

Spousal Maintenance

Which way is the wind blowing?

Quantum & Duration?

What is achievable?

Rosemary Budden

QEB

Outline

- **Duration** – term of maintenance orders
 - Where we are? How did we get here? Does that tell us where we are going?
- **Quantum**
 - assessment of needs
 - evidence of earning capacity
 - other considerations
- **Future applications** to extend or increase

Term of maintenance

D v D (Financial Provision: Periodical payments) [2004] 1 FLR 988 - Coleridge J:

[23] The difficulty is that, if an order for periodical payments is left rampant, if I can use that word – without any restriction on it – then equality can later be destroyed because of intervening events and it potentially flies in the face of the attainment of the district judge's perfectly proper objective.

[24] So the question I ask myself is whether it is fair, in all the circumstances of this particular case against the background of the findings made by the district judge, for there to be a 10-year term, as contended for by the husband, together with a bar under s 28(1A) (a direction that the party who receives the order should not be entitled to try to extend it) or whether the open-ended commitment by the husband to the wife should remain unfettered, or whether at the end of the day there should not be some middle way.

Term of maintenance

[25] ... All things being equal, in my judgment, the wife's periodical payments should not extend beyond the husband's retirement in 10 years' time, even if he in the intervening period prospers relative to her. It is not, in my judgment, fair to the parties for the courts to carry out a careful, equal division of the assets in the way that this district judge did and then leave open, in an unrestricted way, the possibility for 'the basis of' that fairness to be revisited in years to come.

[26] So it is my clear intention that, all things being equal, there should be no further periodical commitment by the husband to the wife after 10 years. However, I have come to the conclusion that with a term as long as this it is simply unsafe to dismiss her claim outright in 10 years' time, when plainly within that 10-year period there is a significant dependency. It is quite impossible for a court to look as far as 10 years hence with any degree of precision and, although, as I say, my clear view is (and I express it in this strong way) that there should be no further payment by the husband beyond that term, I do not propose to put in place the bar under s 28(1A). If unforeseen events occur within the next 10 years which create for the wife financial embarrassment, it would be wrong after this length of marriage and after this length of dependency after marriage to prevent the court from having the ability to consider the matter again. So there will be no s 28(1A) bar but the order will terminate automatically unless the wife succeeds in extending it within the term.

Term of maintenance

Matrimonial Causes Act 1973 s.25A

- (1) Where on or after the grant of decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a), (b) or (c), 24, 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 order 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.

Term of maintenance

Fisher v Fisher [1989] 1 FLR 423 – Purchas LJ

The intention and effect of the amendments to the law relating to ancillary relief which can be ordered by the court effected by the 1984 Act have been apparently well understood and usefully applied until this appeal. The purpose was to discourage in cases of marriages of short duration, particularly where no children were involved, orders for periodical payments which were known colloquially as "meal tickets for life". The new provisions required the court in every case to consider in particular, but not to the exclusion of other relevant factors, whether "it would be appropriate" to limit the term in such a way as to provide a positive stimulus to the spouse in whose favour an order for periodical payments is made to achieve either partial or total financial independence of the supportive spouse.

Term of maintenance

Fisher v Fisher [1989] 1 FLR 423 – Purchas LJ

To adopt with gratitude an expression used by Butler-Sloss LJ in Barrett v. Barrett (infra), it was obviously undesirable that spouses should remain locked in matrimonial financial situations any longer than justice to each required. However, in their terms both s.25A and s.31(7) are careful to qualify the requirement for adjustment by the words "undue hardship". **The expression "adjust to the termination of the support" itself connotes a gradual but progressive effort on the part of the supported spouse. The court therefore has to enquire whether (a) the position has been reached in which such an order is appropriate; and (b) if, and only if, the court is so satisfied then to devise a programme of adjustment which will achieve partial or total financial viability without undue hardship.** In either case the court must have regard to "all the circumstances of the case" and must give first consideration to the welfare of any child of the family.

Term of maintenance

Flavell v Flavell [1997] 1 FLR 353

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, the judicial looking into a crystal ball very rarely finds enough of substance to justify a finding that adjustment can be made without undue hardship. All too often these orders are made without evidence to support them.**

Term of maintenance

C v C [1997] 2 FLR 353 – Ward LJ

(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.**

(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.**

Term of maintenance

C v C [1997] 2 FLR 353 – *Ward LJ*

(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).**

Term of maintenance orders – SS v NS

- 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.

Term of maintenance orders – SS v NS

- vii. The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.
- viii. Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis.
- ix. There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.
- x. On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.
- xi. If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

Term of maintenance

- NS v SS guidance
 - approved by other Judges at High Court level (see for example Roberts J in *AB v FC [2018] 1 FLR 965*),
 - cited with approval in the Family Justice Council: Guidance on Financial Needs on Divorce – second edition, April 2018.

Term of maintenance

Dictionary of Financial Remedies 2019 edition :

Every case will turn on its facts, but it probably follows from these citations that, unless evidence of security for the dependent spouse is provided, perhaps by the existence of capital funds or an established earning capacity, a court is likely to be reluctant to impose term orders against their wishes on primary carers of children whilst their children are minors.

A term ending when all the children have ceased to be minors, or have attained a particular age or have ceased secondary or tertiary education, may sometimes be an adequate protection in this respect but the court will carefully scrutinise assertions by the paying spouse that the recipient spouse who is also a primary carer for children can easily adjust to independence by returning to employment as the children become older, especially where there has been a lengthy gap in that employment.

And a wise observation:

In assessing likely future developments, the distinction between 'evidence' and 'crystal ball gazing' is sometimes hard to ascertain with clarity.

Term of maintenance

“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)” Ward LJ in **C v C**

Versus

“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.” – Mostyn J in **NS v SS**

Where does the onus lie?

- Key question is **whether the payer or the payee should get the benefit of the doubt** - i.e. in a finely balanced case, whether the onus should lie with:
 - The payer to return the matter to court to terminate, or;
 - The payee to return the matter to court to extend the term.

Security in the status quo – the party returning the matter to court (either to terminate or extend) will know that they carry the burden of persuasion, and;

The costs burden of further proceedings is ominous for most. There is some comfort in knowing that the other party will have to carry out a cost/benefit analysis when deciding whether to return the matter to court in the future.

Evidence on earning capacity

Buehrlen v Buehrlen [2017] EWHC 2643 (Fam) – Moor J

23. ...Paragraph 30 is the conclusion of the report. It says, "the average annual band of gross income for designers in London and the South East is from £33,776, to £36,971 per annum gross which, in the author's view, supports the figure of £35,394 as a realistic earning capacity for an established jewellery designer drawn from the now slightly older Jewellery magazine survey." I take the view that that is the role of the judge. The judge hears the evidence, hears the cross-examination, comes to an assessment of the witnesses, including the individual characteristics and traits and abilities of the witnesses and decides what is the appropriate earning capacity to ascribe.

24. I do not believe that it is helpful or useful, in the vast majority of cases, to expand financial remedy proceedings to have this sort of expert evidence. I am concerned that it will, in general, lead to more contested hearings, to longer contested hearings and to increased expense to the parties.

25. I do not accept that this evidence is necessary. I do not consider that it is imperative. I do not consider that it is "demanded" rather than what is merely optional or reasonable or desirable. I have therefore come to the clear conclusion that it is impossible to say that this Circuit Judge was wrong in the conclusion that he came to. Indeed, to the contrary, I am clear that, not only was he not wrong, he was in fact absolutely right. The appeal is therefore dismissed.

Joint lives order

ABX v SBX (2018) EWF 81 – Francis J

95. As regards spousal periodical payments, I am completely satisfied that a joint lives order is appropriate. It is impossible to predict the wife's future health and career pattern. These three young children are her priority and the court's first consideration. In spite of the trend against joint lives orders, there are special circumstances which compel me to order one in this case. Obviously, if circumstances change, the parties can re-visit the situation. I would hope in future that they will consider mediation or arbitration rather than the expensive and cumbersome process on which they have been engaged now for years.

What about Mills?

- **Mills v Mills [2018] UKSC 38**
- a single ground of appeal imposed by the Supreme Court –
- *Lord Wilson “Although the open-ended basis does not specify a fixed term for the life of the order, the circumstances which it identifies as bringing it to an end, in particular the potential for a further order ending it at any time, show how misleading (indeed, as the husband himself says, how unattractive) it is for some non-lawyers to describe such an order as a meal-ticket for life.”*

Quantum – assessment of needs

- Little has changed here – **assessment of needs is referable to the marital standard of living.**
- In modest asset/income cases, needs budgets are carefully scrutinised by the court. Courts tend to endorse Mostyn J's view that: *“It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence.”* (NS v SS)

Quantum – a uniform approach?

- On the other hand, in ‘big money’ cases, astronomical needs assessments continue – see for example **Juffali v Juffali [2016] EWHC 1674 (Fam)**.
- This was a well publicised Part III claim with a ‘*stratospheric*’ matrimonial standard of living.
- Roberts J explicitly endorsed Mostyn J’s view regarding the marital standard of living above, and approved the SS v NS guidance: “*those principles, in my judgment, apply equally to a “so-called “big money case” where a clean break on the basis of capitalised maintenance is the likely outcome*”

Juffali – the “needs” budget

- W’s maintenance budget stood at some £6.37m at trial
- The husband contended for an annual budget of £1m. Under cross examination, the wife accepted that she could “*survive*” on that sum.
- Roberts J determined that the fair figure for annual income need was £2.5m, capitalized at c.£44.3m on a *Duxbury* basis.
- Roberts J found that the husband’s proposed figure of £1m “*fails to reflect sufficiently the marital standard of living in this case*”.

Surviving v Thriving?

- Mostyn J in **FF v KF [2017] EWHC 1093 (Fam):**

“Plainly "needs" does not mean needs. It is a term of art. Obviously, no-one actually needs £25m, or £62m, or £224m for accommodation and sustenance. The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise.”

Harris v Harris (2018) EWHC 1836

- Smaller money case – W’s evidence accepted she could “get by” on what she was receiving
- Appeal determined (amongst other things) first instance Judge wasn’t wrong to to have increased this
- W not kept to bare minium

Evidence cost of work

Evidence on cost of work

- Type of childcare & Cost
 - Nanny / Au pair / Breakfast club & after school club
 - School holidays?
 - Contingency plans – when child is sick
 - Evidence of increase in earning capacity?

Future Applications – the Great Unknown?

- Living in an era of the aftermath of joint lives orders
- Experience of successful applications to increase a nominal maintenance order?
- Experience of successful applications to extend term of maintenance?

Term of maintenance orders – SS v NS

- ix. There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.
- x. On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.
- xi. If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

Term of maintenance orders

Flemming v Fleming [2004] 1 FLR 667 – CA, Thorpe LJ

12. Accordingly from a date prior to the making of the original consent order the judge exercising the power to vary under s.31(7) held both the duty to terminate, if achievable without undue hardship, and also power to do so by making a lump sum order in substitution for continuing periodical payments.
 13. Those obligations are much enhanced in any case where there has been a previous term ordered. The undoubted intention of the parties and of the court in December 1998 was that the payer's obligations would terminate absolutely on 1 December 2002. In such circumstances the exercise of a power to extend obligations requires some exceptional justification.
- Fleming approved by the Supreme Court in **Miller v McFarlane v McFarlane** [2006] 1 FLR 1186 & the Court of Appeal in **Yates v Yates** [2013] 2 FLR 2070

Spousal Maintenance

Which way is the wind blowing?
Quantum & Duration?
What is achievable?

Rosemary Budden

QEB