

## WHITE PAPER

### APPLYING THE LESSONS OF RECENT CASES, WHAT CAN YOU ACHIEVE FOR YOUR CLIENTS OVER THE QUANTUM AND DURATION OF MAINTENANCE ORDERS?

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#### A STARTING POINT

On any issue of maintenance, the starting point is to consider the 11 applicable principles set down by Mostyn J in *SS v NS [2014] EWHC 4183 (Fam)*. It is however only a first instance decision and in places challenges Court of Appeal decisions.

The principal applicable principles for the purpose of this talk are as follows:

1. 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.
2. 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.
3. 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.
4. 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.
5. The marital standard of living is relevant to the quantum of spousal maintenance, but is not decisive.

This talk will focus more on the issue of term, rather than quantum in view of the later talk on the issue of needs.

## **B TERM ORDERS OR JOINT LIVES ORDERS?**

### **1 The Statutory Test**

The important provisions are contained in s25A Matrimonial Causes Act 1973 as follows:

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 or, 24A, 24B or 24E 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.**

### **2. Case Law in respect of s25A**

The provisions of s25A have been described as the statutory steer towards an eventual clean break – *Matthews v Matthews* [2013] EWCA Civ 1874. Despite that, in *Barrett v Barrett* [1988] 2 FLR 516 it was held that although Section 25A requires the court to consider a clean break, there is no automatic presumption in favour of clean break orders. More significantly Baroness Hale in the House of Lords in *Miller/McFarlane* [2006] UKHL24 stated that s25A was,

“A powerful encouragement towards securing the court’s objective by way of lump sum and capital adjustment rather than continuing periodical payments”.

Despite that, she also stated that,

“A clean break is not to be achieved at the expense of a fair result”.

Also in *Miller/McFarlane*, Lord Nicholls stated,

“Under s25A(1) the goal the court is required to have in mind is that the parties’ mutual financial obligations should end as soon as the court considers it just and reasonable”.

The key issue therefore is the test under s25A(2), ie, whether the recipient can adjust without undue hardship to the termination of his or her financial dependence on the other party.

The established position could be summarised by the views of Ward LJ in *Flavell v Flavell* [1997] 1 FLR 383 in which he stated,

“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, in my judgment, often 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, judicially looking into a crystal ball very rarely finds enough of substance to justify a finding that adjustment can be made without undue hardship”.

When looking at making periodical payments orders for those approaching retirement, Ward LJ also stated,

“...it is not usually appropriate to provide for the termination of periodical payments in the case of a woman in her mid-50s. Such an order will only be justified where she has substantial capital of her own and/or a consistent and significant earning capacity”.

In a similar vein, the leading case for many years has been Ward LJ’s decision in *C v C (financial relief: short marriage)* [1997] 2 FLR 26. Ward LJ considered the “proper approach” in detail, although the principal points can be summarised as follows:

- (a) The first task is to consider a clean break.
- (b) Where a periodical payments order is to be made, the duration of the marriage is a factor relevant to the determination of quantum.
- (c) If the periodical payments order is to be limited to a term, would the term be sufficient to enable the recipient to adjust without undue hardship?
- (d) It is not appropriate to say, “this is a short marriage, therefore a term must be imposed”.
- (e) Financial dependence is evidenced from the very making of a periodical payments order.

(f) On the question of adjustment, “the question is, can she adjust, not should she adjust”. In answering that question, the court will pay attention to the following:

- The duration of the marriage.
- The effect of the marriage, its breakdown and the need to care for any minor child will have on the earning capacity of the payee.
- The extent to which she is no longer in the position that she would have been in but for the marriage.
- 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.

(g) The court cannot form its opinion that a term is appropriate without any evidence to support its conclusions. In particular:

- Facts supported by evidence must justify a reasonable expectation that the recipient 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 independence, is not enough.

(h) 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.

(i) The court may be in a position of such certainty that it can impose a s28(1A) bar.

(j) If there is any uncertainty about the appropriate length of the term, the proper course is to impose no term, but leave the payee to seek a variation.

### 3 Has there been a move towards Term Orders?

A few cases reported over the last few years would suggest that is the case, but still joint lives orders remain appropriate in certain cases where the circumstances justify it.

Recent cases to note are as follows:

(a) The checklist set out by Mostyn J in *SS v NS* as mentioned above.

(b) In *G v G* [2012] EWHC 167 (Fam) Charles J considered the test in *C v C*. He stated:

- The court must take an evidence-based approach as to whether the payee can and will adjust without undue hardship.
- 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.
- The need for an evidential base does not mean that the wife can assert that she can 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 the obtaining of a report from an expert on her earning potential.

This was a short marriage with the husband and wife both in their 30s. There was one child, aged four. The wife was a barrister who had undertaken limited work since the birth of the child. She also had interests in family trusts. The periodical payments were ordered to reduce after six years, although no term was imposed.

(c) The supposed “sea change” was heralded by King J’s decision in *L v L* [2011] EWHC 2207 (Fam) where on appeal she substituted a joint lives order for a term order of just over two years and subject to a Section 28(1A) bar. The facts were however unusual: the wife owned a farm worth in the region of £2 million which was soon to be free from mortgage; she had worked throughout the marriage and although her income had dropped, she was talented and highly regarded in what she did; she had no need to re-train; it was a moderate length marriage of only 10 years and the wife was only 44 years old; the children were the subject of a shared care arrangement.

(d) In *Chiva v Chiva* [2014] EWCA Civ 1558 the wife was unsuccessful in her appeal of a two year maintenance order which had been made. Although the wife had historically earned more than the husband, she was only working part time and was earning significantly less than the husband. The Court of Appeal dismissed the appeal, noting that the wife could earn a sum equivalent to the periodical payments order by working only a few additional days each month. It was also open to the wife to apply to extend the order before its end as it was not subject to a Section 28(1A) bar.

(e) The decision in *Wright v Wright* [2015] EWCA Civ 201 attracted a great deal of attention. Upon variation HHJ Roberts had reduced a joint lives order to an order of a six year term.

The judge had noted that the wife had made no effort to secure employment, whereas “vast numbers of women with children just get on with it, Mrs X should have done as well”. In evidence, the wife was found to be evasive regarding her efforts to secure employment. The Court of Appeal refused the wife permission to appeal the decision.

- (f) In *FF v KF [2017] EWHC 1093 (Fam)* Mostyn J considered both the term and quantum of maintenance in the context of short marriages. He noted, “although empirical research shows that in many such cases the quotidian need is determined by an award of a term of years, there is no rule, or even guideline, to this effect”. He acknowledges that there has been cases where lifelong support has been awarded after a short marriage, for example, the aforementioned case of *C v C*.

In the present case, although the marriage lasted only two years, the parties had had been together for nine years, albeit for periods of separation. The wife also suffered from psychological issues as a result of the marriage. Considering the first instance decision, Mostyn J took the view that although the multiplier of 10 was generous, it was entirely legitimate having regard to the various factors. He noted that had the marriage been longer, he was certain that the calculation would have been on the lifetime Duxbury basis.

4 *Waqqott v Waqqott[2018] EWCA Civ 727*

- (a) Cohabitation started in 1991, parties married in 2000 and separated in 2012. One child born in 2004. Wife did not work after 2001.
- (b) Parties agreed that their capital be divided equally – the wife received approximately £8.4 million of capital.
- (c) The issue between the parties was the quantum and term of maintenance.
- (d) At first instance the wife was awarded £115,000 a year on a joint lives basis. Upon appeal to the Court of Appeal, the joint lives order was reduced in quantum and to a term until 2021 with a Section 28(1A) bar.
- (e) Moylan LJ’s judgment is a detailed consideration of issues of sharing, compensation and the clean break. See paragraph 66 onwards and his conclusions from paragraph 118 onwards.

- (f) An earning capacity is not a matrimonial asset to which the sharing principle applies.
- (g) Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. The entitlement to share would continue after the payer ceased working, potentially a period of many years.
- (h) If the court were to seek to effect a capitalised clean break, this would inevitably require the court to capitalise the value of an earning capacity which would conflict with what was said by Wilson LJ in *Jones v Jones*.
- (i) Looking at the impact of this principle more broadly, it would have to apply in every case where one party had earnings which were greater than the other party's earnings, regardless of need. It would impact upon a significant number of cases. The sharing of an earning capacity post-separation does not sit with Lady Hale's observation in *Miller* that, "in general it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources".
- (j) It would inevitably require the court to assess the extent to which earning capacity had accrued during the marriage.
- (k) Moylan LJ also rejected the more extreme argument put forward by the wife that her capital should be protected and not be used to meet her income needs. The Court of Appeal held that this would again conflict with the clean break as the applicant spouse would always have a claim for an additional award to meet his or her income needs.
- (l) The court applies the needs principle when determining whether the sharing award is sufficient to meet that party's future needs.
- (m) Moylan LJ stated that there must be a means of determining whether, and if so how, the sharing award does or does not meet the applicant's needs.
- (n) In considering the application of this principle, Mostyn LJ considered a number of cases in which different rates of return were applied to the applicant's capital. He noted that there were clearly advantages if the Duxbury model and the assumptions within it were to be used at least as a starting point.

(o) Echoing the comments of Wilson LJ in *Vaughan*, Moylan LJ noted that it was impossible to be categorical about what the law expects in this area. As Wilson LJ observed in *Jones*, the earning capacity of the paying party 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.

### **C FAMILY JUSTICE COUNCIL – GUIDANCE ON “FINANCIAL NEEDS” ON DIVORCE**

A very useful document published in June 2016 and updated in April 2018.

The Family Justice Council recognised the unacceptable regional disparities and inconsistencies regarding the type of orders being made, ie, term orders more likely to be made by courts in the north, whereas courts in the south (and especially London) are more likely to make joint lives orders.

The guidance also acknowledges that MOJ statistics clearly indicate that only a small proportion of divorces result in any award of periodical payments.

By way of example, the latest MOJ quarterly statistics published at the end of March 2018 show the following total orders made in England and Wales in 2017.

#### **Periodical Payments**

Uncontested:	8,022
Initially contested, subsequently consented:	2,301
Contested:	830
<b>TOTAL</b>	<b>11,153</b>

#### **Lump Sum Orders**

Uncontested:	18,857
Initially contested, subsequently consented:	5,810
Contested:	1,753
<b>TOTAL</b>	<b>26,420</b>

#### **Property Adjustment Orders**

Uncontested:	14,530
Initially contested, subsequently consented:	5,161

Contested:	1,923
<b>TOTAL</b>	<b>21,619</b>

### **Pension Sharing Orders**

Uncontested:	9,183
Initially contested, subsequently consented:	2,112
Contested:	487
<b>TOTAL</b>	<b>11,782</b>

On the issue of term orders as against joint lives orders, the Family Justice Council's guidance refers to the Law Commission's report, Matrimonial Property Needs and Agreements which describes the objective of financial orders, "to meet needs...to enable a transition to independence, to the extent that it is possible in 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 childcare). We acknowledge the fact that in a significant number of cases independence is not possible, usually because of the age but sometimes for other reasons arising from choices made during the marriage".

The Family Justice Council also note:

- (a) Most case outcomes tend eventually not towards joint lives orders, but towards independence.
- (b) Only a small proportion of divorces result in any award of periodical payments.
- (c) Despite that, in some cases a combination of age, the length of the marriage and duration of time out the workplace may render an ambition of independence impossible.

When considering whether to make a joint lives order or impose a term (and therefore these are the issues which should be addressed in a Form E, Section 25 statement or other pleadings), the Family Justice Council recommends that the court has regard to the following matters:

- Age
- Health and mobility
- Relevant qualifications
- Previous work experience

- Length of time since last employment.
- The opportunity to brush-up, acquire skills or re-train
- Cost and availability of re-training
- Availability of work
- Childcare commitments and the daily routine
- Age, health and any particular needs of a child/children or other dependents
- Childcare options and cost
- Realistic level of net remuneration
- Availability of work related State benefits
- Net financial gain after paying childcare and work-related expenses
- The extent to which there has been pension sharing to take account of future needs
- Compatibility of working with caring for any children
- Attributing an earning capacity in view of the length of the marriage and the ex-spouse's net remuneration and ability to pay

#### **D STOCKPILING**

An unusual factor which may have a significant impact upon both quantum and duration of a spousal maintenance order is that of stockpiling. This approach may arise where the paying party is income-rich, but the parties are capital-poor. Stockpiling tends to arise when additional maintenance is paid with a view to saving towards a specific result.

Examples are as follows:

- (a) The most well-known is *Parlour v Parlour* [2004] EWCA Civ 872 – the husband was a high-earning footballer with a limited career. The wife was awarded a significant level of periodical payments, a substantial part of which was earmarked for her to save towards a clean break after a short period.
- (b) More recently in *Fields v Fields* [2015] EWHC 1670 (Fam), the husband was aged 59 and was anticipated to retire within the next few years. An additional sum of £100,000 per annum was directed to be paid by the judge to the wife to enable her to build up a fund to create a pension. Holman J stated that the, “stockpile...must have 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” upon any future variation application.

- (c) In the event decision of *AB v FC [2016] EWHC 3285 (Fam)*, the decision involved a short marriage with one child. The husband was a high earning footballer and the assets were limited. The judge held that it was not unreasonable to allow the wife to stockpile an element of her maintenance to discharge a mortgage on her home over a number of years. The judge stated,

“In appropriate circumstances, the principle of allowing a former spouse to stockpile for the future is a well-recognised device for achieving fairness as between the parties”.

## **E GLOBAL ORDERS AND SELF-VARYING ORDERS**

The court’s power to make global orders was considered very recently by Roberts J in *AB v CD (jurisdiction: global maintenance orders) [2017] EWHC 3164 (Fam)*. The husband appealed the global order which had been made by HHJ Overall QC. Roberts J rejected the husband’s appeal and re-affirmed the court’s power to make global orders. The following points are of note:

- (a) Roberts J confirmed that the judge had the jurisdiction to make the periodical payments order, not only in relation to the wife, but also in relation to the children, “insofar as payments to the wife conferred a financial benefit on each of them”. Noting the particular wording of Section 23 Matrimonial Causes Act 1973 which distinguished between: payments to the other party to a marriage; payments to a child of the marriage; and payments for the benefit of a child of the family.
- (b) The judge’s failure to apportion the order was not a reason to set it aside because of the assumption that he had made that the husband’s income crossed the threshold for a maximum CMS assessment. The judge had 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.
- (c) Roberts J found that the judge had adopted the established approach which has been used by the family court for more than 20 years following the creation of the CSA. Confined to the sort of situation envisaged by Thorpe LJ in *Dorney-Kingdon v Dorney-Kingdon*, the Court of Appeal had confirmed that Segal orders do not per se amount to an impermissible device to circumvent Section 8(3) Child Support Act 1991. Roberts J stated that the practice of making such orders was well-known to the CMS.

- (d) Roberts J noted that the order made by HHJ Everall QC reflected the standard draft precedent order contained in the omnibus which had been created by Mostyn J and approved by the President in July 2013.
- (e) Roberts J also noted the article written by District Judge Segal in Family Law several years ago in which he had made it clear that Segal orders had been widely misunderstood and that a Segal order does not, and was not intended to, include periodical payments for a child.

The use of stepped orders was considered in three recent cases. In the first, it was felt to be inappropriate, but the use of such orders was approved in the second two.

- (a) In *Aburn v Aburn [2016] EWCA Civ 72*, the Court of Appeal upheld an appeal against a stepped order. At first instance an order had been made for an automatic increase in the spousal maintenance order once the youngest child of the family completed secondary education – the automatic increase equated to one half of the total school fees, including extras. The Court of Appeal held that the original spousal maintenance order had been based upon an assessment of the wife’s needs. The Court of Appeal accepted that although a review of the level of periodical payments may well be justified once the youngest child ceased secondary education, it was impossible to predict what that review would lead to at the time. An automatic variation was therefore inappropriate.
- (b) In *MF v SF (financial remedies: litigation conduct) [2015] EWHC 1273* Moylan J found that the wife had an earning capacity of £5,000 per annum. He therefore ordered as follows:
- The initial award of £30,000 per annum was to reduce after six months, enabling the wife to utilise that earning capacity.
  - With a view to avoiding future disputes, the judge ordered that if the wife earned between £5,000 and £15,000, then the maintenance would reduce by 50p for each net pound earned.
  - If the wife earned above £15,000 net, then the maintenance would be reduced pound for pound.
- (c) In *Juffali v Juffali [2016] EWHC 1684 (Fam)*, the wife acknowledged that there should be step downs at appropriate points in her life. The Duxbury calculation was carried out accordingly. It was an exceedingly high asset case in which the initial award was based upon an income need of £2.5 million per annum, although that was to be reduced by a third when the daughter

completed her first degree tertiary education and by a further 25% just before the applicant's 75<sup>th</sup> birthday.

## **F EARNING CAPACITY**

Another case which dealt with a proposed self-varying order was *Murphy v Murphy* [2014] EWHC 2263 (Fam). There was an issue between the parties as to whether there should be a step-down in the periodical payments order within a few years.

The husband supported his arguments stating that the wife had an earning capacity, although Holman J was critical of the husband that he was only able to provide "very vague generalisations" regarding the wife's earning capacity and full-time employment which he asserted she could secure. In light of the lack of evidence, the judge stated that it would be no more than totally speculative whether by a specified date in the near future the wife would be able to work at any particular level of remuneration. Accordingly, the judge declined to impose a step-down order and also declined to impose a term on the periodical payments order.

In the aforementioned case of *Fields v Fields*, Holman J rejected the husband's assertion that his 42 year old wife could work and generate an income of £20,000 per annum. He held that it was an unreasonable assertion, having regard to the size of the husband's income, the wife's employment history, health and needs of the children.

The issue of earning capacity is usually considered only in the context of a recipient wife, but it can also be important in the context of the paying party. This issue arose in one of the few reported cases concerning an application to discharge a periodical payments order – *Roxar v Jaledoust* [2017] EWHC 977 (Fam). The position was as follows:

- (a) The original order from 2010 required the husband to pay global periodical payments of £2,250 a month on a joint lives basis.
- (b) The husband applied to discharge or vary the order. At first instance the sum was reduced to £1,750 a month.
- (c) Just prior to an appeal before HHJ Hess, the husband disclosed an NHS pension worth £194,000. HHJ Hess made a stepped order providing for the maintenance to terminate upon the husband's State retirement age and ordered a pension sharing order, providing the wife with 50% of the NHS pension.

- (d) Upon appeal before Baker J, he upheld the approach adopted by HHJ Hess. In particular, he noted that the husband had an unexploited earning capacity, having stated in evidence, “it is totally right to say that I have taken my foot off the throttle. I don’t see why I should pay my ex-wife what I do. I don’t see any benefit to myself...”.

In the limited means case of *Tattersall v Tattersall* [2013] EWCA Civ 774, the Court of Appeal considered the earning capacities of both the husband and the wife. The wife was the principal carer of the child of the family and the court held that her earning capacity was likely to remain at its present level until the child was older. By contrast, the husband had reduced his hours to enable him to see his child. The court held that the husband was the only one of the parties who had the capacity to earn more and therefore ensure that the family’s needs were met.

As mentioned earlier in Charles J’s decision in *G v G*, he referred to an expert’s report on the wife’s earning potential. The issue of the suitability of such reports was more recently considered by Moor J.

Moor J considered the test of “necessity” in his decision in *Buehrlen v Buehrlen* [2017] EWHC 3643 (*Fam*). He rejected an appeal against an earlier case management decision, refusing permission for a party to instruct an expert in respect of the other party’s earning capacity.

Moor J considered the leading judgments of the President in *Re TG* [2013] EWCA (Civ) 5 and *Re HL* [2013] EWCA (Civ) 655 regarding the definition of necessity. Moor J noted that the President was clear that “indispensable” would fall into the necessary category, whereas “useful, reasonable and desirable” evidence would not fall into the category of being necessary.

Counsel for the appellant sought to argue that the President’s judgments were distinguishable from the present case as they related to Children Act proceedings, rather than financial remedy proceedings. Moor J noted that although financial remedy proceedings are governed by the FPR and Children Act proceedings are governed by the Children and Families Act 2014, the same test of necessity applies to both sets of proceedings.

On the issue of addressing earning capacity generally, Moor J stated as follows,

“On any application for financial remedies, the judge has to apply s25 Matrimonial Causes Act and has to make an assessment of the earning capacity of both parties, including any increase in such earning

capacity as it would be reasonable for the litigant to take steps to acquire in the foreseeable future. That is what judges do every single day of the week. How do they do it? They do it by listening to cross examination; by the provision of advertisements for suitable jobs; by the results of job applications; by considering the CVs of the parties; and the like. They assess all this evidence. It is extremely rare for an expert to be called”.

Moor J was clear that it is unnecessary to have an expert to address the issue of earning capacity. He viewed it as being completely counterproductive and merely increases costs. He concluded that it was not helpful or useful in the vast majority of cases to expand financial remedy proceedings to have this sort of expert evidence. He was concerned that it will in general lead to more contested hearings, to longer contested hearings and would increase expense to the parties.