SPOUSAL MAINTENANCE
White Paper
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One-stop formula?

> Mostyn J in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam)
>
> Any attempt to create a formula for generating ranges of spousal maintenance "may *prove to be* ***an impossible task****, given the scale and scope of the individual variables"* (at [43])
>
> *"These swirling considerations cannot be pressed into a formula which provides an answer, and it is right that that should be so, for* ***the assessment of need is elastic, fact-specific and highly discretionary****"* (at [40])

The "relevant principles in play" – Mostyn's guidance

1. In *SS v NS*, Mostyn J analysed the historical development of spousal maintenance and provided the following guidelines as to its modern interpretation (at [46]):

    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 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 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.*

GENERAL PRINCIPLES / AIMS

A clean break

2. The court has a duty to consider whether it would be appropriate to impose a clean break as soon as it is just and reasonable (s.25A (1) of the Matrimonial Causes Act 1973).

3. Baroness Hale in *Miller; McFarlane* [2006] 1 FLR 1186, HL [at133] expressly extolled the virtues of a clean break:

> *"This is good practical sense. Periodical payments are a continuing source of stress for both parties. They are also insecure. With the best will in the world, the paying party may fall on hard times and be unable to keep them up. Nor is the best will in the world always evident between formerly married people. It is also the logical consequence of the retreat from the priniciple of the lifelong obligation.* ***Independent finances and self sufficiency are the aims.****"*

Term Order

4. Pursuant to section 25A (2), where the court makes a periodical payments order, the court shall consider whether those payments should be made for a limited term which would be sufficient for the recipient to adjust *"without undue hardship"* at the end of that term. Again, the words *"without undue hardship"* (emphasis added) deserve consideration in circumstances where, post-*Miller,* the concept of the payee suffering any hardship seemed to be anathema to the courts.

5. Section 28(1A) enables the court to direct that a recipient of a periodical payments order may not be entitled to apply for an extension of the term specified in an order.

A transition to independence

6. In *G v G (Financial Remedies: Short Marriage: Trust Assets)* [2012] 2 FLR 48, FD, Charles J said (at [136]) an appropriate periodical payments award:

> *"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 buts:

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."

7. Charles J's decision was handed down on 12 February 2012. On 11 September 2012 the Law Commission published its own consultation paper (Matrimonial Property, Needs and Agreements An Overview (Consultation Paper No 208

(Summary)) which echoed Charles J's emphasis on transition as one of three possible approaches to dealing with periodical payments claims and the clean break. The three possibilities outlined in the Consultation paper were:

- **A compensation based award** – payments geared towards and restricted by the relationship generated needs.

- **A transitional award** – payments to support the recipient until she/he is able to achieve independence. Lives merge over time and on divorce those merged lives need to be *"unravelled"*. The longer the marriage and merging, the more likely the need for ongoing interdependence to unravel the parties' lives.

- **A formula** – to prescribe a certain outcome based on factors such as length of marriage, number of children and parties' incomes.

8. The Law Commission recommended further research and piloting, suggesting short term guidance, such as Practice Directions to the court and court users and guidance to the judiciary to channel reform from the bench. Even in consultation the Law Commission emphasis continued the steer towards independence (at paragraph 102):

> *"The message that the law should convey is that* ***lifelong dependence is not what is wanted, and that self-sufficiency is expected but only where that is possible.****"*

9. On 26 February 2014, the Law Commission published its report (Matrimonial Property, Needs and Agreements (Law Com No. 343)):

> *"Exactly how, and at what level, needs will be met will depend on the resources available and, usually, the marital standard of living. Replicating the marital standard of living in two homes, after divorce, will be rare: most parties will not be able, in the short to medium term, to live at the standard they enjoyed during the marriage. That said, their former standard of living will be relevant so far as any reduction in standard of living as a consequence of the financial settlement made on divorce* ***should not fall disproportionately on one party****. In addition, 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 own resources.****"*

And further;

"… we think that ***the objective in financial settlements and awards should be to enable a party to make the transition to independence****."*

However, they accepted:

"That will not be possible in every situation."

TERM OF MAINTENACE

Gazing into the crystal ball

10. The leading authority for many years was *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26, CA. Ward LJ stated that the *"The question is, can she adjust, not should she adjust"* without undue hardship. He said it was not up to the court to gaze *"into the crystal ball"* to determine whether there was a reasonable expectation that the wife can and will become self-sufficient. Hard evidence is necessary to persuade a court that a recipient can adjust – not mere speculation.

11. Hard facts were necessary to show not just whether self sufficiency was achievable but when self sufficiency would be achieved (*C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26, CA). See also the safety net cases referred to (below).

12. The need for evidence may well prompt requests for expert evidence. Mostyn J's warm receipt of an SJE employment report in *JL v SL* [2015] (No. 2) EWHC 360 adds support for this approach.

A move towards non-extendable terms

13. *L v L (Financial Remedies: Deferred Clean Break)* [2012] 2 FLR 1283, FD illustrates a move towards non-extendable terms / clean breaks as to income.

14. King J allowed H's appeal against a joint lives periodical payments order and imposed a two-and-a-half year term with a s.28(1A) bar, calling it a case *"which cries out for a term order"* (at [69]).

15. King J relied upon a number of magnetic factors: the wife had £2m of her own capital; she had never left the workplace during the marriage; there was a shared care arrangement; the marriage was of moderate length (10 years); children aged 12 and 9. In that sense it is arguable fact specific. However, King J herself described *C v C* as being based *"… on a highly unusual set of facts"* (at [60]). King J held that the District Judge had failed to specifically consider s.25A in her judgment, despite the requirement of the statute.

Statutory Steer to a clean break – from 1997 to 2016

16. *C v C* remained the stalwart defence for wives seeking joint lives provision. The courts were slow to impose term orders unless substantial capital was available to meet lifelong needs (as in *L v L*).

2013 – *Matthews v Matthews*

17. In *Matthews v Matthews* [2013] EWCA Civ 1874, the Court of Appeal went a long way towards knocking down the *C v C* jurisprudence. The Court upheld a decision of Mostyn J who had refused to make a nominal periodical payments order in favour of a wife with young children. There were very limited capital assets. The wife's income capacity was £40,000 working in financial compliance. The husband earned £27,000 net p.a. as a plumber. The two children, aged 6 and 3, lived with the wife and had no contact with the husband. The wife had recently been made redundant and argued that her fragile employment position required the protection of a nominal spousal periodical payments order. Mostyn J said,

> *"In my view the statutory steer to a clean break in section 25A of the Matrimonial Causes Act 1973 should be followed."*

-Echoes of Baroness Hale in *Miller; McFarlane* (at [130]) who said *"clear steer in the direction of lump sum and property adjustment orders with no continuing periodical payments."*

18. In *Matthews* the Court of Appeal emphasised that the discretion to order nominal periodical payments must be exercised with regard to the **Parliamentary presumption in favour of making a clean break wherever possible**.

Feb 2014 - *Grocholewska-Mullins v Mullins*

19. In *Grocholewska-Mullins v Mullins* [2014] EWCA 148, the wife appealed against a capitalisation of her periodical payments. The original order was 8 years old. The wife had cohabited for some time during the life of the order (when it was reduced to reflect the cohabitation).

20. Ryder LJ commented that the wife had had more time than most *"to acclimatize herself to financial independence"* - the emphasis on striving to achieve self support echoing once again.

July 2014 - *Murphy v Murphy*

21. In the High Court, Holman J took a much more conservative approach in July 2014 in *Murphy v Murphy* [2014] EWHC 2263.

22. The wife was 42 and the husband was 35. The parties had been together for 8 years and had twins aged 3 ½. The wife was a graduate with experience prior to the birth of the children in publishing and marketing, then earning £30,000 pa. The capital and pension assets had been shared broadly equally, leaving the wife with a mortgage free home and negligible pension provision. Holman J refused to impose a term expiring when the children finished secondary education commenting that:

> *"What this lady will be able to earn, and how much she will be able to have earned, and what pension she will have by the time she is 57 is frankly, totally speculative."*

Dec 2014 – *Chiva v Chiva*

23. In *Chiva v Chiva* [2014] EWCA 1558, McFarlane LJ dismissed the wife's appeal against an order of only two years spousal periodical payments on an extendable term.

24. The parties had been married for only 4 ½ years. The husband was earning £94,000 net pa. The wife was working only 7 days per month and earned £32,000 net pa. The wife was not working full time due to her commitments to the parties' child then aged 3. The parties had limited capital of only £321,000. McFarlane LJ found an order of only two years without a s.28 (1A) bar to be a reasonable sum for a reasonable period.

Dec 2014 – *SS v NS*

25. On 10 December 2014, Mostyn J handed down his judgment in *SS v NS* (referred to at the start of this paper). His exercise in that case was more than just an attempt to reiterate the underlying justifications for granting an award of spousal maintenance. It was a move towards a more principle-based determination of awards, and one in which those principles are likely to restrict the term of awards.

26. An example of a more principle-based, restrained approach to calculating spousal maintenance came soon after the judgment in *SS v NS*.

Feb 2015 – *Wright v Wright*

27. On 11 February 2015, Pitchford LJ refused permission to appeal in *Wright v Wright* [2015] EWCA Civ 201.

28. The appeal was against an order of HHJ Roberts who replaced a joint lives periodical payments order for an extendable term order with various steps down along the way.

29. HHJ Roberts had been unimpressed with the wife and found that she had made no attempts to find work and had no acceptable explanation for her inactivity. The judge concluded that the wife could adjust without undue hardship in the stepped timescale provided by obtaining work and benefits.

30. The Court of Appeal opined that **should the judge's findings prove overly optimistic the extendable term would provide a route for further relief.**

Extension of term orders

31. The House of Lords in *Miller; McFarlane* allowed the wife's appeal against a five year term and restored a joint lives order, on the basis, inter alia, that the *Fleming v Fleming* [2004] 1 FLR 667, CA test of *"exceptional justification"* placed a *"high threshold"* for extending a term.

32. *Fleming* was approved by the Court of Appeal in *Yates v Yates* [2013] 2 FLR 1070 but has been queried by Mostyn J in *SS v NS*. Mostyn J adopts the interpretation of Charles J in *McFarlane v McFarlane (No 2)* [2009] EWHC 891 that the threshold for extending a term is no higher than that needed to justify an application to discharge a periodical payments order; in either case the court needs to consider the reasoning behind the original order; where a term was imposed has the purpose of the term been achieved or not?

Extendable term or joint lives order?

33. In *SS v NS* Mostyn J argues that where the choice between an extendable term and a joint lives order is finely balanced, the court should chose an extendable term. It is evident that if the higher threshold test is applied it would place a significant burden on the recipient of a periodical payments order; typically the financially weaker party.

34. It has been argued that Mostyn J's approach does not sit easily with the Court of Appeal in *C v C* or Holman J in *Murphy v Murphy* (both of which were known to Mostyn J at the time of his decision).

Avoid undue hardship – but not *some* hardship

35. The statute infers that *some* hardship may be appropriate when considering the cessation of a term order. This was seized upon by Mostyn J in *SS v NS*:

> *"This suggests that Parliament anticipated that a degree of not undue hardship in making the adjustment is acceptable."*

36. Some level of hardship is therefore tolerable. The test remains a subjective and moveable feast.

QUANTUM OF MAINTENANCE

Level of needs

37. The Law Commission Report (Law Commision Matrimonial Property, Needs and Agreements, 26 February 2014) stated (at [2.35]):

> *"We do find acknowledgement that there is no longer a right to be kept at the marital standard of living for life; but it is not known what standard is aimed for. The only indication of what is wanted in Lawrence v Gallagher, for example, is a reference to the need 'for each to live comfortably in their own homes'"*

38. According to Mostyn J, the marital standard of living is not the lodestar in assessing maintenance needs – *SS v NS* (at [35]). The focus on lifestyle during the marriage *"imperils the prospects of eventual independence"*. The reverse is also true; emphasis on independence risks exposing one spouse to disproportionate, not necessarily undue, hardship.

Bonuses

39. In *H v W (Cap on Wife's share of bonus payments)* [2013] EWHC 4105, King J, in dealing with an appeal where the husband's income was made up of a basic salary (£250,000 pa gross), a bonus (which had been c. £200,000 pa gross) and share options, concluded that the correct approach to the wife's maintenance award was as follows:

> *"[38] In my judgment, where the learned district judge fell into error was in failing to identify a figure which would represent 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 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."

40. This approach has been endorsed by Mostyn J in *SS v NS* and by Roberts J in *B v B* [2014] EWHC 4545; the latter, having ordered H to pay to W 25% of his net bonus receipts, did go on to say that *"there is no absolute requirement for adopting this solution in every case which involves receipt by the payer of a discretionary element to his or her income award.* ***It is a matter of balance and degree****"*.

Quantifying maintenance

41. In the case of *MF v SF [2015] EWHC 1273*, Moylan J employed a creative solution to quantifying maintenance. This is a further illustration of a more restrained method of calculating spousal maintenance.

42. On the basis that H's net income was £125,000 (after deduction of the children's school fees) and W's was £13,000, Moylan J ordered H to pay £50,000 pa in maintenance - £30,000 for W and £10,000 for each of the children. This would cease in 2024 when W would be 55, with a s.28(1A) bar.

43. With the hope of avoiding future disputes, Moylan J included the following step-down provision: if, going forward, W were to earn between £5,000 and £15,000 net pa then maintenance would reduce by 50% for each net pound earned, and if she earned above £15,000 net pa then the maintenance would be reduced pound for pound.

44. Further, Moylan J stipulated that in the event of H receiving a (discretionary) bonus, W would receive 25% if the bonus exceeded £15,000 net, up to a maximum of £50,000.

45. The decision appears consistent with the thinking of Mostyn J in *SS*:

    i. Moylan J awarded a term order, with no possibility of extension;
    ii. The provision in relation to H's bonuses is in line with Mostyn J's approach;
    iii. Moylan J considered that W could realise her earning capacity within *"a matter of months"* (at [194]);
    iv. Spousal maintenance would reduce directly in line with W's financial dependence, risk of undue hardship and ability to transition to independence.

Capitalisation of maintenance: *Duxbury* formula

46. There are, naturally, many recent cases endorsing the principle of capitalisation e.g. *AH v PH [2013] EWHC 3873* (term capitalised at 14 years). There are equally many in which maintenance has not been capitalised, e.g. *G v B [2013] EWHC 3414*. But where appropriate, how is the capitalising calculation to be carried out? In *H v H (Financial Remedies)* [2014] EWCA Civ 1523, the Court of Appeal concluded that there was no accepted rate of return (including that under the *Duxbury* formula) which formed an "industry standard" when calculating the capitalisation of maintenance (per Ryder LJ at [26]).

47. However, in *JL v SL (No. 3) (Post-Judgment Amplification)* [2015] EWHC 555, Mostyn J elaborated on the reasons for adopting the *Duxbury* calculator (at [17]):

> *"Of course there is no 'standard' rate in the sense that the economic assumptions underpinning the formula are written in marble from which there can be no deviation. But the Duxbury tables are used in countless cases. Their underlying methodology and assumptions are widely accepted as the usual starting point, and where there is no countervailing evidence, the usual finishing point.* ***In that sense they do represent an 'industry standard'****".*

48. In reality, whether or not *Duxbury* formulae are acknowledged expressly as the "industry standard", they are likely to continue as such in calculating the capitalisation of maintenance, at least in providing a starting point. In *H v H* Ryder LJ expressed the view of the Court of Appeal (at [28]) that it was *"not acceptable"* for a judge to *"pick a rate out of thin air"*.

Compensation

49. In *RP v RP* [2007] 1 FLR 2105, Coleridge J was scathing about the development of compensation claims and the restrictive impact in attempting to achieve a clean break:

> *"…it is simply not possible (and highly undesirable and costly) to conduct…a speculative "what if…?" exercise to reconstruct the parties' marriage on a different basis…Another very undesirable consequence is that clean breaks seem to be becoming more difficult to achieve, despite the statutory imperative to achieve one wherever possible"* (at [76]).

50. In *SA v PA* [2014] EWHC 392, Mostyn J developed themes enunciated in *B v S (Financial Remedy: Marital Property Regime)* [2012] 2 FLR 502 to identify and restrict any element of compensation. He justified the restriction in part on the basis that the claimant for compensation chose to sacrifice his/her career.

51. Having rejected the arguments accepted in the Supreme Court in *Miller; McFarlane*, and referring to the principle of compensation (at [24]) as "**extremely problematic** and **challenging both conceptually and legally**", Mostyn J summarised the principles that should be applied when considering a compensation claim thus:

> *[36] Obviously I am bound by the decision of the House of Lords. However, in the light of the later authorities, 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 principle 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 be reflected by a premium or additional element on top of the needs based award.***
>
> *[37] Having regard to what I said in B v S at paras 73-79 it will be apparent that it is my firm belief that save in highly exceptional cases an award for periodical payments should be assessed by reference to the principle of need alone.*

52. The case law post-December 2014, offers little guidance or insight into the continued value placed on the compensation principle by the judiciary. Perhaps what is more instructive, and indeed more striking, is the absence of cases in which the point has been argued.

53. It appears that the view of Mostyn J has gained some traction and clients are rarely being advised to run a 'compensation case'. Whilst not dead, it appears the principle of compensation is dormant – at least for now…

Estimating future income

54. In *CR v SR* [2013] EWHC 115, Moylan J gave permission to appeal an order which gave W 100% equity in the former matrimonial home and a joint lives periodical payments order, the quantum of which was based on estimates of H's future income. Moylan said:

> *[37] "Clearly, when the court is making orders based on estimates of future income, **there needs to be, in my judgment, a reasonable degree of caution** exercised to make sure that the order which is made is (a) affordable, and (b) does not result in an imbalance or an undue imbalance between the parties' respective future financial positions. There is on that point, in addition in my judgment, a reasonable prospect of the husband satisfying a judge on appeal that the District Judge's order in respect, in particular, of maintenance is based too heavily on estimates of future income, which may, in fact, turn out not to be achieved."*

IMPLICATIONS FOR THE FUTURE

***SS v NS* – a more restrictive approach**

55. Following *SS v NS,* the more restrictive approach to calculating the quantum and term of payments of spousal maintenance appears to be gaining ground.

56. As a result, orders for spousal maintenance on the basis of joint lives **may** be expected to become less common.

57. This direction of travel is taken to an extreme in Baroness Deech's Private Members Bill – the "Divorce (Financial Provision) Bill 2015-16", in which she seeks to create a strong presumption of a five-year fixed term. The Bill currently awaits its second reading in the House of Lords.

58. Section 5 of the Divorce (Financial Provision) Bill 2015-16 reads as follows:

> *"5 Periodical payments and lump sums*
>
> *(1) In deciding whether and in what terms to exercise its powers to make a periodical payments order in favour of one of the parties to the marriage, the court must take into account –*
>
> *(a) any economic advantage derived by either party from contributions by the other, and any economic disadvantage suffered by either party in the interests of the other party or of their family;*
>
> *(b) the fair sharing between the parties of any economic burden of caring after divorce for a child of the family under the age of 16 years; and*
>
> *(c) that a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such periodical payments as is reasonable to enable that party to adjust to the loss of that support in divorce* ***over a period of not more than five years from the date of the decree of divorce****, such period not to be exceed unless the court is satisfied that there is no other means of making provision for a party to the marriage and that that party would otherwise be likely to suffer serious financial hardship as a result"*

59. Tempering any move to such an extreme position, Mostyn J cautions that *"the assessment of need is elastic, fact-specific and highly discretionary"* (*SS v NS* at [40]).

VARIATION / DISCHARGE

60. Under the Matrimonial Causes Act, s.31(7), the court is required to have regard to **all the circumstances of the case** and these circumstances **shall include any change** in any of the matters to which the court was required to have regard when making the original order.

61. Arguments to support a variation include a change to the payor's income and/or available resources:

    a) Income
    In *Hvorostovsky v Hvorostovsky* [2009] 2 FLR 1574, Thorpe LJ stated (at [35]):

    > *"In 2001, in the aftermath of the decision of the House of Lords in White v White [2000] 2 FLR 981, Charles J in the case of Cornick v Cornick (No 3) [2001] 2 FLR 1240 clearly stated that a rule of fairness, namely just as an income fall justifies an application for downward variation, so an income rise justifies an upward variation. In neither case is the outcome bounded by the family's standard of living immediately before the breakdown."*

    b) Available resources
    In *Cornick v Cornick (No 3)* [2001] 2 FLR 1240, Charles J stated (at [105]):

    > *"… 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."*

62. It should be noted that even if there have been no changes in the factors since the making of the original order this would not be fatal to a successful variation application – a change is simply something that the court can include when looking at all the circumstances of the case (Matrimonial Causes Act, s.31(7)).

63. Recent case law has emphasised the court's **statutory duty** to consider whether it would be appropriate to impose a clean break as soon as it is just and reasonable (s.25A (1) of the Matrimonial Causes Act 1973).

64. In *JL v SL (No. 3)* [2015] EWHC 555, Mostyn J emphasises that a clean break is "not only socially desirable but…accords with the intention of Parliament" and "a clean break is to be encouraged wherever possible".

65. The case of *WD v HD* [2015] EWHC 1547 considered the interaction of the 'safety net' argument and the clean break principle. In his judgment, Moor J, dismissing the safety net argument as a reason for not imposing a clean break, held as follows:

> *"[61] The second argument raised by Mr Leech is the safety net argument. It is said that the wife might, at some point in the future, be unable to work. She might lose her job. She might not be able to find another one. There are so many imponderables in this life. It is impossible to operate a crystal ball and be able to determine what may possibly happen at some point in the next eight or so years. I cannot ignore the significant support she has had from her family. Who knows what will happen in future with Mr X. I remind myself that there can be some hardship, albeit not undue hardship.*
>
> *[62] I now return, as I indicated I would, to the case of Matthews. In that case, Mostyn J had imposed a clean break on a wife with two children aged six and three. She had an earning capacity of £40,000 per annum, which I accept in that case was higher than that of her husband, whose earning capacity was only £27,000 per annum. The safety net argument did not cut any ice with Mostyn J. The Court of Appeal dismissed the appeal on the basis that it could not be said that Mostyn J was plainly wrong.*
>
> *[63] I have come to the conclusion that it cannot be said that the decision of the Deputy District Judge was plainly wrong or outside the band of possible orders that she might have come to. Some judges would have retained the nominal order. She did not."*

66. The above passages, alongside the decision in *Matthews*, suggests that the argument that a party may lose their job at some indeterminate point in the future will no longer necessarily hold much sway in arguing for the imposition of a nominal order for spousal maintenance instead of a clean break.

APPROACH TO MAINTENANCE IN ENGLAND AND WALES COMPARED WITH OTHER JURISDICTIONS

Wide scope of judicial discretion in England and Wales

67. As is evident from the foregoing, judges in England and Wales may exercise a wide scope of judicial discretion in relation to the size and duration of maintenance payments, and must give consideration to all of the s25 factors in each and every case[1]; it is unsurprising therefore that England and Wales

[1] Wyatt v Vince [2015] UKSC 15 per Lord Wilson

enjoys "a reputation for being the most generous of all jurisdictions to the weaker financial party…"

Flexibility versus certainty

68. In contrast to the flexible approach in England and Wales on issues of maintenance (the assessment of need being *"elastic, fact-specific and highly discretionary"*, as per Mostyn J in *SS v NS*), many countries favour a more formulaic (and certain) approach when it comes to awarding maintenance. Penningtons Manches have recently produced an excellent summary of the "International Spousal Maintenance Barometer", sourced from Family Law, A Global Guide (Thompson Reuters 2015), which examined 45 key divorce jurisdictions throughout the world. What follows (below), however, is a general look at different jurisdictions, not from this source but rather the author's own researches undertaken prior to publication of the Penningtons Manches report.

Germany

69. In Germany the court often uses official guidelines, notably the Düsseldorf table, which provides certainty in maintenance calculations, including child and spousal payments.

Canada

70. Likewise, in Canada the courts may use the Spousal Support Advisory Guidelines when determining how much spousal support a party should receive. The guidelines are optional and were developed to help bring clarity and predictability to the issue of spousal support.

71. The guidelines contain two formulas:

    i. A formula for when there are dependent children, or 'children of the marriage'

        This looks at two factors: how long the parties were married, and the difference in income between the parties.

    ii. A formula for when there are no dependent children, or 'children of the marriage.'

        This considers the fact that child support is a priority, and also looks at the reduced ability to pay spousal support when there is also a child support obligation, and certain tax and benefit issues. It also factors in the need to provide care and support for the children. The length of the marriage is generally not a factor in using the 'with children' formula.

72. The formulas give a range for the amount of spousal support that may be paid, rather than a specific number. The specific number is to be negotiated, or to be determined by a judge, and depends on the facts of the situation.

73. The formulas are designed to be used for first-time spousal support decisions. They do not take into account the many factors that can be considered when a spousal support order is being reviewed or changed ('varied').

Limited maintenance

74. In some countries, notably Scotland, Cyprus, Germany and Switzerland, the term for maintenance can be strictly limited.

Australia

75. In Australia, spousal maintenance is not payable for life. Instead, it is considered "rehabilitative" – it is designed to be a temporary order to get the party receiving maintenance through a temporary period of their life.

76. Usually a spouse maintenance order would not be for a period of greater than 2 years and in that period the payee would be expected to retrain and become self-supporting. The payer of spouse maintenance can be either spouse and is gender-neutral.

New Zealand

77. In New Zealand, spousal maintenance is generally a temporary arrangement aimed at helping out one party as they work on becoming financially independent. After a reasonable amount of time it is thought that both parties should be responsible for maintaining themselves financially without any reliance on their ex-partner.

78. Occasionally spousal support will continue to be payable past this point, but only in special circumstances where the Court considers it just.

Scotland

79. Under section 9(1)(d) of the Family Law (Scotland) 1985 Act, as amended by the Family Law (Scotland) Act 2006 states:

> *"a party who has been dependant to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust,* ***over a period of not more than three years from the date of decree of divorce****, to the loss of that support on divorce".*

France

80. Joint lives maintenance is almost non-existent in France, unless one partner is of pensionable age or incapacitated. Parties are expected to go back to work.

Estonia

81. The situation is even more stark in Estonia where maintenance is paid in only two circumstances: if the receiving spouse is disabled or of pensionable age and therefore unable to work; or where there are children under three.

Clean break

82. The philosophy of a clean break is embodied in legislation in other jurisdictions, such as in Australia under section 81 of the Family Law Act 1975. In Australia the court must make such orders as to finally determine the financial relationship between the parties to the marriage and avoid further proceedings between them, so far as practicable.

Inherited wealth and pre-marital assets

83. Most EU countries, with the exception of the UK and the Netherlands, exclude inherited wealth and pre-marital assets from the divorce settlement.

Grounds for divorce

84. The grounds for divorce can, in parts of the world, have an impact on the settlement. Some jurisdictions still use the concept of "fault-based divorce" and include factors such as adultery, unreasonable behaviour or desertion as grounds to refuse a claim for maintenance.

85. Malta remains one of the few jurisdictions in which conduct of the divorcing parties is genuinely taken into account; the right to maintenance is forfeited if the recipient caused the breakdown of the marriage for reasons of adultery, cruelty or grievous injury or desertion for two years or more without good cause.

86. In France, the court has the discretion to refuse to award spousal support in cases of fault-based divorce.

Going forward

87. Baroness Deech's Private Members Bill (The Divorce (Financial Provision) Bill seeks to reflect a similar position to that already seen in Scotland, amongst other countries, where the courts take a very restrictive approach to the award of spousal maintenance, and legislation provides that financial provision should be made for a period of not more than three years from the date of divorce.

88. Baroness Deech's Bill remains in its early legislative stages. The Divorce (Financial Provision) Bill has engendered a great deal of debate amongst lawyers and non-lawyers alike. It seeks to make drastic changes to the existing law which will be as unpopular amongst some people as they will be popular amongst others. There is consequently very little prospect of Government support for this Bill.

89. A wider formula of some type (one which would make calculations easier – along the lines of the Canadian model) was not ruled out by the Law Commission in its report (Matrimonial Property, Needs and Agreements (Law Com No. 343). However, they pointed out that work had to be done. There had to be a starting point. Empirical evidence had to be gathered and collated. They thought it might take as long as five years if the government was minded to fund the exercise [3.151 – 3.159].

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