sufficient resources to enable her to spend money on additional, discretionary, items which will vary from year to year and which are not reflected in her annual budget...

AE Needs trumping sharing

Para 26

- "The husband has a reasonable and discernible need for his share of the family capital at the earliest possible time that the needs of the children permit. As soon as the wife's responsibilities as the home-maker for the children reach a point of natural termination, at that point clearly the husband is entitled to his capital share" *Elliott v Elliott* [2001] 1FCR 477

V

- There are two factors in particular which point strongly to the conclusion that there should not be a Mesher order. The first is that the wife's realistic prospects of being able to generate capital of her own between now and the date when one of the Mesher triggers would operate is small, whereas ... this husband will be able to generate a substantial degree of capital for himself over and above that capital ... (*B v B Mesher* [2002]EWHC 3106 Munby J

AF The "bonus-heavy" earner *H v W* [2013] EWHC 4105 (Fam) King J

38. In my judgment where the Learned District Judge fell into error was in failing to identify a figure which would represent the W's maximum reasonable maintenance entitlement taking into account all the circumstances of the case, namely a cap. In my judgment, where the family income is routinely made up of salary and bonus and the bonus represents such a significant proportion of the total that

the Judge is driven to making a conventional monthly order for a sum less than that which he would otherwise feel to be appropriate, (taking into account all the s25 factors and in particular the standard of living and the totality of the income available in the foreseeable future,) he may well provide for a part of the W's maintenance to be paid from the bonus. Such payment, given the intrinsic uncertainty of bonuses, can only be expressed in percentage terms.

39. The proper approach would be for the District Judge to calculate a total figure for maintenance which covers what he finds to be her ordinary expenditure together with such sum as would provide for what as Moylan J described as additional, discretionary, items which will vary from year to year and which are not reflected in her annual budget. Having carried out this exercise the court will then make a monthly order to be paid for from salary at whatever rate the District Judge feels to be fair, and the balance to be expressed as a percentage, of the net bonus up to a stated maximum each year.

40. It should be made clear that such orders cannot be calculated with arithmetical precision. In determining the appropriate percentage the court will do the best it can looking at the historical pattern of bonuses to date and by factoring in such information as may be available in relation to the future prospects of H (or his company). The inherent uncertainty of bonus payments provides, in part, the reason why that the setting of a cap is essential in order to avoid the unintentional unfairness which may arise as a consequence of a wholly unanticipated substantial bonus paid to the H. Such a payment would result in W receiving a sum substantially in excess of that which the District Judge regarded as appropriate in order to maintain her maintenance at a fair level.

41. In common with most bonuses, H's bonus is made up of a number of elements in the form of stock or cash deferral. W's percentage will apply pro rata across the various elements – it would not be fair for her to be entitled to receive the entirety of her maintenance percentage from the cash element leaving the H to take the risk on stock movements and the cash flow consequences of deferred cash payments.

(Or possibly a segmented order as in McFarlane [2009EWHC]891 Fam) ... or would this have no role in the "no-sharing-of-income" regime?

AG

Clean Break

100 ... Lord Scarman in *Minton v Minton* [1979] AC 593, p. 608F/G when he said:

"An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down".

AH Independence

102. Lady Hale noted that: "several provisions were inserted in 1984 to encourage and enable a clean break settlement, in which the parties could go their separate ways without making further financial claims upon the other" (para 130). Section 25A(1) provides a "clear steer in the direction of lump sum and property adjustment orders with no continuing periodical payments. But it does not tell us much about what an appropriate result would be" (para 130). "Independent finances and self-sufficiency are the aims" (para 133) with the "ultimate objective (being) to give each party an equal start on the road to independent living" (para 144). For the avoidance of doubt, it is important also to note that, as Lady Hale reminds us, "a clean break is not to be achieved at the expense of a fair result" (para 134).

Page 31 (and para 48) "most cases tend eventually not towards life-long support but towards independence" but this is not appropriate in all cases; "In some cases a combination of age, the length of the marriage and duration out of the work place may render an ambition of independence impossible. [the majority view expressed by the Judges of the Family Division]

AI

The duty to consider

(page 31) If needs are to be met through a periodical payments order then the court must consider (whether making an initial order or a variation order) whether to make a joint lives order, an extendable term order or a non-extendable term order

Page 34 [Miller, McFarlane Lady Hale para 130] *"If [the court] decides to make a periodical payments order, it must consider how quickly it can bring those payments to an end. It has therefore to consider fixing a term although in doing so it must avoid undue hardship."*

Page 35 para 133 Section 25A is a powerful encouragement towards securing the court's objective way of lump sum and capital adjustment (which now includes pension sharing) rather than by continuing periodical payments ... it is also the logical consequence of the retreat from the principle of the life-long obligation. Independent finances and self-sufficiency are the aims. ¹

AJ

The clean break does not trump fair provision

[Lady Hale para 133 continued] ... *Nevertheless section 25A does not tell us what the outcome of the exercise required by section 25 should be. It is mainly directed at how that outcome should be put into effect.... [134] Hence these three pointers [need compensation and sharing] do make it clear that a clean break is not to be achieved at the expense of a fair result."*

AK

Whether to extend

Page 34 [Miller, McFarlane Lady Hale para 130] *"[The duty to consider] is linked to two other powers*

- 1) *s28(1) allows the court to specify the duration of a periodical payments order*
- 2) *generally it is open to the recipient to apply to extend the term provided this is done before it expires; but section 28(1A) gives the court power to prohibit any application for an extension*

If there is an application for an extension the court has the same duty to consider bringing the periodical payments to an end as soon as possible."

In deciding on the duration of any order, the court will need to consider the statutory steer towards the termination of obligations at the earliest point which is just and reasonable but termination should only occur if the payee can adjust to it without undue hardship

Termination of the obligations should be justified by reference to an evidential foundation not crystal ball gazing or pious exhortation

AL

Evidence needed

(page 35) In *Flavell v Flavell* [1997] 1FLR 353 Ward LJ underlined the need for an evidence based approach and observed *"the words of the section do not impose more than an aspiration that the parties should achieve self-sufficiency. The power of the court to terminate dependency can, however, be exercised only in the event that adjustment can be made without undue hardship. There is ... a tendency for these orders to be made more in hope than in serious expectation. Especially in judging the case of ladies in their middle years, the judicial looking into a crystal ball very rarely finds enough of substance to justify a finding that adjustment can be made without undue hardship."*

AM

The imperative on applicants to co-operate
[para 56] *G v G* Charles J [2012]EWHC 167

143. As argued, I accept that *C v C* confirms that s. 25A(2) is directed to the payee's hardship, that the court must take an evidence based approach to whether the payee can and will adjust and that unless the court concludes, on that evidential basis, that a term should be imposed it should not impose one on the basis that the payee can seek an extension (or on any other basis). Further, I accept and acknowledge that, as with all its other conclusions the court has to base any reductions in periodical payments on an evidential foundation.

144. But, in my judgment this need for an evidential base does not mean that the wife can assert (which at times she seemed to be arguing) that she can

¹ ... and continuing *"nevertheless, section 25A does not tell us what the outcome of the exercise required by section 25 should be. It is mainly directed at how that outcome should be put into effect."*

avoid an evidence based finding on her likely earnings by not providing an estimate of her earnings from the work she is planning to do, and/or by not co-operating in obtaining a report from an expert on her earning potential. As to the latter point, I do not accept that the absence of such a report is an indication that she is unlikely to be able to earn significant sums from part time employment. Rather, in my view, by not quantifying her earnings, and/or co-operating in their quantification, the wife acted contrary to her duty to give full and frank disclosure of her business plans (and thus her s. 25(2)(a) resources) and the overriding objective.

AN

The proper approach

(page 36) In C v C (Financial relief: short marriage) Ward LJ summarised the proper approach:

1. The first task is to consider a clean break which pursuant to s 25A(1) requires the court to consider whether it would be appropriate to exercise its powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.
2. If there is to be no clean break, and a periodical payments order is to be made, then the court must decide pursuant to s 25 what amount is to be ordered. The duration of the marriage is a factor relevant to the determination of quantum.
3. If a periodical payments order is made, whether for 5p per annum or whatever, the question is whether it would be appropriate to impose a term because in the absence of such a direction the order will endure for joint lives or until the remarriage of the payee: see s 28(1)(a).
4. The statutory test is this: is it appropriate to order periodical payments only for such a term as in the opinion of the court would be sufficient to enable the payee to adjust without undue hardship to the termination of financial dependence on the paying party.
5. What is appropriate must of necessity depend on all the circumstances of the case including the welfare of any minor child and the section 25 check-list factors, one of which is the duration of the marriage. It is, however, not appropriate simply to say, "This is a short marriage, therefore a term must be imposed".
6. Financial dependence being evident from the very making of an order for periodical payments, the question is whether, in the light of all the circumstances of the case, the payee can adjust – and adjust without undue hardship – to the termination of financial dependence and if so when. The question is, can she adjust, not should she adjust. In answering that question the court will pay attention not only to the duration of the marriage but to the effect the marriage and its breakdown and the need to care for any minor children has had and will continue to have on the earning capacity of the payee and the extent to which she is no longer in the position she would have been in but for the marriage, its consequences and its breakdown. It is highly material to consider any difficulties the payee may have in entering or re-entering the labour market, resuming as fractured career and making up any lost ground.
7. The court cannot form its opinion that a term is appropriate without evidence to support its conclusion. Facts supported by evidence must, therefore, justify a reasonable expectation that the payee can and will become self-sufficient.

Gazing into the crystal ball does not give rise to such a reasonable expectation. Hope, with or without pious exhortations to end dependence, is not enough.
8. It is necessary for the court to form an opinion not only that the payee will adjust, but also that the payee will have adjusted within the term that is fixed. The court may be in a position of such certainty that it can impose a deferred clean break by prohibiting an extension of the term pursuant to s 28(1A). If however, there is doubt about when self-sufficiency will be attained, it is wrong to require the payee to apply to extend the term. If there is uncertainty about the appropriate length of the term, the proper course is to impose no term but leave the payer to seek the variation and if necessary go through the same exercise, this time pursuant to s 31(7)(a).

(para 57/58 /59 "The Family Justice Council endorses and commends adopting this type of rigorous and disciplined approach, consistent with the overall objective identified above and the gentle transition towards independence ... but we emphasise that each case must be considered on its own merits, upon proper exercise of the court's individual discretion at each stage at which the continuation of periodical payments falls to be considered and in the light of the implied premise of the original order ...

..." SS v NS [2014 EWHC 4183] Mostytn J

AO

46. Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:

i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.

ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.

iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.

v) If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.

vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.

vii) The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.

viii) Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis.

ix) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.

x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.

xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

Surpluses managed by both parties, preparing for independence

AP

74. However, in those cases where an immediate clean break could not be achieved, Thorpe LJ recognised that the "surplus of future income over future needs" could be divided between the parties. In his view it was wrong in principle for "the earner to have sole control of the surplus" (para 66). This was to give *both* parties "the opportunity and the responsibility to invest" with the objective of financial independence being achieved "within a relatively short span".

AQ	<p><u>A continuing mortgage liability</u></p> <p>Para 40 ... so too it is important, for example, to consider the impact on the other party remaining on the mortgage (subject only to an undertaking to use best endeavours to effect his or her release) if that means the other party is unable to obtain a new mortgage to rehouse and so has to rent indefinitely.</p>
AR	<p><u>Undue hardship</u></p> <p>P41</p> <ul style="list-style-type: none"> - A clean break should not be achieved at the expense of a fair result - There is a distinction between “undue hardship” and “hardship” and a payee might be expected to suffer a degree of hardship – not all reductions in the standard of living amount to undue hardship - In assessing undue hardship the court is likely to draw a distinction between for example short childless marriages and marriages which are either long or involve children or both. <p><u>Some hardship ... a transition</u></p> <p>Para 62 ... the statute recognises that some hardship is permissible, what amounts to ‘undue hardship’ is a matter for the court to assess, in this regards ... <i>“the provision awarded should enable a gentle transition for the party who made the domestic contribution from the standard of living enjoyed during the marriage to the standard that she could expect as a self-sufficient woman ... the length of the marriage and the role of an ex wife as the primary caretaker of the children of the marriage would be factors to be taken into account in determining the amount of the provision to meet that transition [Charles J in H v H [2007] 2FLR 548 at 96]</i></p> <p><u>AS</u></p> <p><u>AT</u></p> <p><u>Short childless marriage</u></p> <p>“Nowadays a young spouse at the end of a short marriage ... would normally be expected to take proper steps to make him or herself financially independent to a significant extent within a reasonable time so that by the time the children were adult the requirement for support would have at least diminished if not wholly disappeared. [Coleridge J in MvL [2003] EWHC 328 at 42</p> <p>“It is hard to see how a relationship has generated needs in the case of a short childless marriage, although that is not impossible” [Mostyn J in SS v NS [2014] EWHC 2263 at 24]</p> <p><u>AU</u></p> <p><u>Children changes everything</u></p> <p>“... the having of children changes everything. Of course this wife could never have expected a “meal ticket for life” on the basis of six years of marriage and two years of cohabitation if there had been no children ... But the fact of having children, and their obvious dependence in this particular case on their mother for their care, changes everything, as I have said. The economic impact on this wife is likely to endure not only until they leave school but, indeed, for the rest of her life.” [Holman J in Murphy v Murphy [2014] EWHC 2263 at 35</p> <p><i>There has been legal argument on “undue”, which seems to suggest a pretty extreme set of synonyms, thus opening the door to all sorts of hardship as permissible.</i></p>
AV	<p><u>Joint lives or term</u></p> <p>Mostyn J in SS v NS (Spousal Maintenance) [2014] para 44: However, I believe that if the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.</p>
AW	<p><u>Fixed or extendable term</u></p> <p>64 if the court concludes that a term order is appropriate it must also consider whether any such term should or should not be extendable</p>

<p>AX</p>	<p>Mostyn J in <i>SS v NS (Spousal Maintenance)</i> [2014] para 45: If the choice is, as here, between an extendable and a non-extendable term then the court would have to be satisfied on the evidence that it is more probable than not that independence will be achieved at the expiration of the term. If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party (almost invariably the payee).</p> <p><u>Factors</u></p> <p>69. When considering whether to make</p> <ul style="list-style-type: none"> - a joint lives or term order - with or without a section 28(1A) bar <p>We recommend that courts have regard (inter alia) to the following matters:</p> <ol style="list-style-type: none"> 1) Age 2) Health and mobility 3) Relevant qualifications 4) Previous work experience 5) Length of time since last employment 6) Opportunity to brush up, acquire skills or retrain 7) Cost and availability of retraining 8) Availability of work 9) Child care commitments and the daily routine 10) Age health and any particular needs of a child or other dependants 11) Childcare options and cost 12) Realistic level of net remuneration 13) Availability of work related state benefits 14) Net financial gain after paying childcare and work related expenses 15) The extent to which there has been pension sharing to take account of future needs <p>And finally:</p> <ol style="list-style-type: none"> 16) Compatibility of working with caring for any children 17) Attributing an earning capacity in view of the length of the marriage and the ex spouse's net remuneration and ability to pay.
<p>AY</p>	<p><u>Extending the term</u></p> <p><u>Exceptional OR "What was the original rationale"</u></p> <p>65. In <i>Fleming v Fleming</i> [2003] EWCA Civ 1841 at 12, Thorpe J stated that the exercise of [the] power to extend obligations requires some exceptional justification² ... in <i>Miller, McFarlane</i>, Lord Nicholls and Baroness Hale each accepted this set an applicant [ie to extend the term] a 'high threshold'.</p> <p>66 However, some first instance judges have taken the view that the reasoning underpinning the original order is key to a decision regarding variation ... <i>'The reasoning behind the earlier order that a party seeks to vary is a relevant circumstance of the case and therefore on an application to vary it can be assessed whether the purpose of the earlier order has been fulfilled and if it has, this would e</i></p>

² . 12. Accordingly from a date prior to the making of the original consent order the judge exercising the power to vary under Section 37 held both the duty to terminate, if achievable without undue hardship, and also power to do so by making a lump sum order in substitution for continuing periodical payments. 13. Those obligations are much enhanced in any case where there has been a previous term ordered. The undoubted intention of the parties and of the court in December 1998 was that the payer's obligations would terminate absolutely on 1 December 2002. In such circumstances the exercise of a power to extend obligations requires some exceptional justification. 14. Judge Taylor, it seems to me, did not in his approach to disposal have these considerations sufficiently in mind. He did not have sufficiently in mind his obligation to bring financial relationships between these parties to a conclusion. Nor did he have sufficiently in mind the enhanced obligation so to do in a situation where the payer had a legitimate expectation that his obligations would end on the date provided in the consent order. Judge Taylor approached the resolution of the case as a matter of broad discretion. *Fleming v Fleming* [2003] EWCA Civ 1841

<p>AZ</p>	<p><i>a relevant (and perhaps a decisive) factor in favour or refusing an extension or variation.” Therefore no an extension application an examination would have to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve ... [cont below] ³</i></p> <p><u>Application to discharge</u></p> <p><i>“ Similarly on a discharge application an examination would have to be made of the assumption that it was just too difficult to predict eventual independence.” [Mostyn J in SS v NS (Spousal Maintenance) [2014] EWHC 4183 at 44</i></p>
<p>BA</p> <p>BB</p>	<p><u>Stepped maintenance orders</u></p> <p><i>67. ... whether the quantum of payments should reduce over the lifetime of the order, as the payee becomes more self-sufficient and/or to achieve a gentle transition down from the marital standard of living where that is not thought to constitute a proper level of provision for the payee in the longer term.</i></p> <p><i>68 ... a court can as it routinely does make orders for periodical payments which may go up or down at various defined points to reflect anticipated future circumstances and in particular anticipate gain of employment ... so undoubtedly in a situation in which the court is of the opinion that it would be reasonable to expect a part to the marriage to take steps to acquire an increase in his or her earning capacity, then that circumstance and opinion operates to influence future levels of maintenance and most probably some identified step down. But the court still has to form that necessary opinion. [Holman J in Murphy v Murphy [2014] EWHC 2263 at 22</i></p> <p><u>But speculation without the s25 balancing exercise is impermissible:</u> <i>Aburn V Aburn</i> Crt of Appeal EWCA Civ 72</p> <p><i>32 Mr Love summed up the central point in the appeal as follows: “If a court is going to exercise discretion, it has to do so on an informed basis. The only known fact here was that H’s education would cease and the school fees bill would no longer need to be paid. The rest is pure speculation.” found myself in complete agreement with that submission. 33 For the reasons that I have given, I conclude that the deputy district judge was wrong as a matter of law and plainly wrong in the exercise of his discretion, by making an advance variation order based upon only one known element with respect to the parties’ finances, and the needs of H, some four years hence.</i></p>
<p>BC</p>	<p style="text-align: center;"><u>Duxbury & amortisation</u></p> <p><u>Where you don’t amortise</u></p> <p>109. I propose, first, to consider <i>Vaughan v Vaughan</i> [2010] 3 WLR 1209, in which Wilson LJ said the following:</p> <p><i>“42 More widely, we have received interesting arguments about the circumstances in which the law expects a spouse to apply not only income but capital to the meeting of maintenance needs or obligations. There is no doubt that the case in which (let us say) a wife is most clearly expected to apply capital to the meeting of her maintenance needs is when, at arm’s length following divorce, the husband agrees, or is ordered, to pay her a needs-based capital sum: such will still have been calculated by reference to the Duxbury formula, inherent in which is the principle of amortisation. There is, by contrast, no doubt that the court will not generally expect her to apply inherited capital (as opposed to the income generated therefrom) to the meeting of her maintenance needs: <i>Lauder v Lauder</i> [2007] 2 FLR 802, para 64, per Baron J. But I am clear that it is impossible to be categorical about what the law expects in this area. No doubt there are circumstances in which it is reasonable to order a husband to make periodical payments even though his income is insufficient to support them and he will therefore have to make them wholly or</i></p>

³ *Mostyn J in SS v NS at 44*. Both parties here agree that the spousal maintenance order should be for a term; but they dispute whether it should be extendable. How easy is it to enlarge an extendable term? In *Fleming v Fleming* [2003] EWCA Civ 1841; [2004] 1FLR 667 at para 12 Thorpe LJ stated that “the exercise of [the] power to extend obligations requires some exceptional justification”. In *Miller* at para 97 Lord Nicholls and at para 155 Lady Hale accepted that this set an applicant a “high threshold” to surmount. However, in *McFarlane v McFarlane* [2009] EWHC 891 (Fam) Charles J stated at para 104 that “the test or approach described and applied in *Fleming* does not survive”. I agree. An application by a payer to discharge and an application by a payee to extend should be decided by reference to the same principles.

partly out of his capital; and, correspondingly, no doubt there are circumstances (see, for example, my conclusion in this very case at para 44 below) in which it is reasonable to expect a wife to apply capital to the meeting of at any rate some of her maintenance needs even if it has come into her hands by inheritance or, more generally, otherwise than as a needs-based capital payment by the husband. Perhaps particularly when they reach or approach retirement and have reasonably significant capital assets (often the product of savings out of income), many people treat the distinction between income and capital as fluid; the court will recognise this reality."

...

112. In a pre-*Miller* case, *Lambert v Lambert* [2003] Fam 103, Thorpe LJ (para 60) could see "no possible reason why the wife alone should be required to amortise" her share of the marital wealth to meet her needs. Likewise, Bodey J (para 75) considered that for the wife "to have to amortise capital when the husband himself would not have to do likewise" would not "meet the aim of achieving fairness".

BD Duxbury of particular application to variations

113. There is one post-*Miller* case, to which we were not referred, in which Lady Hale makes a brief observation about this issue. In *Simon v Helmot* [2012] UKPC 5, a case dealing with predicting the future for the purposes of the quantification of damages for personal injuries, Lady Hale referred to Duxbury and said (para 70):

"The *Duxbury* calculation was first devised when it was thought that the purpose of financial awards in matrimonial cases was to cater for the "reasonable requirements" of the dependent party. Now that the "sharing principle" has been adopted, the calculation is mainly used as a guide to capitalising an existing periodical payments order or to check whether the sum produced by the sharing principle will be enough to meet the applicant's needs".

BE Duxbury rates or something else?

41. ... , the judge decided .. although there was "no benchmark rate for attributed income on capital", the "Duxbury rate ... is as close to a benchmark as can be determined". Specific justification would be required to depart from that rate. The judge took a lower rate for an initial period, because the wife would have less financial flexibility, but, thereafter, he applied what he regarded as "the *H v H* rate of return", being 3.75% gross. He deducted tax at an assumed rate of 40% giving 2.25% net. The judge considered, further, that it was appropriate to take this rate because the capital fund was not being amortised and the wife would also be receiving periodical payments.

...

114. In *JL v SL (No 2)(Appeal: Non-Matrimonial Property)* [2015] 2 FLR 1202 Mostyn J determined what sum the wife would receive by application of the sharing principle, namely £2.9 million, and observed that (para 55):

"It might be thought that it is a truism that just under £3 million is sufficient to meet the lifetime needs of a 50 year old woman living in Buckinghamshire".

However, he went on to determine what capital the wife would require to meet her needs. He assessed the sum required in part (for the first 10 years) by taking a non-amortising sum and in part (for the remaining years) by taking an amortising sum (paras 58-68). He applied the Duxbury assumptions to both aspects of the calculation. The result was that the total sum required by the wife to meet her needs (including housing) was just over £3 million. This was the amount of the award rather than the sum arrived at by application of the sharing principle.

115. Other cases demonstrate that the courts have adopted a degree of flexibility when determining needs based awards. This flexibility has included as to the deployment of the applicant's own capital and in respect of amortisation and rates of return.

* *CR v CR* (para 101): Bodey J applied a 5% annual gross return, when calculating the sum required to meet the wife's income needs (rather than a conventional Duxbury). He also acknowledged that this might require the wife "to spend through some of her" capital award in order to meet her needs;

* *B v B (Ancillary Relief: Post-Separation Income)* [2010] 2 FLR 1214: I calculated the sum required to meet the wife's income needs by reference to an assumed 2% net rate of return;

* *Z v A (Financial Remedy)* [2014] 2 FLR 109 (para 43): Coleridge J did not consider "(c)omplete amortisation" of the wife's own assets fair when determining the award required to meet the wife's needs. He applied a 3% net return to the wife's assets. The balance required to meet the wife's income needs was not calculated solely by reference to Duxbury but in part by reference to a fixed term of 10 years (para 44);

* *AR v AR (Inherited Wealth)* [2012] 2 FLR 1 (para 100): I awarded the wife a sum (£3.2 million) which was greater than the "simple Duxbury sum" (£2.5 million) required to meet her income needs in part to provide her with "an additional measure of financial security";

* Another example of a non-amortised calculation and award is *B v S (Financial Remedy: Marital Property Regime)* [2012] 2 FLR 502 (para 87).

There are, of course, a number of other cases in which a conventional Duxbury lump sum has been awarded, such as *BD v FD (Financial Remedies: Needs)* [2017] 1 FLR 1420.

116. Rates of return were considered by the Court of Appeal in *H v H (Financial Remedies)* which concerned a variation application. The judge's award was set aside because, when calculating the lump sum required to enable the wife to meet her income need, he had applied a 3.75% net rate of return to the capital the wife had received under the original financial order. This had not been a rate proposed by either of the parties and the judge used this rate "without addressing the question to the advocates for them to make submissions" (para 28). Ryder LJ went on to say that if the judge had arrived at this rate having heard submissions then, "absent an irrational decision, his exercise of discretion would have been incapable of challenge" (para 28).

117. At first instance the wife had proposed a rate of return of 3.75% gross which was said to be "a standard Family Division" rate. The husband had not proposed any particular rate. Ryder LJ rejected the notion that there was an "industry standard" for these purposes. However, he also considered that a judge could adopt the Duxbury assumptions if "valid on the facts of the case" (para 31).

...

134. I would also agree with [Wilson LJ's] observation that it is "impossible to be categorical about what the law expects in this area". Given the range of options from full amortisation to an assumed rate of return and the range of potential circumstances (including all the section 25 factors) it is difficult to see how a definitive outcome can, in fairness, be mandated for all cases. In some cases it will clearly be fair for that part of the sharing award available to meet income needs to be fully amortised, for example, because neither party has any resources other than those being shared. In other cases, the court might take the view that the applicant should have a greater level of security than that provided by an amortised sum because of the respondent's earnings and apply only an assumed rate of return. To repeat, when determining this issue, the court will need to have regard to all the relevant circumstances, to the clean break principle and, as appropriate, the issue of undue hardship.

135. I have used the expression "assumed rate of return" because, again, of the scope for different rates of return sometimes to be applied as reflected in the cases referred to above (para 115). I also use the expression "rate of return" because, in my view, the relevant question is the gross rate of return which is not necessarily confined to income but can include both income and capital returns.

136. There are, however, clearly advantages – both in terms of providing clarity and of consistency – if the Duxbury model and the assumptions within it were to be used at least as a starting point.

...

138. As to the specific issue raised in this case, namely whether it is fair for an applicant spouse to be required to use their sharing award to meet their income needs when the other spouse will meet their needs from earned income, the answer is that the latter factor will be relevant to the court's determination of the former issue.

<p>BF</p> <p>BG</p>	<p><u>Duxbury and stepped orders</u></p> <p>For an example see <i>Juffali Juffali v Juffali</i> [2016] EWHC 1684 (Fam), where the calculations incorporated steps down in income needs and housing (see para 156)</p> <p><u>But no factoring in of the prospect of remarriage</u></p> <p>153. I decline to accept Mr Warshaw's invitation to apply my mind to the prospects or likelihood of her future remarriage or cohabitation. It seems to me that such an assessment has no place or relevance in my approach to this case. The applicant is an independent woman. She will make her own choices in future as to whether or not she chooses to remarry. It would be impertinent of me to suggest that this court had any function in pre-determining such a choice on the basis of the likelihood of such an event materialising. In any event, on what basis am I supposed to carry out that assessment? It is a non-issue as far as I am concerned. I might have taken a different view on the facts if she was already in an established and committed relationship. But she is not, and there the matter must lie. <i>Juffali Juffali v Juffali</i> [2016] EWHC 1684 (Fam)</p>
<p>BH</p> <p>BI</p>	<p style="text-align: center;"><u>Stockpiling</u></p> <p><u>The principle</u></p> <p>138. If, in exceptional cases such as the present, periodical payments can be used to enable a payee to accumulate capital and thus facilitate a termination of financial obligations within a reasonable time, such a use seems to me fair and square within the statutory objective. What do not, however, seem to me to be within the statutory objective in the present two cases are indeterminate and unfocused joint lives orders very substantially in excess of needs. ... 139. An award of periodical payments designed to enable the payee to accumulate capital which can then be taken into account when consideration is being given to the sum required to achieve the termination of the order for periodical payments seems to me wholly consistent with the terms of both MCA section 25A (and for that matter, section 31(7B)) and does not conflict with the principle that capital awards are once and for all. (Lattham LJ in <i>Parlour v Parlour</i> [2004] EWCA (Civ) 872 at 139.</p> <p><u>The structure</u></p> <p>56 ... If, however, there is an element of stockpile, it must of course be saved and in some way ring-fenced, so that it is indeed available for future needs and can be identified and taken into account if or when the husband's income drops and he seeks to reduce the level of periodical payments or discharge them altogether. ... 58 . I will make identified provision for stockpiling. Investing the element of stockpile in a mortgage would, in my view, be an acceptable and indeed wise way of saving and ring-fencing it. Accordingly, the amount which I identify and provide for stockpiling may, if the wife so wishes, be applied in funding a capital repayment mortgage over any sensible period of years. It must be clearly understood that the stockpile is intended to enable the wife to build up funds so as to be self supporting upon the husband's death, or if he earlier retires and his income markedly reduces. If the wife does invest the stockpile in a more valuable home by financing a mortgage, then in due course she is likely to have to trade down so as to release funds for income. The current high levels of maintenance which I will order are not going to be available lifelong for the wife, and she must clearly understand that now.</p> <p><u>AB v FC [2016] EWHC 3285:</u> "H will pay to W periodical payments at the rate of £164,000 per annum payable monthly in arrears by banker's standing order. Of that sum, up to £80,000 per annum shall be earmarked for mortgage repayments over an 8 or 10 year period. In terms of safeguards, Mr Southgate suggested in closing submissions that these sums could be diverted to the lender via his instructing solicitors. I can see practical difficulties with this arrangement but, if it is one which is acceptable to all the parties, I shall not interfere in those arrangements. It may be that further thought is needed before committing the arrangement to a final order of the court. The purpose will be to protect the stockpiled mortgage funds so as to ensure that W is indeed building up equity in her home and not dissipating that portion of the maintenance payments on other discretionary expenditure."</p>

Managing the CMS

BJ

AB v CD (Jurisdiction Global Maintenance Orders) [2017] EWHC 3164 (Fam) at 48. "Thorpe LJ construed an order in similar terms to the one under appeal before me to be legitimate. Whilst he may have qualified such legitimacy as being "just within bounds", that expression does not dilute or neutralise his confirmation of the status of such orders as legitimate and proper orders within the court's armoury. Their legitimacy derives from the fact that they do not challenge or seek to oust the jurisdiction of any statutory agency which from time to time fulfils the function imposed on it by Parliament to assess the level of child support and the liability of the payer. Such orders must have a substantial ingredient of spousal support in order to engage the jurisdiction of s 23 of the 1973 Act. ... 49 The judge's failure to apportion the order is not reason to set it aside because of the assumption he plainly made that the husband's income crossed the threshold for a maximum assessment both at the time of the final hearing and in all likelihood into the future. He declared on more than one occasion that he did not have jurisdiction to make an order which was exclusively for the benefit of one or more of the children. That was not an order which he made or one which he intended to make. The door was left open for a CMS assessment which is precisely what has happened in this case.

The key issues are 1) needs 2) duration of dependency 3) the goal of independence 4) standard of living during the marriage (but trumped by 3)? 5) what is fair in the light of the remainder of the picture.

Needs budget

1. A big but realistic budget
 - a. Very big budgets are irritating.
 - b. If you have made that mistake (cos you didn't know his financial situation) then do a new budget when you do.
 - c. Beware high elements; logic all the way through:
 - i. It is wrong for the court to permit line by line x-exam
 - ii. So you can undermine your budget by one or two mistakes
 - d. Might reference to transitioning be important? Can you emphasise the children's needs for continuity now?
 - e. Where seeking provision from bonus-laden income, divide into
 - a) basic and b) discretionary spending.

Your budget will not be overstated ... save where it relates to aspects of genuine difference, it will all be used as a reference point.

2. Standard of living

- a. You need pithy anecdotes for para 4.2

Be careful about insisting on a parish mouse existence unless this is truly the case – There is a lack of grace in protesting too much.
Costs will be lower in the modest house;

3. Historical analysis of spending - a range of issues:

- a. Broad brush only. It may show a higher or a lower total spend than the fair proportion target.
- b. Building your projections on a historical analysis makes it appear rigorous and promotes confidence in cross-exam.
- c. You will need to strip out his spending (and will seek to minimise it so that the reduction between history and prospective spend is minimal).
- d. What time frame do you take ... older might avoid the "revenge-spend" period ... but may have higher numbers of old life elements and be unrepresentative. Ideally it will be based on the bank statements of the form E but this may not be possible.
- e. Be careful to avoid one off capital spends in the calculations BUT then be sure to incorporate provision for all the "one off/ occasional / depreciation/repair" items.
- f. Trades-help/ staff to meet the demands of the new situation?

Emphasise your own spending in the joint household

Revenge-spends?

4. Life cover/ protective insurance elements?

5. Rebuilding

- a. What of stockpiling
- b. Should there be build up for uni fees
- c. Maybe should ask for pension contributions / retirement savings

Duration of career will be important

<p>b. Instead use [his] overspending will justify your budget</p>	
<p>13. Separate out your accounts and do it early</p> <ul style="list-style-type: none"> a. To build financial capacity b. To iron out losses in the transfer c. To generate clarity as regards needs 	
<p>14. Rush to the shops?</p> <ul style="list-style-type: none"> a. Where lawyers recommend this to build the budget they are surely in breach of their duties to the court 	
<p>Child support</p> <p>15. How to factor in child support</p> <ul style="list-style-type: none"> a. Her interests may be to have a low pitch child support figure to increase the scale of the spousal element to Duxbury 	<p>It all depends – that gamble on remarriage prior to children independence informing which way you seek to pitch it</p>
<p>16. The university years</p>	
<p>17. Termination</p>	<p>The imperative of avoiding further expensive returns to court</p>
<p>Looking to the future</p> <p>18. Findings as to capacity / steps to earning (probably payer rather than payee)</p> <p>19. Recitals as to expectations</p> <ul style="list-style-type: none"> a. Memories of this case will fade; documents may become unavailable; proving the intent at the time will become harder with the 20:20 vision of hindsight – ideally record on the face of the order what were the intentions ... but there are implications for <ul style="list-style-type: none"> i. Retaining papers ii. Counsel preparing really detailed note of the underlying assumptions – you <p>20. Arrangements for process ... arbitration? Papers only? (but will that work well?)</p>	<p><i>As lawyers be scrupulous in creating the paper trail of evidence, advice and recommendations that will be needed on a variation.</i></p>
<p>Preparing for the variation</p> <p>21. Analyse the obligations of the judge – how will you deliver on them and what records should be kept?</p>	<p>Send through job applications? Showing later what jobs there have been is less powerful than being able to show a failure to apply for them</p>
<p>The variation</p>	<p>Arbitration? Consider pressing for light touch process? Chapter V process?</p>

VARYING *spousal Periodical Payments orders – circa May 2018*

1	What is the order and what is being applied for? Eg, 1) Variation 2) variation & extension of term 3)capitalisation? 4)imposition of term, 5) termination 6)remission of arrears 7) orders for repayment	S31(1)	
3	Has there been a <u>change of circumstances</u> ? • Strike out where a repeat application		Birch GNvMA
2	<u>Approach</u> • The court has a broad discretion • All factors can be looked at (even those prior to the order) • The approach should be evidenced based		Harris Lewis Aburn
4	<u>The goal is fairness</u> • The objective remains the same: independence, where achievable (but is now stripped bare of sharing and similar considerations) • First consideration is the welfare of minor children • The change in the matters the court was required to have regard to • Then the "s25 factors"	S31(7) S31(7)	MILLS
5	Compensation		VBvJP Lauder
6	<u>Needs</u> • Income needs may be transitioning from an earlier level – the marital standard of living is not a lodestar • But then payer's increases of living standards may increase the needs recognised		Cornick(3)
7	<u>Payee's resources</u> to meet [her] needs • current or future earnings		
8	• Existing or foreseeable capital ... whether amortised		
9	• new relationship		
10	Payer's capacity: can the payer meet the shortfall • new relationship responsibilities will not trump but may be a factor		Kv K; Grey vaughan
11	What was the design / <u>intention</u> of the original order? • Has that purpose been defeated? • Are these needs for which this payer should be an insurer • For example are they a consequence of financial mismanagement?		Mcf no 2 Wright Mills/yates
12	• Decisions to <u>extend the term</u> will reference the intent of the original order • (or perhaps adopt the <i>Fleming test of exceptional justification</i>)		
13	Effective [start] date for the new provision		Grey
14	<u>Duty to consider:</u> Where making new provision, the court has to consider a term and can impose such term as it thinks fit ... Where evenly-balanced prefer a term.	S28(1)	
15A	<u>Duty to consider termination:</u> If making a PPs order, it shall consider whether (in all the circumstances and having regard to change) whether to vary so they are made only for such period as is sufficient to enable the recipient to adjust :	S31(7)(a)	
15B	... and adjust without hardship that is undue		
16	Consider stepped orders		
17	The court may consider prohibiting extension of the term • Where evenly-balanced prefer extendable terms • Where there are young children no bar the norm	S28(1A)	Chiva Fisher
18A	<u>Capitalisation "three" ("Duxbury")</u> – Approach: <i>what is the right lump sum/ pension share to exchange for the rights to receive pps and complete the clean break?</i> If it discharges the pps award, the court can order: • Payment of a lump sum or a property adjustment order	S31(7A) s31(7B)a/b	
18B	• A pension share	S31(7B)ba	
19	• Also consider stockpiling (with or without extendable term)		

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A	Remission of arrears • Leave required to enforce arrears over 12 months old	S31(2A) S32	
B	Orders for repayment • Excess may be ordered as the court thinks just	S33	
	Flexibility of procedure (including "the light touch")		Morris

VARYING *spousal Periodical Payments orders – circa May 2018*

1	<p>What is the order and what is being applied for? Eg, 1) Variation 2) variation & extension of term 3)capitalisation? 4)imposition of term, 5) termination 6)remission of arrears 7) orders for repayment</p>	S31(1)	
3	<p>Has there been a <u>change of circumstances</u>?</p> <ul style="list-style-type: none"> Birch v Birch [2015] EWCA Civ 833 "15. Parliament did not in subsection (7) or elsewhere make a change of circumstances a condition for exercise of the jurisdiction to vary. Nevertheless, unless there has been a significant change of circumstances since the order was made, grounds for variation of it under section 31 seem hard to conceive <p>Strike out where a repeat application</p> <p>32 In Wyatt , Lord Wilson spoke of the question being whether the claim was 'legally recognisable'. He said that a claim would not be 'legally' recognisable if, for example, a wife had remarried; or the application was an identical application to one which had been already dismissed; or one which had otherwise been finally determined. It is clear to me that the mother's application for periodical payments for C falls into the second of those examples and that it would therefore be open to me to strike it out under the Family Procedure Rules 4.4(a) or (b) on the basis of there being no reasonable grounds for making the application, or on the basis of its being an abuse.</p> <p>GN v MA [2015] EWHC 3939 Bodey J</p>		Birch
2	<p><u>Approach</u></p> <ul style="list-style-type: none"> The court has a broad discretion <p>Either party may feel, with the advantage of hindsight, that the judge failed. The wife may feel that she has been undercompensated when accident or illness befalls. The husband may resent the capital paid over when the former wife finds a new husband. These considerations are familiar to ancillary relief specialists, since they apply equally to the negotiation or determination of claims at the stage of the divorce. It follows, in my judgment, that the discretion exercised by the judge in this new jurisdiction must be very broad. Unless some clear error of approach or calculation has been demonstrated, I do not believe that this court should lightly interfere with the judge's figures.</p> <p>Harris v Harris [2001]FCR 68 Crt of Appeal at 22</p> <p>The powers of variation, ... have been, if anything, progressively enlarged, and that the intention of Parliament is that, in handling these family matters where money is concerned, the court should have as unfettered a discretion as possible to deal with the situation as it is when the matter comes before it. I am sure it is not the intention of Parliament in any way to trammel the discretion by any kind of technical reasoning or technical grounds.</p> <p>Lewis v Lewis [1977] 1 WLR 409</p> <ul style="list-style-type: none"> All factors can be looked at <p>The powers of the court when dealing with an application to vary a periodical payments order were not confined to considering the alteration in the actual means of the parties; that under section 31 (7) of the Matrimonial Causes Act 1973 the court was required to have regard to changes in any of the matters mentioned in section 25 of the Act of 1973 and, therefore, the judge was right to look at all the circumstances as they were when the case was before him and to make an order that was reasonable in those circumstances.</p> <p>Lewis v Lewis [1977] 1WLR Crt of Appeal from headnote)</p> <p>The court here has to provide reasonably for the maintenance of three growing children. In those circumstances, it seems to me that the judge was perfectly right to look at the matter as it stood at the time when the case was</p>		Harris Lewis Aburn

before him and make an order which was reasonable in the circumstances of that case, both from the point of view of the husband and father and from the point of view of the wife and mother.
Lewis v Lewis [1977] 1 WLR 409

- The approach should be evidenced based
See "AL" in above table
- In broad terms, the task?

21. Therefore, as a generalisation, applications brought under this new jurisdiction, if built upon a sound financial foundation, will find favour with the court. In many cases there is an obvious desirability of terminating continuing financial dependency when that can be achieved safely and without the risk of hardship. So in most cases the real question for the court is likely to be, not whether to capitalize, but how to quantify the recipient's compensation for the dismissal of a statutory right. Quantification must plainly be governed by the other provisions of section 31 and particularly section 31(7), which provides:

"In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18, and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates."

22 That, in my judgment, gives the trial judge an almost unfettered discretion. Duxbury tables have an obvious utility but they can never amount to more than the offer of a starting point. The exercise is necessarily speculative, in the sense that the judge may have to evaluate a series of future events or developments that cannot be predicted or foreseen with any certainty. This case illustrates that quantification required an evaluation of the applicant's relationship with Mr. Henderson. Quantification also proceeded on the assumption that her future earning capacity was secure. Subsequent events almost immediately after judgment suggest that that assumption may have been eroded. So the judicial conclusion will always be vulnerable. Either party may feel, with the advantage of hindsight, that the judge failed. The wife may feel that she has been undercompensated when accident or illness befalls. The husband may resent the capital paid over when the former wife finds a new husband. These considerations are familiar to ancillary relief specialists, since they apply equally to the negotiation or determination of claims at the stage of the divorce. It follows, in my judgment, that the discretion exercised by the judge in this new jurisdiction must be very broad. Unless some clear error of approach or calculation has been demonstrated, I do not believe that this court should lightly interfere with the judge's figures. Harris v Harris 2001 1 FCR 68

The approach

I need to look at the original order and how it dealt with the parties' resources and needs and what has changed since then, and must look at the parties' positions now. Mr X v Mrs X HHJ Roberts [2014 EWFC B17

Proportionality – the percentage cross-check

iii) I fear that the judge did not stand back from the figures to judge the overall proportionality of his conclusion. In both of the reported cases by which he directed himself (Lauder v Lauder [2007] EWHC 1227 (Fam); [2007] 2 FLR 802 and VB v JP [2008] 1 FLR 742), the utility of a percentage comparison between the original order and the order on variation was commended. That exercise the judge had noted at paragraph 71(iii), seemingly with approval

4	<p><u>The goal</u> is fairness</p> <ul style="list-style-type: none"> The objective remains the same: independence, where achievable (but is now stripped bare of sharing and similar considerations) <p>Mills v Mills [2017] EWCA Civ 129</p> <p>5. In written submissions, the parties advanced a sophisticated battery of arguments, contending that the principles to be applied to an application under section 31(7) of the Matrimonial Causes Act, 1973 are in some sense in doubt or in need of clarity or otherwise in need of guidance from this court.</p> <p>6. It is sufficient to say, as was helpfully conceded by Mr Feehan QC on behalf of the wife, that the statutory test in relation to variation applications under section 31(7) is not in doubt, is easily capable of being understood and has had ample authority from this court to explain it. It is no part of Mr Feehan's appeal that this court needs to revisit the wise words of Thorpe LJ in North v North [2007] EWCA Civ 760, in particular, at paragraph 32:</p> <p>"Once within the territory of discretion, the court's over arching objective is a fair result. There are of course two faces to fairness. The order must be fair both to the applicant in need and to the respondent who must pay. In any application under Section 31 the applicant's needs are likely to be the dominant or magnetic factor. But it does not follow that the respondent is inevitably responsible financially for any established needs. He is not an insurer against all hazards nor, when fairness is the measure, is he necessarily liable for needs created by the applicant's financial mismanagement, extravagance or irresponsibility."</p> <ul style="list-style-type: none"> First consideration is the welfare of minor children s31(7) The change in the matters the court was required to have regard to Then the "s25 factors" 	S31(7) S31(7)	MILLS
5	<p>Compensation</p> <p>59. In my view there emerge from the post-Miller and McFarlane authorities to which I have been referred the following propositions in elaboration of, but consistent with, the House of Lords decision. First, it is at the exit of the marriage and in relation to the division/ redistribution of the family assets that the consideration of the element of compensation immediately arises, but as a feature of the concept of fairness rather than as a head of claim in its own right. Second, on the exit from the marriage, the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ("sharing") unless and to the extent that consideration of her needs, or compensation for relationship-generated disadvantage so require. A clean break is to be encouraged wherever possible. Third, in big money cases, where the matrimonial assets are sufficient for a clean break to be achieved, a wife with ordinary career prospects is likely to be have been compensated by an equal division of the assets and consideration of how the wife's career might have progressed is unnecessary and should be avoided. Where, however, that is not the case and the parties accept or the court decides that fairness can only be achieved by an award of continuing periodical payments in respect of a wife's maintenance, then the matter of compensation in respect of relationship-generated disadvantage requires consideration, again as a strand or element of fairness. Fourth, in cases other than big money cases, where a continuing award of periodic payments is necessary and the wife has plainly sacrificed her own earning capacity, compensation will rarely be amenable to consideration as a separate element in the sense of a premium susceptible of calculation with any precision. Where it is necessary to provide ongoing periodical payments for the wife after the division of capital assets insufficient to cover her future</p>		VBvJP Lauder

maintenance needs, any element of compensation is best dealt with by a generous assessment of her continuing needs unrestricted by purely budgetary considerations, in the light of the contribution of the wife to the marriage and the broad effect of the sacrifice of her own earning capacity upon her ability to provide for her own needs following the end of the matrimonial partnership. These considerations are of course inherent in s.25(a)(b)(d) and (f) of the 1973 Act.

62. Against this background, two particular issues have been argued before me in relation to compensation. First, whether the observations of the House of Lords are restricted to the court's approach upon an original application for ancillary relief at which the appropriate order for redistribution of the parties assets is considered and made, or is it a matter which also falls for consideration on an application for variation of a maintenance order made at that time. Second, and in any event, is the instant case one where it is necessary or appropriate to consider the element of compensation as a matter separate from that of the parties' needs (generously assessed).

63. On the first question, Miss Bangay has submitted that the only time for consideration of the principle of compensation was and is the exit point of the marriage when the parties agree, or the court decides, the fair outcome at that point. She points out that nowhere in the speeches in *Miller and McFarlane* is it suggested that the exercise should be repeated in the context of a variation application in relation to a maintenance order made at the time. She submits that to seek to do so is contrary to the requirement in the court to search for finality following divorce and further submits that, for the court to be willing to re-open consideration of a fair and/ or agreed solution years after that exit point would be to open the flood gates to maintenance applications in which it would be argued that the compensation principle was not specifically considered and applied at the time.

64. I do not accept those submissions. Whether or not they were made to Baron J in *Lauder*, it was plain to her, as it is plain to me, that the language of the House of Lords is of general application and extends where appropriate to consideration by the court of the overall fairness of an order made upon an application to vary a joint lives periodical payments order. At paragraph 21 of her judgment, Baron J accepted that, in relation to that part of the court's original order which dealt with the wife's capital claim by way of a lump sum order, the wife was precluded from a second bite of the capital cherry. She nonetheless made clear, and proceeded to deal with the wife's application on the basis, that the provision for long-term periodical payments originally made as a concomitant to the amount of award of capital was susceptible to, and required, consideration on her variation application in the light of the recent guidance in *Miller and McFarlane* in the passages I have quoted above. As a result she made an award which included an element of compensation for relationship-generated disadvantage in the situation where the wife, who apparently did not work during the marriage, had nonetheless by her efforts following separation clearly demonstrated that had she done so, her earning capacity which she had sacrificed during the marriage would have been substantially greater on separation than it was.

65. That award took into account the wife's right to have an element of compensation but did not quantify it separately from the element of the wife's needs as generously interpreted. Again, in my view that approach was appropriate. The judge was right to refuse to interfere with the clean break settlement of the wife's capital claims (albeit in modern eyes they might have been regarded as discriminatory). However, under s. 31(7) of the 1973 Act, her task in assessing the application for variation of the wife's joint lives maintenance order was to have regard to all the circumstances of the case, including any change in the matters to which it had to have regard when making the original periodical payments order: c.f. per Booth J in *Boylan* [1988] 1 FLR 282 at 286D; see also the observations of the Court of Appeal in *Cornick v*

	<p><i>Cornick (No2)</i> [1995] 2 FLR 480 when decisively rejecting the "budgetary" approach urged upon it by counsel for the appellant.</p> <p>66. I have the same task. Having made the findings which I have in relation to this wife's earning capacity, it is right for me to have regard to her undoubted relationship-generated disadvantage, albeit difficult to quantify, and to take it into account in my award. However, because of (1) the general uncertainty of the extent of the disadvantage, (2) the realistic agreement of the parties that there is an indefinite continuing need for periodic maintenance, and (3) the fact that a clean break at this stage is not suggested to be possible or appropriate, this case is not one where it is necessary to attempt to quantify the element of compensation separately from that of the wife's needs generously assessed against the background of the standard of living during the marriage, the husband's considerably increased income and the reduced availability to the wife of a substantial proportion of the child maintenance originally provided.</p>		
6	<p><u>Needs</u></p> <ul style="list-style-type: none"> Income needs may be transitioning from an earlier level – the marital standard of living is not a lodestar But then payer's increases of living standards may increase the needs recognised <p>...the court should consider the whole picture. The earlier cases... show that the court can take into account an increase in the wealth of the payor and that s25(2)(c) namely the standard of living enjoyed by the family before the breakdown of the marriage is by itself not a determinative factor ... For example if the payor's available resources decreased dramatically, the payee would not be able to argue successfully against a downward variation because the payee's standard of living would then fall below the standard enjoyed by the family before the breakdown of the marriage. In my judgment in those circumstances the payee would be likely to have to suffer the consequences of the inability of the payor to pay as much. It is therefore logical that a payee is not precluded from deriving benefit from an increase in the payor's fortunes even if this results in the payee enjoying a higher standard of living than she or he did during the marriage."</p> <p><i>Cornick v Cornick (no 3)</i>[2001]2FLR1240 Charles J at 105</p>		<p>See AA above etc</p> <p>Cornick(3)</p>
7	<p><u>Payee's resources to meet [her] needs</u></p> <ul style="list-style-type: none"> current or future earnings 		
8	<ul style="list-style-type: none"> Existing or foreseeable capital (whether amortised) New relationship 		<p>Grey2009 CofA</p>
9	<p><u>Payer's capacity: can the payer meet the shortfall</u></p> <ul style="list-style-type: none"> new relationship responsibilities will not trump but may be a factor <p>37. In <i>Roberts v. Roberts</i> [1970] P. 1 the Divisional Court of the Probate, Divorce and Admiralty Division allowed an appeal by a wife against an order of the justices that, out of a net income of £22 per week, her husband should pay only £2.50 per week for the maintenance of herself and their son. The reasoning of the justices was that the husband needed to apply the balance of his income to the support of himself and, in particular, of his cohabitant and two of her children. The court (Sir Jocelyn Simon P and Rees J):</p> <p>(a) decided, at 3E, to survey the relevance not only of a husband's moral obligation to support a cohabitant but also of an ex-husband's legal obligation to support a second wife (on the basis that the claim of the former could not rank higher than that of the latter);</p> <p>(b) held, at 6E to 8B, that not only an ex-husband's legal obligation to a second wife but also a moral obligation of a husband or ex-husband to a cohabitant had to be brought into account in assessing the level of his obligation to maintain a first wife; but</p> <p>(c) held, at 8G, that "on general principle, a spouse must on marriage be presumed ... to take the other subject to all existing encumbrances,</p>		<p>Vaughan</p>

	<p>whether known or not – for example ... an obligation to support the wife or child of a dissolved marriage"; but</p> <p>(d) considered, at 8H to 9F, that English law did not, as did some Commonwealth courts, take the principle to its logical conclusion by affording "primacy" or "priority" to the claims of the first wife; yet nevertheless</p> <p>(e) concluded, at 5D and 10D, that a decision, such as that of the justices, to give such "priority" to the claims of the cohabitant (or second wife) as virtually to ignore the claims of the first wife was plainly wrong.</p> <p>38. Any judge-made "principle" of family law enunciated over forty years ago requires rigorous scrutiny in case changed social conditions have rendered it obsolete. But I see no reason to conclude (and Mr Mostyn did not argue) that the principle enunciated in the case of Roberts and quoted at [37(c)] is obsolete. It has been applied in a few reported cases, albeit themselves also now old, and it remains in the text-books. But what was and is its effect? In the interests of realism and practicality the Divisional Court Muffled it. And, to the muffling of it, we should certainly still subscribe. One may conclude with confidence only that the court should always have the principle in mind; that it should give effect to it where it reasonably can; and that, although it should not go so far as to give priority to the claims of the first wife, it should certainly not give priority to the claims of the second wife.</p> <p>Vaughan v Vaughan [2010] EWCA Civ 349</p>		
10	<p>What was the design / <u>intention of the original order</u>?</p> <ul style="list-style-type: none"> • Has that purpose been defeated? • Are these needs for which this payer should be an insurer • For example are they a consequence of financial mismanagement? <p>It is no part of Mr Feehan's appeal that this court needs to revisit the wise words of Thorpe LJ in North v North [2007] EWCA Civ 760, in particular, at paragraph 32:</p> <p>32. Once within the territory of discretion, the court's over arching objective is a fair result. There are of course two faces to fairness. The order must be fair both to the applicant in need and to the respondent who must pay. In any application under Section 31 the applicant's needs are likely to be the dominant or magnetic factor. But it does not follow that the respondent is inevitably responsible financially for any established needs. He is not an insurer against all hazards nor, when fairness is the measure, is he necessarily liable for needs created by the applicant's financial mismanagement, extravagance or irresponsibility. The prodigal former wife cannot hope to turn to a former husband in pursuit of a legal remedy, whatever may be her hope that he might out of charity come to her rescue. (Thorpe LJ)</p> <p>38. ... But there was a large logical hole in his reasons. For he held that Mr North should not be responsible for those elements of Mrs North's needs which resulted from her own choices; and those choices to which he referred on the face of it accounted for all her relevant present needs ... (May LJ)</p> <p>Sir Ernest Ryder SP Mills 2017 EWCA Civ 129 para 6.</p> <p>But despite the rhetoric, haven't many spouses who have mismanaged or been unlucky done ok, see Yates [2012] EWCA Civ 532; Mills [2017] EWCA Civ 129</p> <p>However, the spouse who fails to meet expectations to retrain in the earlier determination is unlikely to have sympathy and will need good reasons See Mr X v Mrs X [2015]EWFC B17</p>		

	<p>An interlude: <u>The pitch of needs:</u> These different elements will combine into a unique matrix, involving:</p> <ol style="list-style-type: none"> 1. A bracket of spending referencing: <ol style="list-style-type: none"> a. What the applicant now says they need, b. The paying party's current standard of living <i>As perceived in the original order</i> c. The Standard of living during the marriage and d. duration of the marriage, e. The adjustment to that standard to reflects the aspiration to independence of the original order and f. the adjustment reflecting anticipated duration All seen in the light of experiences on the ground 2. The applicant's capacity to meet that need, ie by reference to <ol style="list-style-type: none"> a. Earnings, b. With particular reference to child-care c. Capital d. Any new relationship; 3. The respondent's capacity to contribute towards/ meet that need, 4. All assessed by reference to <ol style="list-style-type: none"> a. The underlying 'vision' of the original order b. The continued aspiration to achieve the applicant's financial independence. <p>The judge's discretion is at its highest at this quantification stage. Examples can be seen in:</p> <p style="padding-left: 40px;">N v N (consent order: Variation) 1993 2 FLR 868 Grey v Grey [2009]EWCA Civ 1424 Yates [2012] EWCA Civ 532 Murphy v Murphy [2014] EWHC 2263 Chiva v Chiva [2014]EWCA Civ 1558 Mr X v Mrs X [2015]EWFC B17; and Wright v Wright [2015]EWCA Civ Mills [2017] EWCA Civ 129</p> <p>One has the impression of contested issues of fact where judicial findings are crucial to the outcome.</p>		
11	<ul style="list-style-type: none"> • Decisions to <i>extend the term</i> will reference the intent of the original order • (<i>or perhaps adopt the Fleming test of exceptional justification</i>) 		
12	<p>Effective [start] date for the new provision</p> <p>if, as in the present case, the court determines at trial cross applications for variation and capitalisation the judge's first task is to determine the application for variation applying section 31(7) and the authorities culminating in Cornick v Cornick (No 2). Having settled the past by fixing the commencement date for the variation the judge must settle the future by fixing the date upon which periodical payments are to cease and, the order for lump sum and/or property adjustment in lieu.</p> <p>Pearce [2003]EWCA Civ 1054 at 26</p>		Pearce
13	<p><u>Duty to consider:</u> Where making new provision, the court has to consider a term and can impose such term as it thinks fit ... Where evenly-balanced [ie between term and joint lives] prefer a term.</p>	S28(1)	
14A	<p><u>Duty to consider termination:</u> If making a PPs order, it shall consider whether (in all the circumstances and having regard to change) whether to vary so they are made only for such period as is sufficient to enable the recipient to adjust :</p>	S31(7)(a)	
14B	<p>... and adjust without hardship that is undue</p>		

15	<p>Consider stepped orders</p> <p>But does this sit easily with the logic in Aburn:</p> <p>A review may well be justified at such a stage. But it must be impossible to predict, as the deputy district judge sought to do, in August 2014, what the result of that review would be in the summer of 2018.</p> <p>29 This element of the deputy district judge's decision is, in my view, plainly within the parameters which rightly limit the scope for appellate intervention in financial provision cases described by Thorpe LJ in <i>N v N</i> . If a district judge in an ordinary financial provision case determined current periodical payments solely by reference to only one element in the needs versus resources equation there would be little dispute that the exercise of judicial discretion was "plainly wrong". In like manner such a decision, based upon only one element in the equation, would be "wrong" as a matter of law in that it would not be possible to demonstrate that the court had had regard to each of the relevant factors set out in the checklist in Matrimonial Causes Act 1973, s 25 .</p> <p>Aburn [Court of Appeal 2016 at 28]</p>		
16	<p>S28(1A) The court may consider prohibiting extension of the term</p> <ul style="list-style-type: none"> • Where evenly-balanced prefer extendable terms • Where there are young children no bar the norm 	S28(1A)	Chiva Fisher
17A	<p>Capitalisation "three" ("Duxbury") -</p> <p><i>Approach: what is the right lump sum/ pension share to exchange for the rights to receive pps and complete the clean break?</i></p> <p>If it discharges the pps award, the court can order:</p> <ul style="list-style-type: none"> • Payment of a lump sum or a property adjustment order <p>White v White [1998] 2 FLR 310 ,319: "Duxbury is a tool and not a rule. A judge has a discretion. In fixing the figure he will have regard to the facts of the particular case in deciding whether the figure from the table should be adopted or should be increased or decreased to achieve justice upon the facts of the particular case. What the judge is endeavouring to do is to express as a capital sum what is a fair capital sum in the circumstances in substitute for the periodic payments which would otherwise have been appropriate (Approved: Harris v Harris 2001 1 FCR 68)</p>	S31(7A) S31(7B)a/b	
17B	<ul style="list-style-type: none"> • A pension share • Also consider stockpiling (with or without extendable term) 	S31(7B)ba	

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18	Remission of arrears • Leave required to enforce arrears over 12 months old	S31(2A) S32	
19	Orders for repayment • Excess may be ordered as the court thinks just	S33	
20	Flexibility of procedure (including "the light touch") PROCEDURAL 87 On a variation application is the court required to consider the matter de novo? In my view, the simple answer is that it is not. The court must conduct an exercise which is proportionate to the requirements of the case. They might warrant a complete review but they can also justify, what Mr Duckworth refers to as, a light touch review. In this respect, Mr Duckworth was right to acknowledge that the court can confine its consideration to factors relevant to the variation application. ... 90 Further, although not referred to during the course of the hearing, the overriding objective requires the court to deal with cases proportionately. Thus, although section 31(7) requires the court to have "regard to all the circumstances of the case", this is not the same as requiring the court to undertake the section 25 exercise de novo. It is instructive to see what the Supreme Court said recently in respect of case *564 management in a financial remedy claim. In Wyatt v Vince (Nos 1 and 2) [2015] 1 WLR 1228 , para 29 Lord Wilson JSC (with whom the rest of the court agreed) said: "by rule 1.4(1) of the [FPR] , the court must further the overriding objective by actively managing cases, which, by rule 1.4(2)(b)(i)(c) , includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly. This exercise will dictate the nature, and in particular, the length of the substantive hearing." 91 In Sharland v Sharland [2016] AC 871 , para 43 Baroness Hale of Richmond DPSC (with whom the other six Supreme Court Justices agreed) said: "This court recently emphasised in Wyatt v Vince (Nos 1 and 2) [2015] 1 WLR 1228 the need for active case management of financial remedy proceedings, 'which ... includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly': para 29. In other words, there is enormous flexibility to enable the procedure to fit the case. This applies just as much to cases of this sort as it does to any other." 92 The court has "enormous flexibility" to determine the "nature" of the substantive hearing. This includes, as Mr Duckworth accepts, focusing on the relevant factors and in my view also, where appropriate, conducting a light touch review. Specifically, to require the court to undertake the exercise de novo would be contrary to the overriding objective and the obligation for a case to be dealt with proportionately. Moylan J in Morris v Morris [2016 EWCA Civ 812		Morris

Capitalisations on a variation application

You don't just apply the original methodology to the new figures – so predictions are impossible
Broadly you are seeking to answer “**what is the right lump sum to exchange for the rights to receive pps?**”

1) What is the level of future needs	
a. Is the budget inflated?	VB vJP@14(1)
b. Causal connection to marriage (eg: duration of marriage & period out of work/ children) will be dealt with sympathetically – otherwise may be a question of relieving significant hardship	SS v NS@46(iii)
c. What is the current standard of living of each party?	Cornick (no 3)@105
d. What was the marital standard of living? Relevant (but not a decisive 'lodestar'), given the underlying objective:	SSvNS@46(vi)
e. What arrangements are appropriate to achieve the gentle transition to independence?	Miller-McF@158
f. Global total rather than line by line – though perhaps more careful on a variation application given aspiration of independence	
2) Are there unexploited earnings: At what level could the applicant earn? From when	VB vJP@14(3)
3) Capital	
a. Amortising already awarded capital will often be wrong	Waggott (see quotes attached)
b. But what should be the approach to any other capital?	
4) Compensation – might be introduced but not to permit a second bite at the capital cherry. Though via <u>SA v PA [2014]</u> this doorway now narrow	VBvJPesp@59
5) Cross check of percentage comparisons and proportionality (original order and now)	VBvJP@85 Hvorostovsky@33
6) Where basic and discretionary income, split maintenance accordingly into 1)basic needs & 2)Discretionary items from bonus (on capped percentage basis)	HvW@38>
7) What should be the start date	Pearce@37
8) What is the end date Termination Challenge assumptions that it is too hard to predict earnings and independence	SSvNS@44
a. How can termination be achieved whilst avoiding undue hardship	S31(7)(a)
b. Where considering extending an extendable term, i. (probably not) a principle of 'exceptionality', as described in > ii. Look at the assumptions that underpinned the original order and the reasons that they have not come to pass.	(as in Fleming@12) SSvNS@44
c. If extendable v fixed term is balanced, prefer an extendable term	SSvNS@46(xi)
9) Capitalisation	
a. Substitute such orders as would fairly compensate the payee	Pearce@45
b. Remit is limited to substituting for the pps award a capital award and to complete the clean break.	
c. No straying into redistributing capital for unfortunate investment or financial arrangements or success (as sharing etc was completed with the first order).	Pearce@17
d. Thus cannot seek discharge of the mortgage (nor of the mortgage payments required to maintain it).	Pearce@36
e. Discretion is widest at pitching needs and narrowest at capitalisation. (thus avoiding the temptation to seek fairness from post-first-order developments) Query the role of the financial planner's projection.	Pearce@38
10) Whether capitalisation is fair and practicable	Vaughan@28
11) Stockpiling (Fields 2015 Holman J)	Fields@56

Considerations

- 1) Get the original order
 - a. Has it all been implemented?
 - b. What is the structure of maintenance – term – quantum – indexation ... is it all in operation
- 2) Has the order been complied with?
 - a. Payment in full of the orders?
 - b. Have indexation changes been implemented? If not why?
- 3) Is there a deadline for the application eg because a term [or is there a bar which prohibits extension
- 4) Inter-relation with cms
 - a. Check date of order (3/3/2003) etc etc
- 5) Circumstances then
 - a. Transcript of evidence / hearing
 - b. D081
 - c. Position statements from fdr
 - d. Budgets from forms E
- 6) ... and circumstances now ... change is not the test but will be examined
 - a. What do we know as to situation now
 - b. What are plans for the future -
- 7) In particular earning capacity
 - a. What were the expectations at the order
 - b. What has been done since the order and is now planned
 - c. What could now be done
 - d. What else has got in the way of achieving independence?
- 8) Timing –
 - a. if too soon hard to justify, in the absence of unexpected change
 - b. if too late, has the payer / payee acquiesced ... is there the opportunity to adjust?
- 9) Cohabitation
 - a. Not akin to remarriage – it will not end the order
 - b. New partner circumstances are relevant – will often justify reduction – a contribution at least will be expected
- 10) Clean hands –
 - a. Have you complied with all terms in the order?
 - b. Payer paid in full – and indexed
- 11) Warn
 - a. Of outcome - it is discretionary and hard to predict
 - b. of Costs
 - i. Will the likely gain justify it
 - ii. Should information / evidence be gathered first
 - c. that it is intrusive: each will have moved on but paperwork will be required
 - d. It will be a demanding process
 - e. But there are limits to the investigation which will be restrained to what is proportionate
- 12) Budget
 - a. Not hope list – but current needs - Think carefully about it all
 - b. Cross check against original schedule
 - c. Can changes be justified –
 - d. Identify capital spends -
 - e. Case law refers to broad brush – but you can expect x-examination on the budget
 - f. Be ready to update your budget once you know the situation better
- 13) Recitals to record the basis of the order –
 - a. and expectations as to what will give grounds
 - b. Housing budget
 - c. Return to work
 - d. Can you get indications from the judge and record them