**Drawing on live cases, how far can you push the Court when arguing for the variation of a maintenance order, e.g. if the paying party is retiring or the receiving party inherits or is cohabiting?**

## Variation of maintenance – statutory authority

Matrimonial Causes Act 1973 (MCA), s31(1)[1]:

"Where the court has made an order to which this section applies, then, subject to the provisions of this section and of section 28(1A) above[2], the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended."

Applies (amongst other things) to orders for periodical payments and secured periodical payments made for the benefit of a child of the family or the parties themselves. We are concerned with the latter.

Statutory discretion set out in MCA, s31(7):

- Have regard to all the circumstances of the case
    - This includes "any change in any of the matters to which the court was required to have regard when making the order to which the application relates"
    - An updating of the s25 exercise, level of detail proportionate to the case
- First consideration given to the welfare of any minor child of the family
- Duty to consider a deferred clean break, mirroring MCA, s25A(2)

## Variation of maintenance – case law

There is a wealth of relevant case law, which is presented thematically but in chronological order within each theme. Not all of the case law derives from variation cases.

*Assessing the level of maintenance*

| Case | Principle |
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| *McFarlane v McFarlane* [2009] EWHC 891 (Fam) | **Compensation**<br>In the variation application arising from that most famous of cases, the concept of compensation once again played a role in providing W with PPs in excess of her needs. Joint lives order replaced with extendable term order to the date of H's last payment of profit share before retirement, quantum based on stepped percentages of H's variable income. |
| *Hvorostovsky v Hvorostovsky* [2009] EWCA Civ 791 | **Importance of proportionality of award**<br>World-famous opera singer (now sadly deceased) married to ballerina whose career was no longer a factor. W applied to vary payments she received under a tax-efficient offshore arrangement following the more than trebling of H's gross annual income to £1.86m. Court at first instance awarded an uplift of PPs to £120,000 plus £12,500 for each of the two minor |

[1] Equivalent civil partnership provisions are found in the Civil Partnership Act 2004, Sch 5, Part 11
[2] Power to make periodical payments orders which are non-extendable

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| | children plus school fees. W appealed.<br><br>The Court of Appeal increased W's PPs to £140,000 per year and the children's to £15,000 each. The most significant factor in the case was H's vastly increased income. W's income needs had also increased. CA emphasised the importance of taking a step back from the figures and looking at the overall proportionality of the case. As in previous cases, a comparison of the percentage of H's income paid to W before and after variation would have been helpful here.<br><br>[Comment: the court's endorsement of comments in *Cornick v Cornick (No 3)* [2001] 2 FLR 1240 that a fall in income justifies a reduction in maintenance and that an increase in income justifies an increase in maintenance does not sit easily with Mostyn J's focus on needs, absent grounds for finding compensation, in *B v S* and *SS v NS* – see below.] |
| *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam) | **Focus on need absent compensation**<br>Case dealing with an original order, rather than a variation. Mostyn J strongly articulates the position that PPs should be determined on the basis of need alone in all but exceptional cases. Needs are described as "elastic" with "much room for the exercise of discretion in their assessment". Compensation may be applicable in a tiny minority of cases. Sharing (in Mostyn's view) should form no part of the award of PPs. There was some evidence of a sharing-type approach to income in some case law but Mostyn believed this was "based on a doubtful principle".<br><br>The case of *Waggott v Waggott* [2018] EWCA Civ 727 of course emphasised the principle that earning capacity cannot be "shared".<br><br>[NB: there is an even clearer argument against "sharing" in an application to vary PPs as it would amount to clear double recovery by the applicant. On the issue of need, see also Mostyn J's analysis of the principles behind maintenance orders in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam)] |
| *O'Dwyer v O'Dwyer* [2019] EWHC 1838 (Fam) | **Focus on need rather than sharing**<br>Another order upon decree absolute rather than variation. Drawing on *Waggott*, the judgment disavows the "sharing" of income and emphasises the need for a calculation referable to needs, how much income the payee's capital would generate and whether/when the payee should use up their capital. |

*Payer and payee's relative share of responsibility for meeting need*

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| *Pearce v Pearce* [2003] EWCA Civ 1054 | **Extent of payer's responsibility for payee's choices**<br>After a 1997 order, which included PPs at £36,000 per year, W sold her mortgage-free flat and depleted the proceeds with a loss-making property purchase in Ireland. When W returned to London, she could only afford to buy with a mortgage. In 2001, W applied to increase PPs and capitalise them.<br><br>Court of Appeal allowed H's appeal finding that the court should not have included in the cost of servicing future mortgage debt when assessing W's |

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| | income needs. Court also ruled that the judge should have restricted himself to an assessment of PPs and the relevant capital sum to replace them. (£740,000 lump sum reduced to £655,000). Decision later approved in *Mills*. |
| *North v North* [2007] EWCA Civ 760 | **Extent of payer's responsibility for payee's choices**<br>W's housing needs met by 1981 financial order. Ground rents transferred to her to provide £6,000 annual income. Nominal spousal maintenance order for joint lives. W relocated to Australia and made investment losses. H's wealth increased. W applied to vary upward.<br><br>Court of Appeal reversed decision to award W PPs of £16,500 per year, capitalised at £202,000. H should not remain responsible for all W's choices, albeit that some of her needs were caused by misfortune rather than mismanagement.<br><br>Submissions invited for an appropriate award between the extremes of the original increased PPs order and dismissing the application entirely. Decision approved in *Mills*.<br><br>[Comment: note that this is a rare example of the upward variation of a nominal order.] |
| *Vaughan v Vaughan* [2010] EWCA Civ 349 | **Payee's obligation to use capital to meet needs**<br>See below |
| *Yates v Yates* [2012] EWCA Civ 532 | **Extent of payer's responsibility for payee's choices**<br>W received lump sum on the basis that she would use 50% to discharge her mortgage. Instead she invested in a non-income bearing bond. Judge hearing the variation application included interest payments on the remaining mortgage debt when capitalising her continuing PPs.<br><br>Court of Appeal found this inclusion was wrong because W had elected to hold back capital made available to pay off her mortgage. "The financial consequences of her investment choice are her responsibility." Decision approved in *Mills*. |
| *W v W* aka *Wright v Wright* [2015] EWCA Civ 201 | **Payee's obligation to contribute to own needs**<br>In 2008, court ordered PPs of £33,200 per year for joint lives, *inter alia*, plus child maintenance. H, an equine surgeon, sought to vary the order downward in 2012 on the grounds that his financial situation had deteriorated and that original judge had anticipated W (who was not working at the time of the order) would be making a working contribution towards her own expenditure within 2 years of the order. An increase in the children's school fees had been offset by H's income from a business that had not crystallised by 2008. W had done nothing to retrain or prepare herself for work.<br><br>Roberts J had ordered a downward variation in spousal maintenance between November 2013 and December 2019 as follows: £32,000 (year 1); £24,000 (year 2); £1,500 per month (for seven months); £1,000 per month (for three years and seven months); end of payments to coincide with H's retirement, no s28(1A) bar. The Court of Appeal upheld the order. |

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| | [Comment: the case drew attention for its criticism of W and the signalling of a more hard-line approach towards primary carers returning to work.] |
| *Mills v Mills* [2018] UKSC 38 | **Extent of payer's responsibility for payee's choices**<br>Joint lives maintenance order made by consent in 2002, including spousal PPs of £13,200 per year. W received majority of liquid capital to enable her to rehouse. By the time of the variation application, W had no capital, having made a series of investments and obtaining very large mortgages by means not fully explained. H applied to discharge and capitalise the maintenance order for a modest capital sum. W cross applied for upward variation of PPs. H found to have net annual earnings of £55,000, W £18,500 with a budget shortfall of £17,292 (£13,200 of which was covered by the original PPs order).<br><br>Supreme Court upheld first instance judge's decision to dismiss both the variation and the discharge/capitalisation applications. H would continue to pay £13,200 but would not be asked to pay more, and thereby subsidise entirely W's continuing need to rent which was referable to the (questionable) choices she had made. |

*Effect of cohabitation*

| Case | Principle |
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| *Atkinson v Atkinson* [1987] 3 All ER 849 CA | **An old case which nevertheless sets the tone for subsequent case law**<br>PPs of £5,500 per year paid to W for joint lives (later increased by consent to £6,000). W entered into cohabiting relationship and H applied to vary or discharge the PP order. Judge held that cohabitation was relevant in so far as it reduced W's income needs (via contributions from the new partner and/or the economy of living together). PPs were reduced to £4,500 per year but not to a nominal amount as H had wished. H appealed.<br><br>It is worth noting that W was ascribed no earning capacity due to her physical disabilities and that H's income had increased from £30,000 at separation to £40,000.<br><br>Court of Appeal upheld the original order and rejected H's argument that settled cohabitation should be equated with marriage (which of course brings spousal maintenance payments to an end by MCA, s28(1)). Cohabitation and specifically the decision not to marry are "conduct" which it would be inequitable to disregard so there is scope to be very fact-specific.<br><br>The approach was later followed in *Fleming v Fleming* [2003] EWCA Civ 1841 |
| *Atkinson v Atkinson* [1995] 2 FLR 356 (surname is coincidence) | **Further example of the approach that cohabitation is not marriage**<br>H suspended payment of £30,000 per year spousal PPs when he learned that W's partner was living with her. W enforced. H cross-applied to vary. Judge reduced payments to £18,000 per year. H appealed, as did W.<br><br>On appeal, Thorpe J viewed new evidence of the cohabitee's prosperous circumstances. Once again, cohabitation was not to be equated with marriage but was a factor the court should take into account. It would |

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| | depend on any given case how much weight that factor would have. £10,000 per year spousal PP order substituted. |
| *Kimber v Kimber* [2000] 1 FLR 383 | **Hallmarks of cohabitation**<br>(1) membership of the same household; (2) stability; (3) financial support; (4) sexual relationship; (5) whether they have children; (6) presentation to the wider world<br><br>It is not necessary for all six factors to be present. Approach has been adopted in other cases where fact of cohabitation has been in dispute. |
| *K v K* [2005] EWHC 2886 | **A different take on cohabitation?**<br>Original order divided assets almost 50/50 and included index-linked PPs to W of £16,000 per year. H applied to vary from £18,955 to a nominal order on grounds of his imminent drop in income and W's cohabitation. Coleridge J acknowledged the normalisation of cohabitation and mused whether it could continue not to be equated with marriage. PPs varied down to £10,000 per year and capitalised at £100,000, taking into account the existence of other aspects of the capital picture and the substitution of the joint lives order with a term order.<br><br>Judge endorsed maintenance orders being stated to come to an end upon the payee's cohabitation. |
| *Grey v Grey* [2009] EWCA Civ 1424] | **Importance of addressing cohabitation**<br>Not a variation case but one in which W denied cohabitation but accepted she was in a fixed permanent relationship with another man during cross-examination, and was in fact pregnant with his child. The judge refused to make any finding on the issue of cohabitation on the grounds that it could not affect her entitlement to an income order. After a delay, the judge awarded PPs of £125,000 per year (plus child maintenance).<br><br>The appeal was allowed and the case remitted for rehearing on the issue of cohabitation. It was insufficient to have said there was no evidence of financial contribution from the man. |

*Capitalisation and Duxbury tables*

| **Case** | **Principle** |
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| *Pearce v Pearce* [2003] EWCA Civ 1054 | **Proper approach**:<br>(1) Decide what, if any, variation to the original order is necessary<br>(2) Fix the date from which the varied order should commence<br>(3) Substitute a capital payment for the income from maintenance, in accordance with the Duxbury tables |
| *Vaughan v Vaughan* [2010] EWCA Civ 349 | **Refining the approach in *Pearce*; approach to subsequent marriages; proper use of capital by the payee**<br>Parties entered into deed of separation in 1981 providing *inter alia* for PPs of £12,000 per year. Application for ancillary relief in 1989 resulted in increase to £27,175 per year. In 2009, H applied to terminate PPs and W cross-applied to capitalise. Neither had a future earning capacity of any note. Judge granted H's application. |

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| | Court of Appeal examined (1) proper treatment of theoretical claims of H's second wife and (2) extent of W's duty to use up her own capital to meet her income needs.<br><br>Approach:<br>(1) Identify level of PPs due from payer to payee, including an assessment of whether they should continue at all without exposing the payee to undue hardship<br>(2) Calculate what lump sum is required to capitalise the continuing PPs using the Duxbury formula<br>(3) Survey whether it is fair to both parties to capitalise the PPs, in particular whether it is reasonably practicable for the payer<br><br>Court of Appeal found that the judge had over-elevated the claims of the second wife by almost treating her potential entitlement to 50% of the parties' capital as a pre-existing proprietary right, to the detriment of the first wife. Courts should give priority to neither.<br><br>"All the judge should have done was to take into account the husband's obligation to maintain the second wife to the extent to which she could not maintain herself out of the income already judicially attributed to her."<br><br>On the extent to which a payee should be expected to deplete their own capital in order to meet income needs: "it is impossible to be categorical about what the law expects in this area". The courts may recognise a certain fluidity between income and capital as parties reach retirement. Analysis will be very fact-specific.<br><br>PPs of £14,000 per year capitalised at £215,000 using Duxbury tables. |
| *AR v AR* [2011] EWHC 2717 (Fam) | **Duxbury is a "tool not a rule"**<br>Case contains detailed analysis of the role of Duxbury tables and endorsement of this oft-quoted principle. The justice of the case may require a capital award that departs from a simple Duxbury calculation. |
| *Simon v Helmot* [2012] UKPC 5 | **Duxbury is not perfect**<br>Non-family case containing detailed analysis of the uncertainty inherent in the Duxbury tables. |
| *Tattersall v Tattersall* [2018] EWCA Civ 1978 | **Not wrong in law to use a calculation basis other than Duxbury**<br>It is clear that the court *should* use Duxbury rather than Ogden tables (actuarial tables used to calculate general damages for future financial loss in PI context) to calculate capitalised maintenance. Ogden tables envisage almost no growth or risk to capital whereas Duxbury tables accept a degree of risk. However, a judge will not be making an error of law if they use "a method of calculation other than Duxbury" |

*Procedural and other miscellaneous matters*

| **Case** | **Principle** |
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| *Jones v Jones* [2000] | **Timing**<br>The application to vary must be made during the term of the periodical |

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| 2 FLR 307 | payments order. However, it is not necessary for the court to actually order a variation within that term. |
| *Harris v Harris* [2001] 1 FCR 68 | **PP orders that pre-date statutory power to capitalise (pre-01/11/1998)**<br>Court can nevertheless capitalise such orders as MCA, s31(7A) has retrospective effect. |
| *NG v SG (appeal: non-disclosure)* [2011] EWHC 3270 (Fam) | **Notice of request to capitalise**<br>It is not permissible to capitalise a periodical payments order without such application "having been advertised". If a party seeks capitalisation, "the proposed payer of a capitalisation award should actually receive, with ample notice, an application for that relief". On a practical level, significant preparatory work such as *Duxbury* calculations will need to be done. |
| *T v M* [2013] EWHC 1585 (Fam) | **Timing**<br>Order dated September 2010. H issued application to vary PPs in March 2011. Although H had done relatively well in the original application, he had misgivings about W's true level of income. However, the judge was aware of this issue at the time the order was made. Reopening the matter so soon was unlikely to serve any useful purpose and the strike-out of H's application under FPR r4.4 was upheld. |
| *Morris v Morris* [2016] EWCA Civ 812 | **Extent of the s25 exercise**<br>Having regard to all the circumstances of the case does not always mean considering the matter "de novo". The exercise should be "proportionate to the requirements of the case". This could be a "complete review" or a "light touch review". |
| *Joy-Morancho v Joy* [2017] EWHC 2086 (Fam) | **Timing**<br>Order dated August 2015. Joint lives maintenance of £120,000 per year, credit given for any payments received under French child maintenance order and payments by H in respect of rent. W's capital claims were (exceptionally) adjourned. Application to vary issued a matter of months after the 2015 order, amid other litigation in England and elsewhere. Application dismissed in August 2017 as an attempt to reopen and undermine original order |
| *Birch v Birch* [2017] UKSC 53 | **Is there a threshold for how different circumstances need to be to justify a variation?**<br>This case was about the court's jurisdiction to grant release from undertakings. Lord Wilson examined MCA, s31 and found that although the statute did not make a change of circumstances a condition of exercising the jurisdiction to vary, "unless there has been a significant change of circumstances since the order was made, grounds for variation of it under s31 seem hard to conceive." |

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