WHITE PAPER

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Maintenance

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

Preliminary

1. Parties: for whom you are acting? It makes a difference!

2. Tribunal? Judge, arbitration, private FDR, round table meeting? It makes a difference!

3. Facts: Every financial remedy case is fact dependent (e.g. *SS v NS [2014] EWHC 4183 (Fam), North v North [2007] EWCA Civ 760, Yates v Yates [2012] EWCA Civ 532, White v White [2000] 2 FLR 981, Miller v Miller; McFarlane v McFarlane [2006] UKHL 24* - and *Mills v Mills (CA)* at paragraph 7[1]). Interpretation of the primary facts can occasionally controversial.

4. Overview and ultimate objective: in *Minton v Minton* [1979] AC 593, 608) Lord Scarman 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'.*

5. The statutory steer towards independence – see below.

[1] SS V NS [2014] EWHC 4183 (Fam) see paragraph 40: *"[40] I would suggest that 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*
North v North [2007] EWCA Civ 760 see paragraph 27: *"[27] As to previous authority, I do not find either of the cases cited particularly influential. All decisions in this field are highly fact dependent."*
White v White [2000] 1 AC 596 see page 992: *"The weight, or importance, to be attached to these matters depends upon the facts of the particular case"*

6. The topic is complex, multi-faceted and hotly debated across the spectrum of judicial, academic, professional and public opinion; this can only be a glimpse into the issues from the perspective of the question asked, namely how the latest cases can help practitioners achieve the best results for their clients as to quantum and duration of maintenance.

Statutory framework

7. Section 25 MCA 1973; section 25A MCA and s31 MCA

8. **MCA s25: Matters to which court is to have regard in deciding how to exercise its powers under ss. 23, 24 24A, 24B and 24E.**

"(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 24A, 24B or 24E 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 of the court under section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E above 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.

(3) As regards the exercise of the powers of the court under section 23(1)(d), (e) or (f), (2) or (4), 24 or 24A above 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….

9. **Statutory factors**: Needs, (*Wyatt v Vince [2015] UKSC 14* and *Miller v Miller; McFarlane v McFarlane [2006] UKHL 24* - "needs must be relationship generated") - per Mostyn J "*For my part I find it difficult to see why it is just and reasonable that an ex-husband should have to pay spousal maintenance or enhanced spousal maintenance by reference to factors which are not causally connected to the marriage, unless one is looking at the issue in a macro-economic utilitarian way and deciding that in such circumstances it is better that the ex-husband picks up the cost of the ex-wife's support rather than the hard-pressed taxpayer. This, again, is a matter of social policy. But I would suggest that in such a case spousal maintenance payments should only*

be awarded to alleviate significant hardship" (SS v NS (Spousal Maintenance) [2014] EWHC 4183 (Fam).

10. The earning capacity (the payer's, not that of the payee) is not a marital asset to be shared - *Waggott v Waggott [2018] EWCA Civ 727.* The payee's earning capacity is obviously highly significant.

11. **Non-statutory factors**: compensation (but see *RP v RP [2007] 1 FLR 2105*, *SA v PA [2014] EWHC 392*) and the safety net argument (but see *WD v HD [2015] EWHC 1547)*

The cases

12. What are the recent (and not so recent, but potentially relevant) cases going to quantum and duration?

13. Not so recent:

14. *C v C (Financial Relief: Short Marriage) [1997] 2 FLR 26 CA* and *Flavell v Flavell [1997] 1 FLR 353 -* two (pre-White) CA cases - the crystal ball.

15. *(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 a fractured career and making up any lost ground.*

16. *(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 dependency, is not enough.*

17. *(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). (*Emphasis added).

18. Other payee cases: Murphy v Murphy [2014] EWHC] 2263 ("Children change everything…impossible to gaze into the crystal ball…")

19. The payer cases: *SS v NS (Spousal Maintenance) [2014] EWHC 4183 (Fam)*

"*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 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.

20. Whether the Supreme Court (in *Mills*) will endorse or even comment on Mostyn J's judgment remains to be seen.

21. **The s25A steer towards independence**:

22. Section 25A MCA 1973 was introduced by s3 MFPA 1984, and came into effect in October 1984, imposing on courts the duty to give active consideration to a clean break. In a relatively recent decision, *Matthews v Matthews [2013] EWCA Civ 1874* the Court of Appeal described the nature of that duty, *per* Tomlinson LJ:

"*We are here concerned with an exercise of discretion, but it is an exercise of discretion in which Parliament has indicated that there should be a clear presumption in favour of making a clean break, in the sense that that is something which the court is mandated to consider, whether it would be appropriate to bring about a complete break between the parties, so far as concerns financial matters, as an initial consideration*

23. And in *Waggott v Waggott [2018] EWCA Civ 727* Moylan LJ said at paragraph 103 of the judgment:
"The "steer" provided by section 25A is clear because of the duty *it imposes on the court under 25A (1), when making an order of the type(s) specified, "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". (emphasis added)*

24. In *G v G [2012] EWHC 167 (Fam)* Charles J comprehensively reviewed the authorities and said:" [136] *What I take from this guidance on the approach to the statutory task is that 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 remarriage) 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 recognizes that the aim is independence and self-sufficiency based on all the financial resources that are available to the parties. (Emphasis added). *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). "

25. In *Waggott v Waggott, [2018] EWCA 1093 (Fam)* Moylan LJ said this:
"104. *Further, on any application under section 31, subsection (7) requires the court to consider the termination of periodical payments, in the same terms as under section 25A(2). This is combined with the power under section 31(7B) to make a lump sum, property adjustment or pension sharing order and to prohibit the making of any further application. Therefore, if a clean break could not be effected fairly at the time of the first order, it can be implemented on a subsequent application".* (Emphasis added)

26. Other relevant authorities tending towards a restriction of open-ended maintenance include: *Miller McFarlane, L v L [2012] 2 FLR 1283, Chiva v Chiva [2014] EWCA 1558, JL v SL [2015] EWHC 555, WD v HD [2015] EWHC 1547.*

27. The Law Commission in 2014, and the Family Justice Council in 2016 and 2018 have both considered the points arising.

28. The Family Justice Council (para 57) considered Mostyn J's key analysis at paragraph 46 in SS v NS *[2014] EWHC 4183 (Fam)* and concluded:
"When read in conjunction (SS v NS) with the overarching guidance provided in the leading cases in the House of Lords (Miller; McFarlane) and in the Court of Appeal (Flavell and C v C), the Family Justice Council endorses and commends adopting this type of rigorous and disciplined approach, consistent with the **overall objective** identified in paragraph 15 and the 'gentle transition' towards independence."

29. ***Mills v Mills***: an opportunity missed?

30. Facts of *Mills*: Relevant factors included:

(i) The court process, from FDR in 2002 to s31 application in 2015 and the case's passage through the Court of Appeal to the Supreme Court.
(ii) Chronology; ages of parties; relevance of one child, now 24, W's medical condition; H's occupation and income; W's presentation of her financial and

medical position to court in 2002 and 2015; W's failure / inability to give proper disclosure of her true financial position at both hearings; W's actual income and historic earnings.

31. Judgment is expected in September / October.

Conclusion

32. The payee, (who wants to prolong maintenance for the maximum quantum and duration) may do well to rely upon *C v C*, *Flavell*, *Murphy*; refer to the crystal ball, rely upon medical evidence if available and helpful, avoid excessive detail in personal accounts and expenditure schedules, rely upon the research into gender-relevant earnings-disadvantage (including the most recent paper from Miles and Hitchings[2])and ultimately, if the case will support it, rely upon the overriding duty to achieve fairness. Of course, and unexceptionally, the presence of 'under age' children will always inform the outcome of every case; the difficulty usually comes when those children reach 18 and leave home or go to University / the work place and the payee is left with time on his or her hands but no recent or relevant skills to support him/herself. There is considerable anecdotal evidence as to the courts' approach in such cases, and a firm suggestion of regional variation. It seems clear that (across the board) the likely outcome of such a case has shifted over the past ten years or so; the decision in *Mills* may touch on the point.

33. The payer may rely upon the decisions and views of Mostyn J, Moylan LJ, and Sir James Munby, referred to above. In addition (he) has the views and guidance of the FJC, s25A, and the fact that *C v C* pre-dated *White v White* and has not exactly been followed in *Matthews* or *Waggott*.

The future?

34. How long is the law of England and Wales likely to stay as it is? Is England and Wales ever likely to follow the Scottish (or a similar) model? What implications may any advice given today have in the future? For whom is the

[2] Financial Remedy outcomes on divorce in England and Wales: 'Not a meal ticket for life' – Forthcoming in (2018) 31(2) Australian Journal of Family Law

clean break likely to be more beneficial? What is to be taken from Lord Wilson's observation (during a speech to Bristol law students on 20 March 2017) that it is 'a difficult path that we judges have to tread'?

35. The decision in *Mills v Mills* may clarify some of the questions posed in this paper, including those in the previous paragraph?

36. The 'Deech Bill' may progress through Parliament.

37. The Times campaign to reform the law in five areas, including this one, may bear fruit.

38. Alternative dispute resolution structures may emerge. *Per* Sir James Munby P[3]:

'*One of the things the Law Commission looked at while I was chairman, when it was looking into financial remedies, was the Canadian model of tables and charts and formulae, which if you feed in some basic information indicate I think what kind of order in terms of financial magnitude one would expect on those figures. Now that is not I think using artificial intelligence but it's the same basic concept that you feed in a lot of material, you create a model in that particular case a paper model, rather than an AI model, which then produces an answer. The question then becomes in a sense – this is going to happen in the sense that people do it – does one treat the answer as being definitive, so that the judge simply becomes a sort of penny in the slot weighing machine tell you what your weight is, or is it simply a tool which is available to the judge to give a sort of steer – a starting point, a working hypothesis maybe in ballpark terms or something available to the judge as a cross check? But there's a more fundamental question in a sense – as lawyers we are wedded to the concept of process and judicial process and determination by a process which involves an argument whether oral or written, leading to a judicial determination. Now let's take a very simple but very real problem. A straightforward, if there is such a thing, financial remedy claim following divorce where the assets are let's say are £250,000,*

[3] Family Affairs (forthcoming)

£350,000 or £500,000. The process which we currently offer the litigant is one which typically, far too frequently, ends up with a disproportionate percentage of those assets disappearing into the pockets of lawyers or otherwise into the costs of the system. That's before you look at the emotional burdens of people being locked into post-relationship breakdown litigation for maybe a year or two years. We've never asked people – it would be very interesting, we should actually ask people – if you had a choice and be very careful to make sure that the question wasn't loaded – we should actually ask people in a completely open fashion, a question which essentially was 'would you rather have something like the existing system improved, but where it'll take a year to get an answer, where a significant percentage of the assets will disappear in the costs of the process, where the outcome is unpredictable and where either or both sides may be dissatisfied with that outcome and where you may, horror of all horrors, have to mount an appeal, or would you prefer a cheap and cheerful process which within a very short space of time would provide you with an answer which is likely, with a reasonable degree of probability, to be within the right ballpark?' I don't know what the answer is, but we should ask this question. I just have a feeling that put in a non-tendentious, even-handed way, we might be surprised by the answer because, what is it that people actually want? Do they want a process which involves the traditional process of argument, advocacy, whether oral or written? A judicial determination, judicial musing, judicial judgment. Or do they want an answer? I suspect we might be surprised to discover a lot of people would prefer to have the answer. The instinctive rejection of AI maybe something which comes more easily obviously to the lawyers than to the litigants'.

39. Societal change may be recognised in the next case to reach the Supreme Court, if it is not to be <u>*Mills.*</u> Once again, per Sir James Munby[4] *"In this connection I cannot resist a last look at Turner[5], writing, as you will recall, 68 years ago…."Misguided and preposterous though some of this opposition now appears, it is doubtful whether it will seem any more peculiar, one hundred years hence, than <u>some of the reasons we produce today for perpetuating</u>*

[4] Speech to Edinburgh University 20 March 2018
[5] E S Turner, Roads to Ruin: The Shocking History of Social Reform, published in 1950

hardship and injustice. Our ancestors thought it absurd that wives should wish to keep their own earnings; our descendants may be astonished at our system which forces a man to maintain a woman, sometimes for life, after a hopeless marriage has been disrupted. It is likely that our descendants will derive ... much heartless fun from contemplation of our divorce laws, and the reasons we use to defend them." Well, as you will appreciate, we have only another 32 years to go!" (Emphasis added).

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