BLOOMSBURY PROFESSIONAL FAMILY LAW - CURRENT ISSUES CONFERENCE 15TH SEPTEMBER 2021

Spousal and Child Maintenance: Where Are We Now?

A. The Executive Summary

1. *SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124 per Mostyn J:[1]

> [46] Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:
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> (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.
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> (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.
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> (iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.
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> (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.
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> (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.
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> (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.
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> (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.
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> (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

[1] In a speech to the Devon and Somerset Law Society on 16th October 2018 *("Spousal Maintenance – Where did it come from, where is it now, and where is it going?"*) after citing this paragraph Mostyn J stated that "This seems to have stood the test of time. It has been loyally followed by Roberts J in *AB v FC [Short Marriage: Needs: Stockpiling]* [2018] 1 FLR 965, and in *Juffali v Juffali* [2017] 1 FLR 729. It has been approved by the Family Justice Council: Guidance on Financial Needs on Divorce – second edition, April 2018 (principal author Roberts J) at 58: *"the FJC endorses and commends this type of rigorous and disciplined approach"*.

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.

B. Term order or joint lives?

2. In *SS v NS* at [46] (v) Mostyn J expresses the view that where the choice between an extendable term and a joint lives order is *"finely balanced"* the *"statutory steer"* means that the court should choose an extendable term.[2]

3. The same judge expressed a similar view in *Quan v Bray & Others* [2019] 1 FLR 1114 when commenting that joint lives orders are *"exceptional"* (at 48/49).

4. An inconsistency of approach as to how judges exercise their discretion in relation to this issue around the country was commented upon by the Family Justice Council in their paper, *Guidance on "Financial Needs" on Divorce* published in June 2016 (and updated in April 2018). Referring to the earlier Law Commission report, *'Matrimonial Property, Needs and Agreements'* (No. 343, 26th February 2014) it was acknowledged (at paragraph 4(i)) that there were *"unacceptable regional disparities and geographical inconsistencies"* in financial remedy orders being made in relation to quantum of maintenance and the duration of any periodical payments order.[3]

5. MCA 1973 s25A provides that:

(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] The phrase *"statutory steer*" is one used in *Matthews v Matthews* [2014] 2 FLR 1259 by Tomlinson LJ at [13] after citing s25A(1). It echoes that of Baroness Hale in *Miller/McFarlane* [2006] 1 FLR 1186 at [130] of a *"clear steer in the direction of lump sum and property adjustment orders with no continuing periodical payments."*

[3] The suggestion being that 'term' orders were more likely to be made by courts in the North, whereas courts in the South (and especially in London) were more likely to make 'joint lives' orders.

6. Although MCA 1973 s25A requires the court to *consider* a clean break (i.e. to apply itself to the questions set out in s25A(2)) whenever it decides to make a periodical payments order, there is no automatic presumption in favour of clean break orders.

7. In *Barrett v Barrett* [1988] 2 FLR 516 Butler-Sloss LJ (as she then was) held (at p519) if there is to be termination *unless* there is good reason then the contrary then *"it should have been set out in the Act. But it is not …"*. She later said (at p519/520) *"I do not see Parliament as taking from the court the exercise [of] discretion in the widest possible way, so long as each aspect of s25, so far as appropriate, and s25A, particularly subs.(2), are clearly in the mind of the court and are given appropriate weight ...."*.[4]

8. In *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26 Ward LJ stated at p45 [emphasis added]:

> To summarise, the proper approach is this:
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> (1) …
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> (2) …
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> (3) …
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> (4) The statutory test is this: is it appropriate to order periodical payments only for such a term as in the opinion of the court would be sufficient to enable the payee to adjust without undue hardship to the termination of financial dependence on the paying party?
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> (5) What is appropriate must of necessity depend on all the circumstances of the case including the welfare of any minor child and the s 25 checklist factors, one of which is the duration of the marriage. It is, however, not appropriate simply to say, "*This is a short marriage, therefore a term must be imposed*".
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> (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.
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> (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.

[4] A similar view was expressed *SRJ v DWJ (Financial Provision)* [1999] 2 FLR 176 by Hale J (as she then was) at p181 - "*Thus there is a duty to consider a clean break and the power to bring it about … however … there is no presumption in favour of a clean break.*" Cf. *Matthews v Matthews* [2013] EWCA Civ 1874 per Tomlinson LJ at [15] – "… *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* …".

(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 s28(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).

9. Ward LJ expressed a similar view in *Flavell v Flavell* [1997] 1 FLR 353 in which he stated at p358 [emphasis added]:

> 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, judicial looking into a crystal ball very rarely finds enough of substance to justify a finding that adjustment can be made without undue hardship**.

10. *Murphy v Murphy* [2014] EWHC 2263 (Fam)[5] - in which Holman J refused to impose a term expiring when the children finished secondary education - [emphasis added]:

> [32] My statutory duty is to be found in section 25A(2) which provides as follows … **It is extremely important to observe that that sub-section requires the court, as a first step, to form an "opinion". Second, the critical word in the sub-section is not "should" but "would"**. In other words, the court has to be able to form an opinion that by the end of the selected term the payee will be able to adjust without undue hardship to the termination.
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> [33] … What this lady will be able to earn, and how much she will be able to have earned, and what pension she will have by the time she is 57 is frankly, totally speculative …
>
> [35] What, frankly, the arguments by the husband overlook is that the having of children changes everything. Of course this wife could never have expected a "meal ticket for life" on the basis of six years of marriage and two years of cohabitation if there had been no children … But the fact of having children, and their obvious dependence in this particular case on their mother for their care, changes everything, as I have said. The economic impact on this wife is likely to endure not only until they leave school but, indeed, for the rest of her life.

11. *Murphy v Murphy* was cited in *BD v FD (Financial Remedies: Needs)* [2017] 1 FLR 1420 per Moylan J (as he then was):

> [121] Further, the longer the duration of (i) and (ii) [(being (i) the length of marriage and (ii) the length of the period of contributions to the welfare of the family which can, clearly, both pre-date the marriage and post-date the end of the marriage)], the more likely that [the applicant spouse's] needs will be assessed on a lifetime's basis.

12. Echoing the comments of Ward LJ in *C v C* at paragraph 8 above, in *FF v KF* [2017] EWHC 1093 (Fam), a short childless marriage which caused psychological harm to the wife,

[5] The parties had agreed that the wife should receive periodical payments initially in the sum of £31,000 per annum and that they should reduce by 50% for future earned income, but two issues remained in dispute (i) whether there should be an automatic step-down in the level of periodical payments within a specific short period; and (ii) whether a term should be imposed upon the order. Holman J declined to order either. In *Matrimonial Property and Finance* (at B3 [77] fn. 2) Peter Duckworth states that *Murphy "is a decision on its own facts"*.

Mostyn J acknowledged (at [19]) that in short marriages *"the discretion when assessing needs is particularly broad and fact-sensitive"*. As for term, Mostyn J stated:

> 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.

13. Mostyn J expressly acknowledged that there have been cases where lifelong support has been awarded after a short marriage, such as *C v C* noting that at p43D Ward LJ *"specifically rejecting the submission that there should be a principle that a short marriage demands a term payment."*

14. The *C v C* and *Murphy* v *Murphy* approach is arguably inconsistent with MCA 1973 s25A and the views expressed in the Law Commission Report and the Family Justice Council's Guidance.[6]

15. In *Matrimonial Property and Finance* (at B3 [70]) Peter Duckworth describes *C v C* as a *"prime example of hard cases making bad law"*. He states that "*the Court of Appeal harked back to the pre-1984 ancien régime with obiter dicta that seemed to call for strict proof of a wife's ability to adjust to independence, before the court could place a term on her maintenance. Given that, in the nature of things, no one can prove what the future holds, this was asking the impossible; and the result was, in effect, a return to the old, flawed principle of joint lives maintenance by default."* Subsequently, at B3 [76] he states that *SS v NS* at [46] (iv) is a *"better statement of principle"* than *C v C "where, in effect, the Court of Appeal ruled that the burden of proof was on the payer of maintenance to show why any term should be imposed. Such an approach is out of step with the modern law and hopefully may now be consigned to the scrapbook of history."*

16. In *G v G (Financial Remedies: Short Marriage: Trust Assets)* [2012] 2 FLR 48 Charles J stated that:

> [141] … like all cases of its and earlier dates, *C v C (Financial Relief*: *Short Marriage)* must be read and applied in the light of the significant changes that have resulted from *White*, and later cases (in particular *Miller v Miller; McFarlane v McFarlane*), and this is so notwithstanding that *C v C (Financial Relief*: *Short Marriage)* is specifically directed to the application of s25A(2).

17. Charles J did, however, confirm that 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.[7]

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[6] The Family Justice Council after setting out paragraph [46] of *SS v NS* stated (at [58]) that it *"endorses and commends"* the adoption of *"this type of rigorous and disciplined approach"* which was said to be consistent with the *" 'gentle transition' towards independence."*

[7] *G v G* is also of note given Charles J's further observation that that 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 obtaining a report from an expert on her earning potential. The absence of such a report is not an indication that she is unlikely to be able to earn significant sums, but rather by not quantifying her earnings, the wife (on the facts) was found to have acted contrary to her duty to give full and frank disclosure of her business plans.

18. The general trend away from joint lives orders in favour of term orders was perhaps first signalled in *L v L (Financial Remedies: Deferred Clean Break)* [2012] 2 FLR 1283 per Eleanor King J (as she then was):

    a. H's appeal against a joint lives periodical payments order was allowed and the court imposed a two-and-a-half year term with a s28(1A) bar, calling it a case *"which cries out for a term order"* (at [69]);

    b. Eleanor King J relied upon a number of magnetic factors: the wife had £2m of her own capital; she had never left the workplace during the marriage; there was a shared care arrangement; the marriage was of moderate length (10 years); children aged 12 and 9;

    c. Eleanor King J described *C v C* as being based *"… on a highly unusual set of facts"* (at [60]) and held that the District Judge had failed to specifically consider s25A in her judgment, despite the requirement of the statute.

19. In *Quan v Bray & Others* [2019] 1 FLR 1114 Mostyn J having referred at [48] to s25A and s28(1A) as having been *"strangely neglected since they were enacted"* stated that:

> … recent decisions have emphasised their key importance. A limited term should be imposed unless the court is satisfied that the claimant would not be able to adjust to a cut-off without undue hardship. Normally that decision is easily reached because the claimant will have a capital base to fall back on in her later years. Generally speaking, there would have to be shown good reasons why a term maintenance order should not be made. And, generally speaking, where a term maintenance order is to be made there would have to be shown good reasons why it should not be non-extendable. Ultimately the court's goal should be wherever possible, to achieve, if not immediately, then at a defined date in the future, a complete economic separation between the parties.

20. In *ABX v SBX* [2018] EWFC 81 Francis J made a joint lives order in favour of a wife who was diagnosed with a disabling disease and who therefore had a very limited earning capacity. He addressed this issue by stating at [95]:

> 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 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.

21. In *Mills v Mills* [2018] 2 FLR 1388 the Supreme Court allowed the husband's appeal against the Court of Appeal judgment whereby it had increased the wife's 'joint lives' periodical payments order from £1,100 pm to £1,441 pm (being the shortfall between her income and her needs). This was principally because given that provision had already been made for the wife's housing costs in the capital settlement, the Court of Appeal erred in taking her rental costs in full into account when increasing her periodical payments. The Court of Appeal order was set aside and the order of the first instance judge restored. Lord Wilson of Culworth stated as follows:

> [25] In accordance with his duty the judge then turned to consider the husband's application for him to set a fixed period upon the wife's continued receipt of the periodical payments. But, applying s 31(7)(a) set out in para [14] above, the judge concluded, unsurprisingly, that he could not identify any fixed period as being sufficient to enable the wife to adjust without undue hardship to their termination. It followed that the order should continue to require them to be paid on the open-ended basis, namely during their joint lives until her remarriage or further order in the

interim. 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.

22. In *Waggott v Waggott* [2018] 2 FLR 406 Moylan LJ reduced on appeal a joint lives maintenance order to a term order, lasting just under three years, and subject to a s28(1A) bar. The issues which led to this decision were a consideration of (i) whether an earning capacity was capable of being a matrimonial asset to which the sharing principle applies; and (ii) to what extent it is fair for an applicant spouse to be required to use his/her sharing award to meet his/her income needs when the other spouse will meet his/her needs from earned income (a question which engaged the issue of investment return on non-housing capital and amortisation).

C. <u>Earning Capacity</u>

23. MCA 1973 s25(2)(b) requires that the court have regard *inter alia* to earning capacity and *"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."* How should this be evidenced?:

    a. in *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] 2 FLR 533 per Mostyn J a few years before the end of the marriage, the husband chose to become a teacher after 28 years in the banking industry, and from an earnings peak of over $1.5m pa as a banker, his income reduced to c. £52,000 pa. W argued that there should be no departure from equality (notwithstanding H's acknowledged £2.116m pre-marital assets) for a number of reasons including that H had (at [4] (iii)) *"eschewed the exploitation of a substantial earning capacity in the financial sector in favour of a lowlier paid job as a schoolmaster."* Mostyn J stated as follows:

    > [42] … if it is alleged that a party is not exploiting an earning capacity, then it is incumbent to prove that by clear evidence rather than by anecdotal scraps. I would have expected evidence from an employment consultant demonstrating that H did indeed have and has a substantial earning capacity in the financial sector since 2007.[8]

    b. in *Buehrlen v Buehrlen* [2017] EWHC 3643 (Fam) Moor J rejected an appeal against a case management decision of HHJ Scarratt, refusing permission for H to instruct an expert in respect of W's earning capacity (as a model maker and jewellery designer). He said as follows:

    > [19] I now turn to consider the arguments for allowing this evidence. It helps, perhaps, that this was my area of specialisation in practice. Whilst a full-time judge for the last six and a bit years, I have dealt mainly with what might be described as the "big money" financial remedy cases rather than those that do not have quite such significant assets. But in practice, I appeared, on numerous occasions in cases where the assets were lower and I have heard a significant number of such cases even since my full-time appointment. I cannot remember the last time that I heard a case where there was an employment expert called. It was certainly a very long time ago. I recognise that Mr Justice Mostyn has apparently heard from this particular expert in one recent case and has given

[8] It is of note that Mostyn J went on to say (in the same paragraph) that:
… even if W had been able to show that H had indeed eschewed a high earning capacity I find it impossible to criticise him for moving into another more happy and fulfilling field at the age of 55, even if rather lower paid. By ordinary standards H is well paid as a school master. I do not attribute to him any higher earning capacity than that which he presently earns, and I certainly do not criticise him at all for having failed to earn more since leaving banking in 2007.

his approval to the expert's evidence. I understand that, but by its very nature, the fact that case was before Mr Justice Mostyn suggests to me that it was a complicated piece of litigation rather than one of the legion of financial remedy cases that are undertaken across the country on a day to day basis. I am not suggesting for a moment that this case or, indeed, any case is unimportant litigation, but this case is standard fare for a District Judge or Circuit Judge sitting in the Financial Remedies Unit.

[20] On any application for financial remedies, the judge has to apply s.25 of the 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. Indeed, that was the case before the rules changed to require necessity.

[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.

D. Nominal 'safety net' orders

24. *Matthews v Matthews* [2014] 2 FLR 1259:

a. Mostyn J's decision to refuse to make a nominal periodical payments order in favour of a wife with young children was upheld;

b. there were very limited capital assets. The wife's income capacity was £40,000 pa working in financial compliance. The husband earned £27,000 pa net as a plumber. The two children, aged 6 and 3, lived with the wife and had no contact with the husband. The wife had been made redundant but had been able to obtain employment for six of the twelve months preceding the order. She argued that her fragile employment position required the protection of a nominal spousal periodical payments order;

c. the Court of Appeal emphasised that the discretion to order nominal periodical payments must be exercised with regard to the statutory presumption in favour of making a clean break wherever possible;

d. Per Tomlinson LJ:

[13] In those circumstances, Mr Buck is driven back simply to his submission that the judge was wrong in principle to decide that there should be a clean break, subject only of course to the payments for child support …

[14] Mr Buck took us also to a decision of Wilson J, as he then was, in *S v B (Ancillary Relief: Costs)* [2005] 1 FLR 474 … Mr Buck took us to the judge's discussion of the point of principle, which appears at para [36] of his judgment, where the judge was concerned with an appeal against the making of an order for periodical payments of the type which Mr Buck says ought to have been made in this case, that is to say a nominal order thereby keeping alive the possibility of an application for a variation in the event that the wife's circumstances deteriorated during the minority of the child of the marriage …

> [15] It seems to me that the corollary of what Wilson J there said is that, whilst the nominal order in that case was not appealable, so too ordinarily the refusal of a judge to make a nominal order will not be appealable because it cannot be shown to be wrong in principle. 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.

25. The phrase *"statutory steer*" (used by Tomlinson LJ at [13]) echoes that of Baroness Hale in *Miller/McFarlane* [2006] 1 FLR 1186 (at [130]) of a *"clear steer in the direction of lump sum and property adjustment orders with no continuing periodical payments."*

26. See also *WD v HD* [2017] 1 FLR 160 per Moor J:

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

27. In *AJC v PJP* [2021] EWFC B25 Deputy District Judge Hodson expressed the view that an application to convert a nominal periodical payments order into a substantive one was not *"an ordinary variation application"* as:

> [29] … variation of a nominal order has intrinsically a huge difference. A party receiving maintenance at a particular level knows it may go down if they themselves have increased income and may go up if e.g. the paying party is earning more and they can demonstrate need. The paying party knows they are always at risk of having to pay more if the receiving party has a reduction in their income or if they themselves have much greater income. It is a state of flux. … In the ordinary course of events when there is a spousal maintenance order, neither paying party nor receiving party are too surprised if the other seeks to review.
>
> [30] I suggest it is wholly different with a nominal order converted into a substantive order of whatever amount. First, I suggest it is only to be converted if there is a significant change in circumstances. Not just e.g. 20% increase or decrease in income of either party. But a significant change. It is not something which either party necessarily expects to happen nor generally be a matter of anxiety on a month by month, year by year basis. It's there but not expected to be activated in most circumstances. Secondly, it's not budgeted. The paying party in particular doesn't bring it into account in their own budgeting. If the paying party of a normal maintenance order has a good level of increase in income, they are if well advised inevitably going to build in the risk of an increase in spousal maintenance. The child support calculator would expect an increase in child support with an increase in remuneration of the paying party. This doesn't happen with nominal

provision. So in my assessment the nominal maintenance order is an entirely different element of the budgeting and life planning of each party. This has to be relevant in circumstances where the post-divorce landscape encourages parties to move on and not look back. Thirdly, the mere fact that it is nowhere clearly specified for the public when the nominal will be converted into the substantial must only add to the uncertainty, precariousness and unsatisfactory nature of this provision. Those appearing before the family courts of England and Wales are entitled to know the circumstances in which a particular payment requirement will come about. By analogy, when will a *Mesher* kick in? Fully set out in the terms of the order. When will the nominal kick in? Who knows! This is wholly unsatisfactory. This is not good for family law and the parties whether paying or receiving.

28. In *AW v AH and Others (Financial Remedies)* [2020] 2 FLR 519 Roberts J made a nominal 'joint lives' spousal periodical payments order (in addition to adjourning the wife's capital claims for seven years) where satisfied that the (bankrupt) husband's financial position may recover in the near future.

29. Of relevance in this context are the comments made in *North v North* [2008] 1 FLR 158 per Thorpe LJ:

> [32] … In any application under s31 the applicant's needs are likely to be the dominant or magnetic factor. But it does not follow that the respondent is inevitably responsible financially for any established needs. He is not an insurer against all hazards nor, when fairness is the measure, is he necessarily liable for needs created by the applicant's financial mismanagement, extravagance or irresponsibility. The prodigal former wife cannot hope to turn to a former husband in pursuit of a legal remedy, whatever may be her hope that he might, out of charity, come to her rescue.

E. MCA 1973 28(1A) 'bar'

30. In *SS v NS* at [46] (xi) Mostyn J expresses the view that where 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.

31. *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26 Ward LJ stated at p45 [emphasis added]:

> To summarise, the proper approach is this:
>
> (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 s28(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).

32. *D v D (Financial Provision: Periodical Payments)* [2004] 1 FLR 988 per Coleridge J:

> [23] … 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 …
>
> [25] … [i]t is not, in my judgment, fair to the parties for the courts to carry out a careful, equal division of assets … and then leave open, in an unrestricted way, the possibility for 'the basis of' that fairness to be revisited in years to come.

[26] … 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 … 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 …

33. In *Richardson v Richardson (No. 1)* [1994] 1 FLR 286, Thorpe J (as he then was) emphasised that the only means by which to exclude the right to apply for the extension of a limited term under MCA 1973 s31 was to include a s28(1A) bar direction expressly.

F. <u>Extension of term orders – a high threshold?</u>

34. In *SS v NS* at [46] (ix) Mostyn J expresses the view that *"there is no criterion of exceptionality on an application to extend a term order … 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"*.

35. *Fleming v Fleming* [2004] 1 FLR 667:

    a. at the time of the original order, the wife was already living with a new partner and a consent order made by which she was to receive £1,000 pm for four years with no s28(1A) 'bar'. The wife applied to extend the term by which time she had cohabited for five years. The Judge allowed the wife's application but reduced the amount to £500 pm and converted the term to a 'joint lives' order;

    b. the Court of Appeal allowed the appeal. Thorpe LJ set out a high threshold for extending a term order referring (at [13]) to *"some exceptional justification"* for the court to exercise its power to extend obligations and (at [14]) to the payer having ***"****a legitimate expectation that his obligations would end"* on the date provided in the order.

36. In *Miller/McFarlane* the House of Lords allowed the wife's appeal against a five-year term and restored a joint lives order, on the basis, *inter alia*, that the *Fleming* test of *"exceptional justification"* placed a *"high threshold"* for extending a term (see Lord Nicholls at [97] and Baroness Hale at [155]).

37. A different approach was taken by Charles J in *McFarlane v McFarlane* [2009] 2 FLR 1322 [emphasis added]:

    [97] *Fleming v Fleming* [2004] 1 FLR 667, FD is referred to by Baroness Hale of Richmond (see para [155]). In paras [13] and [14] of his judgment in that case Thorpe LJ referred to the power to extend obligations to pay periodical payments beyond a period set for them (as was done by the Court of Appeal in this case, without making an order under s 28(1A) of the MCA, that the wife may not apply for an extension of the term) as something that required exceptional justification, and said that there was an enhanced obligation to bring the financial relationship between the parties to an end when a term for payment had been set by the original order.

    [104] Notwithstanding the cross reference to it by Baroness Hale of Richmond (see para [155]) in my view, **the test or approach described and applied in *Fleming* does not survive the confirmation and points referred to in para [97] hereof**. Rather, as I indicated in *Cornick (No 3)* (see para [121]), in my view, **the reasoning behind the earlier order that a party seeks to vary is a relevant**

circumstance of the case, and therefore, on an application to vary it can be assessed whether the purpose of the earlier order has been fulfilled and, if it has, this would be a relevant (and perhaps a decisive) factor in favour of refusing an extension or variation. …

[107] In my view, looking to the future of this case there are relevant differences between the effects of:

(i) a continuing joint lives order for periodical payments;
(ii) an order that provides for periodical payments for a term; and
(iii) an order that provides for periodical payments for a term and in addition that the wife is not entitled to make a further application for a periodical payments order or an extension of that term.

[108] In the third case, absent a successful appeal, in my view, that is a deferred clean break.

[109] **In the second case my view is that the *Fleming* test or approach does not survive but the reasoning behind the term imposed on the variation is relevant and could be a magnetic or determinative factor. If that view is wrong and the *Fleming* test or approach does survive the wife would have to overcome the hurdle it sets**.

[110] In the first case the position would be as it is now and again, in my view; the reasoning behind the varied order both on principle and on amount would be a relevant factor on future applications.

38. In *G v G (Financial Remedies: Short Marriage: Trust Assets)* [2012] 2 FLR 48 Charles J stated at [145] that he *"remain[ed] of the view"* he had expressed about *Fleming* in *McFarlane*.

39. *Fleming*, *Miller/McFarlane* and *McFarlane* were all referred to by Eleanor King J (as she then was) in *L v L (Financial Remedies: Deferred Clean Break)* at [71] – [74] before stating (at [76]) that *"[i]t is not necessary for me the consider the current state of the law on extendable terms."*

40. *Fleming* was approved in *Yates v Yates* [2013] 2 FLR 1070 per Thorpe LJ:[9]

[9] It must be said that it is highly unusual for a three-year term order to be so liberally extended [to a 15-year term] on the subsequent application to the court. Of course, it is a matter of discretion, but it is the authority of *Fleming v Fleming* which cautions against such extensions unless exceptional circumstances have been established. …

41. *Fleming* was queried by Mostyn J in *SS v NS (Spousal Maintenance)*:

[44] Both parties here agree that the spousal maintenance order should be for a term; but they dispute whether it should be extendable. How easy is it to enlarge an extendable term? In *Fleming v Fleming* [2004] 1 FLR 667, at para [12] Thorpe LJ stated that *'the exercise of [the] power to extend obligations requires some exceptional justification'*. In *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186, at [97] Lord Nicholls of Birkenhead and at para [155] Lady Hale of Richmond accepted that this set an applicant a *'high threshold'* to surmount. However, in *McFarlane v McFarlane* [2009] 2 FLR 1322, Charles J stated at para [104] that *'the test or approach described and applied in Fleming does not survive'*. I agree. An application by a payer to discharge and an application by a payee to extend should be decided by reference to the same principles. Charles J points out, at para [104] that:

[9] *Pearce v Pearce* [2003] 2 FLR 1144, *North v North* and *Yates v Yates* were all expressly held to have been correctly decided in *Mills v Mills* [2018] 2 FLR 1388 per Lord Wilson at [40].

> 'the reasoning behind the earlier order that a party seeks to vary is a relevant circumstance of the case, and therefore on an application to vary it can be assessed whether the purpose of the earlier order has been fulfilled and, if it has, this would be a relevant (and perhaps a decisive) factor in favour of refusing an extension or variation.'

Therefore, on an extension application an examination would have 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. Similarly, on a discharge application an examination would have to be made of the assumption that it was just too difficult to predict eventual independence. This is to state the obvious …

F. Quantum of Periodical Payments

Elasticity

42. *B v S (Financial Remedy: Marital Property Regime)* [2012] 2 FLR 502 per Mostyn J [emphasis added]:

> [79] Save in the exceptional kind of case exemplified by *McFarlane v McFarlane* [2006] 1 FLR 1186 a periodical payments claim (whether determined originally or on variation) should in my opinion be adjudged (or settled), generally speaking, by reference to the principle of need alone. Of course **needs are elastic in concept** and there is **much room for the exercise of discretion** in their assessment.

43. *SS v NS (Spousal Maintenance)* per Mostyn J [emphasis added]:

> [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**.

44. *FF v KF* [2017] EWHC 1093 (Fam) per Mostyn J:

> [18] So far as the "needs" principle is concerned there is an almost unbounded discretion. The main rule is that, save in a situation of real hardship, the "needs" must be causally related to the marriage. Like equity in the old days, the result seems to depend on the length of the judge's foot. It is worth recalling that Heather Mills-McCartney was awarded over £25m to meet her "needs" (*McCartney v McCartney* [2008] EWHC 401 (Fam)). Mrs Juffali was awarded £62m to meet her "needs" (*Juffali v Juffali* [2016] EWHC 1684 (Fam)). In the very recent case of *AAZ v BBZ* [2016] EWHC 3234 (Fam) the court assessed the applicant-wife's "needs" in the remarkable sum of £224m. 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.
>
> [19] In a short marriage case the discretion when assessing needs is particularly broad and fact-sensitive. 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. There have been cases where lifelong support has been awarded after a short marriage: see, for example, *C v C* [1997] 2 FLR 26, where lifelong periodical payments were awarded, Ward LJ at page 43D specifically rejecting the submission that there should be a principle that a short marriage demands a term payment. In *Miller v Miller* at first instance (*M v M* [2005] EWHC 528 (Fam)) Singer J assessed the wife's needs after that short marriage at £5m comprising the former matrimonial home valued at £2.3 million and a *Duxbury* fund of £2.7 million producing for that 36-year-old woman £90,000 spendable for every year for the rest of her life. Although the House of Lords

preferred to uphold that award by reference to the sharing principle alone, it did not question the entitlement of the judge, in the exercise of his discretion, to assess Mrs Miller's needs thus.

45. In *ND (by her litigation friend KW) v GD* [2021] EWFC 53 Peel J observed as follows:

> [49] Needs are an elastic concept. They cannot be looked at in isolation. In *Charman* (supra) at [70] the court said: "*The principle of need requires consideration of the financial needs, obligations and responsibilities of the parties (s.25(2)(b); of the standard of living enjoyed by the family before the breakdown of the marriage (s.25(2)(c); of the age of each party (half of s.25(2)(d); and of any physical or mental disability of either of them (s.25(2)(e)*". Mostyn J said in *FF v KF* [2017] EWHC 1093 at [18] … To that I would add that the source of the wealth is also relevant. If, as here, it is substantially non-marital, then in my judgment it would be unfair not to weigh that factor in the balance. Mostyn J made a similar observation in *N v F* [2011] 2 FLR 533 at [17-19].[10]

Relationship-generated or not?

46. It will be recalled that in *SS v NS* at [46 (iii)] Mostyn J said that *"Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship"*. This followed his previous observation:

> [31] 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.

47. Peel J considered this in *ND (by her litigation friend KW) v GD*:

> [50] Counsel for H submits that needs should be "relationship-generated". The logic, in its purest form, is that W's health is not causally linked to the marriage, was diagnosed after separation and therefore none of her needs occasioned by health fall to be met by H. He shied away from pressing me to reach this conclusion, but invited me to bear this in mind when considering needs in the round. In my judgment, this approach cannot be right. The statute does not limit consideration of needs in this way (s25(2)(e). In *Miller/McFarlane* at [11] Lord Nicholls said: *"Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."*
>
> [51] … It would be odd if W's health is excluded from consideration if a diagnosis is made 1 month after separation, but included if the diagnosis is made 1 month before separation.

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[10] In *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] 2 FLR 533 Mostyn J stated at [19] that *"So if an agreement to preserve non-matrimonial property can have the effect of assessing need more conservatively (indeed in Granatino far more conservatively) than would have been the case absent that factor, why cannot the presence of pre-marital property simpliciter not have an equivalent or similar effect? … I do not take this passage [Jones v Jones at [31]] to suggest that assessment of need is an insulated metric uninformed by factors that are centrally key to the performance of the sharing principle …"*.

It is arguable that in *Ipeçki v McConnell* [2019] EWFC 19 at [27 iv)] Mostyn J subsequently expressed a different view to that he had earlier expressed in *N v F* at [19]:

iv) The agreement does not meet any needs of the husband. I do not take the language used by the Supreme Court, namely *"predicament of real need"* as signifying that needs when assessed in circumstances where there is a valid prenuptial agreement in play should be markedly less than needs assessed in ordinary circumstances. If you have reasonable needs which you cannot meet from your own resources, then you are in a predicament. Those needs are real needs.

> [52] What does seem clear from paragraph [140] is that the compensation principle does depend on a direct causal link between the additional economic disadvantage and the relationship; that seems entirely logical given that the principle goes beyond core needs.

The importance of budgets

48. In *O'Dwyer v O'Dwyer* [2019] 2 FLR 1020 Francis J at [36] stated that when considering the quantum of periodical payments by reference to the needs principle *"[i]n the exercise of his broad discretion, the Judge was absolutely entitled to be generous to the wife in terms of assessment of her maintenance requirement by reason of the fact that the husband will be enjoying a substantial income"*. However, he went on to emphasise that it could not be a number 'plucked out of the air' stating that:

> … a judge is not entitled simply to take a round number without reference to any arithmetic, and in particular (a) the recipient's needs; (b) the income that the recipient's capital will generate and (c) whether or not the recipient's capital should be amortised; and, if so (d) from what date the recipient's capital should be amortised. Parties who conduct these cases up and down the land, often without the benefit of legal advice, need to know how judges alight upon a particular figure for periodical payments. Otherwise, discretion gives way to a risk of disorder or even chaos with people not knowing how or whether to settle.

49. Further, at [43] he stated that *"[i]t is clear to me that it is the judicial function to analyse the budgets put forward, albeit that a detailed analysis of every item is not required. A judge must always, of course, be alive to forensic manoeuvrings by experienced family lawyers."*[11]

The relevance of the marital standard of living

50. In *SS v NS* at [46] (vi) Mostyn J expresses the view that *"[t]he 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."*

51. It is well-settled that:

    a. the marital standard of living is not the *"lodestar"* in quantifying financial awards - *SS v NS* per Mostyn J at [35];
    b. it may well not be fair for the applicant to have his or her needs provided for at the marital standard of living either at all or for longer than a defined period (i.e. not for life) due, for example, to the length of the marriage - *BD v FD (Financial Remedies: Needs)* [2017] 1 FLR 1420 per Moylan J (as he then was) at [116];

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[11] These comments echo those made in:

Purba v Purba [2000] 1 FLR 444 per Thorpe LJ at p449:

In this field of litigation budgets prepared by the parties often have a high degree of unreality – usually the applicant wife's budget is much inflated … But the essential task of the judge is not to go through these budgets item by item but stand back and ask, what is the appropriate proportion of the husband's available income that should go to the support of the wife?

AR v AR (Treatment of Inherited Wealth) [2012] 2 FLR 1 per Moylan J (as he then was):

[71] … in my judgment the court's task when addressing this factor is not to arrive at a mathematically exact calculation of what constitutes an applicant's future income needs. It is to determine the notional annual income which, in the circumstances of the case, it would be fair for the wife to receive. Further, in a case such as the present, in my judgment the wife is entitled to have sufficient resources to enable her to spend money on additional, discretionary, items which will vary from year to year and which are not reflected in her annual budget.

c. any use of the standard of living as an initial benchmark *"emphatically does <u>not</u> mean that … in every case needs are to be met at that level either at all or for more than a defined period (of less than life)" - BD v FD (Financial Remedies: Needs) per* Moylan J at [118] (original emphasis);
d. *"[t]he provision should enable a gentle transition from that standard [the marital standard of living] to the standard that she could expect as a self-sufficient woman" - Miller/McFarlane per* Baroness Hale [2006] 1 FLR 1186 at [158]; and
e. *"[a]s time passes, how the parties lived in the marriage becomes increasingly irrelevant. And, too much emphasis on it imperils the prospect of eventual independence" - SS v NS* per Mostyn J at [35].

52. The importance to this issue of the length of the marriage was also emphasised in *AB v FC (Short Marriage: Needs: Stockpiling)* [2018] 1 FLR 965 per Roberts J:

> [71] I am similarly enjoined to consider the standard of living which the parties were able to enjoy prior to the breakdown of the marriage: see s 25(2)(c). … standard of living has to be looked at in terms of the length of the marriage. Where, as here, the marriage was short-lived, the impact of consistently high marital expenditure over a relatively short period finds less resonance or reflection in the standard of living which a former (maintained) spouse is entitled to expect in future.
>
> [77] It has to be borne carefully in mind that there is an interrelationship between the *level* at which future needs will be assessed and the *period* during which a court is likely to find those needs should be met by the paying former spouse. The longer the period, the more likely it is that the court will decline to assess those needs on the basis of a standard of living which replicates that enjoyed during the marriage

53. There is (perhaps) a parallel here with the reasoning that there will be less matrimonial property which will be shared equally (as distinct from non-matrimonial property which will not be) after a short marriage. See *Miller/McFarlane* per Lord Nicholls at [17] [emphasis added]:[12]

> This [equal sharing] principle is applicable as much to short marriages as to long marriages: see *Foster v Foster* [2003] 2 FLR 299, 305, para 19 per Hale LJ. … The difference is that a short marriage has been less enduring. **In the nature of things this will affect the quantum of the financial fruits of the partnership**.

54. It is also of note that in *RC v JC* [2020] EWHC 466 (Fam) Moor J observed that:

> [37] [Standard of living] is a factor that is specifically mentioned in section 25(2)(c) but I have always been careful to avoid making an order that penalises those who have spent frugally during the marriage, whilst benefiting those that have spent lavishly.

55. If a party has enjoyed a higher standard of living than he/she previously enjoyed then the 'benchmark' argument is (even) weaker – particularly if the duration of the marriage is short. See (for example) *Miller/McFarlane* per Lord Nicholls:

> [57] … The standard of living enjoyed by the Millers during their marriage was much higher than the wife's accustomed standard and much higher than the standard she herself could afford.

[12] An observation referred to most recently in *E v L* [2021] EWFC 60 per Mostyn J at [43] - *"As Lord Nicholls pointed out, the statutory factor of the duration of the marriage will be reflected in the nature of things by the fact that in a short marriage the accrual will almost inevitably be less than in a longer marriage."*

[58] … No doubt both parties had high hopes for their future when they married. But hopes and expectations, as such, are not an appropriate basis on which to assess financial needs. Claims for expectation losses do not fit altogether comfortably with the notion that each party is free to end the marriage. Indeed, to make an award by reference to the parties' future expectations would come close to restoring the 'tailpiece' which was originally part of s25 of the 1973 Act. By that tailpiece the court was required to place the parties, so far as practical and, having regard to their conduct, just to do so, in the same financial position as they would have been had the marriage not broken down. It would be a mistake indirectly to re-introduce the effect of that discredited provision.

G. Post separation endeavour and quantum of maintenance - *Waggott v Waggott*

56. *Waggott v Waggott* [2018] 2 FLR 406 concerned two principal issues which Moylan LJ summarised as follows:

> [1] … (i) Is an earning capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has a continuing entitlement to share?
>
> (ii) How should the court assess whether an award determined by application of the sharing principle meets the party's needs? More specifically to the arguments advanced in this case, to what extent is it fair for the wife to be required to use her sharing award to meet her income needs when the husband will meet his needs from earned income?

(i) Should an earning capacity built up during a marriage continue to be shared?

57. Moylan LJ held that the answer to this question was no:

> [122] In my view, there are a number of reasons why the clear answer is that it is not.
>
> [123] Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in *Jones v Jones*.
>
> [124] Looking at its impact more broadly, it would apply to every case in which one party had earnings which were greater than the other's, regardless of need. This could well be a very significant number of cases. Further, if this submission was correct, I cannot see how this would sit with Lady Hale's observation in *Miller* that, even confined to *"(i)n general"*, *"it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation"* (para 144) or her observation as to the effect of *"(t)oo strict an adherence to equal sharing"* (para 142).
>
> [125] Additionally, it would inevitably require the court to assess the extent to which the earning capacity had accrued during the marriage. This would require the court to undertake the exercise to which there are the powerful objections referred to by Wilson LJ in *Jones v Jones*. Where would the court start and by reference to what factors would the court determine this issue?

58. The court's refusal in *Waggott* to treat earning capacity as an asset to be shared post separation was (perhaps) unsurprising. It had already been held in *Jones v Jones* [2011] 1 FLR 1723 that, for the analogous purpose of calculating the matrimonial assets available for division, a capital value should not be ascribed to a spouse's earning capacity.

59. In *Jones* at [25] Wilson LJ (as he then was) referred back to Lord Mance's speech in *Miller/McFarlane* where at [172] he *"articulated three objections to the capitalisation of a spouse's earning capacity at the date of the marriage"* and said he agreed with all of them:

> (a) The capacity is not easily measurable in capital terms. The judgment of the judge in the present case is replete with objections to the adoption of arbitrary percentages in application of the sharing principle …
>
> (b) The proper depth of any enquiry into a spouse's expertise and acumen is unclear. … In truth the judge was placing a substantial capital value on the husband as a person; I am convinced that such is no function of the divorce court …
>
> (c) Above all, capitalisation of the earning capacity established by one spouse by the date of the marriage is likely to be unjustly discriminatory if the other had not by then established an earning capacity …

60. Wilson LJ therefore decided that a spouse's established earning capacity at the date of the marriage did not fall *"to be capitalised, or otherwise brought into account, for the purpose of the sharing principle"* (para 26), thereby expressly overruling the decision of Nicholas Mostyn QC (as he then was) in *GW v RW (Financial Provision: Departure from Equality)* [2003] 2 FLR 108.

61. This feature of the *ratio* of *Waggott* was applied in *O'Dwyer v O'Dwyer*. At [18] Francis J stated that *"[a]ny remaining doubts as to whether an income stream is an asset which can be shared, save for the purposes of paying for needs or compensation, was clearly dispelled by the judgment of the Court of Appeal in Waggott*" and that the court's answer to the question posed *"was clear and unequivocal"*. He therefore concluded at [22] that *"[a]pplying the very clear dicta enunciated in Waggott … it is now settled law that income cannot be shared. An award of periodical payments (absent rare compensation cases) must be based on properly analysed arithmetic reflecting need, albeit that the judge is still left with a significant margin of discretion as to how generously the concept of need should be interpreted."*

62. Subject to the separate question of need, a party's income earned outside the span of the marriage is therefore in principle his (or her) own to keep:

> … at the end of the day the only reason there is income after separation is because of work done after separation. A footballer who earns £100,000 per week earns that because he is on the pitch playing football. Certainly, the skills he was born with, and the development of those skills (which may well have happened during his marriage), are all reasons why he can command his salary, but he will not get paid it unless he plays football. The footballer has to fill the unforgiving minute with sixty seconds' worth of distance run *after the marriage*.[13]

(ii) Spousal maintenance awards where capital is available to meet income needs

63. *Waggott* considered two ways in which a party can use capital to meet income needs:
    a. to apply investment returns on non-housing capital; and
    b. to amortise that capital.

[13] *B v S (Financial Remedy: Marital Property Regime)* [2012] 2 FLR 502 per Mostyn J at [76] [original emphasis] - cited with approval in *Waggott v Waggott* [2018] 2 FLR 406 at [126]. Mostyn J reiterated this view in *CB v KB (Financial Remedies: Calculation of Income Streams and Child Support)* [2020] 1 FLR 795 at [43].

(a) The notional investment return

64. In *Waggott,* Moylan LJ rejected the appellant's counsel's *"more extreme"* submission that in respect of the capital that the wife was awarded on a sharing basis *"the wife should not have to make any use of her capital share, including by the attribution of a notional investment return, to meet her income needs"* - [9] and [130]. It was said that this *"again would conflict with the clean break principle to such a significant extent as to undermine the statutory "steer" because, absent other resources, the applicant spouse would always have a claim for an additional award to meet his or her income needs."*

65. Accordingly, the Court of Appeal considered that at a minimum, the wife would be expected to use her investment return from her spare capital to meet her income needs.

66. Moylan LJ considered that although the court's approach as to how capital should be applied to income needs cannot be categoric, there were advantages to assuming that a spouse's capital would provide a rate of return of 3.75% gross, consistent with the *Duxbury* model:

> [136] There are, however, clearly advantages – both in terms of providing clarity and of consistency – if the *Duxbury* model and the assumptions within it were to be used at least as a starting point. I note that in *H v H* there was *"an assumption in the parties' calculations that 3.75% was an appropriate rate of return for the judge to apply"* (para 25). As I have concluded as set out above, the manner by which the court assesses an award by application of the need principle and the manner by which it assesses whether a sharing award is sufficient to meet needs must be consistent. Given the consequential correlation between needs and sharing, using the same model would remove a potential element of inconsistency between the two which might result in different outcomes depending on whether the court started with a needs based award or vice-versa.

67. The court rejected, at [137], the submission that the rate of return actually available to the spouse at the time of the hearing should be adopted, with adjustments left to a subsequent variation application, both because this would encourage future litigation, and because it failed to take a long-term view.

68. Moylan LJ's suggestion that *"clarity and consistency"* would be served if an assumed gross rate of 3.75% were used came after having acknowledged that in *H v H (Financial Remedies)* [2015] 2 FLR 447, Ryder LJ had rejected the notion that there was an *"industry standard"* (at [26]).

69. In *O'Dwyer v O'Dwyer* Francis J commented at [39]:

> … one can argue endlessly about the appropriate rate of return but it seems to me that time and again the assumptions in At A Glance are used and I use them for the purposes of this case. At paragraph 136 in *Waggott*, Moylan LJ saw clear advantages in adopting the *Duxbury* assumptions, and whilst of course I have a discretion to depart from them it seems to me that I should follow the lead so clearly given by him. I therefore work on the basis of a return of 3.75%.

70. In *ND (by her litigation friend KW) v GD* [2021] EWFC 53 Peel J observed as follows:

> [28] I have to say, with due respect to all who requested and sanctioned this exercise [of bespoke calculations by the SJE Financial Advisor], that it has been of negligible value to me in resolving this case. In my view the parties could very easily have used the *Capitalise* programme to generate bespoke calculations. What matters is the figures which are put into the programme by each party to calculate the outcome contended for. Often during a hearing, as issues crystallise, the judge will ask for specific calculations to be carried out; indeed, I did just that in this case. The underlying

assumptions can be adjusted on the Capitalise programme if required. I do not see that the SJE was asked to do any more than create his own *Duxbury* style calculations, but, perhaps inevitably, he adopted different underlying assumptions. The result is a quasi-*Duxbury* calculation, inconsistent with the specific *Duxbury* model which has stood the test of time for decades in financial remedy cases. … In my view, it was never *"necessary"* (to apply the Part 25 test) for [the SJE] to have been instructed. Indeed, as things have transpired, and perhaps unsurprisingly, neither party really sought to rely on his figures which are so wide ranging as to be of minimal value.

[29] Although I acknowledge that there may be the odd case where an expert is required to carry out a very clearly defined and tailored *Duxbury* calculation, in the vast run of cases it is inappropriate to reach beyond the *Duxbury* tables in *At A Glance*, or the *Capitalise* programme for a more advanced formula. For my own part, I strongly caution against the sort of exercise which was carried out here which has been a largely futile and costly exercise. There should rarely, if ever, be a need for an IFA to carry out a *Duxbury* style exercise which adds cost, delay, and confusion.

[53] During the hearing … I was presented with a number of capitalisation calculations by an IFA who used underlying assumptions which differ from the *Duxbury* model. In *JL v SL (No. 3)* [2015] EWHC 555 Mostyn J reviewed the *Duxbury* assumptions and concluded that they remain sound. The *Duxbury* model has stood the test of time since the eponymous case of *Duxbury v Duxbury* some 30 years ago. As has been often stated, it is a tool and not a rule. The court has the flexibility to depart from it to the extent necessary in any given case … True, the court is not barred from considering capitalisation calculations other than by the *Duxbury* methodology (e.g. *Tattersall v Tattersall* [2018] EWCA Civ 1978) but I am firmly of the view that there would have to be a very good reason to go down a different route.

(b) Amortisation

71. The court in *Waggott* also considered the extent to which capital awarded on a sharing basis should be amortised. Moylan LJ took Wilson LJ's comments in *Vaughan v Vaughan* [2010] 2 FLR 242 as the starting point for his analysis as to how the court should approach the question of amortisation.

72. It is (perhaps) possible to discern from the comments of Wilson LJ in *Vaughan* at [42] a general rule that, up to retirement, a party is not expected to amortise capital received otherwise than as a needs-based award but, even so, the law could not be categorical:

[42] More widely, we have received interesting arguments about the circumstances in which the law expects a spouse to apply not only income but capital to the meeting of maintenance needs or obligations. There is no doubt that the case in which (let us say) a wife is most clearly expected to apply capital to the meeting of her maintenance needs is when, at arm's length following divorce, the husband agrees, or is ordered, to pay her a needs-based capital sum: such will still have been calculated by reference to the *Duxbury* formula, inherent in which is the principle of amortisation. There is, by contrast, no doubt that the court will not generally expect her to apply inherited capital (as opposed to the income generated therefrom) to the meeting of her maintenance needs: *Lauder v Lauder* [2007] 2 FLR 802, para 64, per Baron J. But I am clear that it is impossible to be categorical about what the law expects in this area. No doubt there are circumstances in which it is reasonable to order a husband to make periodical payments even though his income is insufficient to support them and he will therefore have to make them wholly or partly out of his capital; and, correspondingly, no doubt there are circumstances … in which it is reasonable to expect a wife to apply capital to the meeting of at any rate some of her maintenance needs even if it has come into her hands by inheritance or, more generally, otherwise than as a needs-based capital payment by the husband. Perhaps particularly when they reach or approach retirement and have reasonably significant capital assets (often the product of savings out of income), many people treat the distinction between income and capital as fluid; the court will recognise this reality.

73. In *Waggott*, Moylan LJ held that:

> [132] … as Wilson LJ observed in *Jones* (para 27), an earning capacity 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. However, to repeat what Wilson LJ said in *Jones*:
>
> > "Even if, however, an earning capacity may also sometimes be relevant to a fair distribution of the assets pursuant to the sharing principle, it does not follow that the earning capacity should itself be treated as one of those assets, still less that an attempt should be made to capitalise it."

74. At [134] Moylan LJ stated that the law cannot be categorical in this area and must have regard to all the relevant circumstances.

75. When deciding whether a spouse should be expected to amortise, one factor may be the extent to which the other spouse was able to meet his or her needs through earned income, without needing to have recourse to capital – [132] and [138] (*"As to the specific issue raised in this case, namely whether it is fair for an applicant spouse to be required to use their sharing award to meet their income needs when the other spouse will meet their needs from earned income, the answer is that the latter factor will be relevant to the court's determination of the former issue"*).

76. *Waggott* is therefore <u>not</u> authority for the proposition that a party is required to amortise their non-housing capital (whether in whole or part) in every case. It depends, *inter alia*, on how much the other spouse is earning and for how long it is anticipated this will be.

77. A factor which must be considered is the clean break principle (see [100]-[103]).

78. In *Waggott* itself, Moylan LJ found that when considering whether to impose a term maintenance order, the lower court had been wrong to decide the issue:

> [146] … by reference *only* to whether the wife would be able to earn the shortfall between her income needs and the amount generated by her free capital (para 25 above). He decided that, by this measure, she could not adjust without undue hardship. For the reasons set out above this was too narrow an approach. The judge should have addressed the issue more broadly including by considering whether it would be fair for the wife to deploy part of her capital to meet her income needs. This broader consideration was required both so as properly to address the question of undue hardship and also so as to give proper weight to the clean break principle.

79. Moylan LJ went on to find that a deferred clean break was possible, with the wife's income needs, as assessed by the lower court, fully met, if she amortised 21% of the free capital that would be granted to her on a sharing basis – [152]. As such the Court of Appeal replaced the 'joint lives' order with a term order expiring on 1st March 2021 with a s28(1A) bar – [155].

80. *Waggott* would seem to suggest that the *"statutory steer"* towards a clean break in MCA 1973 s25A should result in at least a modest amortisation of spare capital if that is the only way that a clean break can be achieved.

81. There will no doubt be some complaint that the test of whether a party can adjust without 'undue hardship', in cases where a sharing based award inevitably gives rise to spare

capital in excess of needs, weighs heavily in favour of amortisation of the spare capital, irrespective of the '*broader consideration*' endorsed by Moylan LJ.

82. On the other hand, *Waggott* makes clear that the judge at first instance will have significant discretion in deciding the issue of amortisation in light of all the circumstances, including the respondent's earnings and the extent to which the respondent is able to leave his or her own capital share intact. Provided that the question is actively considered, *Waggott* suggests that a decision by a court at first instance with respect to amortisation will not be easily challengeable.

83. In *O'Dwyer v O'Dwyer* Francis J stated at [41]:

> Whether or not a spouse should be required to amortise their capital will be case specific. It is my view that, in a bigger money case, after a long marriage where contributions are likely to have been equal, if different, if the economically stronger party (here the husband) has a very substantial income, it is fair to determine that the economically weaker should not have to amortise their capital for a period of time. In *Waggott*, Moylan LJ made clear that there should be flexibility in respect of the extent to which capital should be amortised. In my judgment, there is every reason in the present case not to amortise the wife's capital during the remaining years when the husband will enjoy very substantial income. It seems to me that this will also give proper effect, post *Waggott*, to the Judge's assessment of fairness. I note that, in paragraph 134 of his Judgment in *Waggott*, Moylan LJ referred to *"the range of options from full amortisation to an assumed rate of return"* and said that *"it is difficult to see how a definitive outcome can, in fairness, be mandated for all cases".* It is clear that the Judge left a substantial element of discretion in this respect.

84. These principles were put into effect by Francis J in *O'Dwyer* who carried out the following step-by-step analysis:

    a. *step one* - establish how much capital the receiving party will have once she has purchased a home for herself. The wife was assessed as requiring a housing 'fund' of £1.128 million. After deducting £1.2 million to cover this figure, the costs of a car, currency fluctuations and other expenses, the wife would have £1,732,739;

    b. *step two* - attribute an income to that figure. Working on the basis of a return of 3.75% (see above) this equated to an income of £64,978 pa (or $84,471 pa). This figure would be taxable in the wife's hands in the United States and netted down to about £52,000 (or $67,600);

    c. *step three* – determine whether the receiving party's capital should be amortised and (if so) from what date. On the facts, if the court were to amortise all of the wife's capital from day one, it produced about £100,000 net pa. However, it was not considered fair, after a long marriage with full contributions and where the husband had a large income from a business developed during the marriage, to amortise the wife's capital for the remaining years of the husband's employment. It was said (at [41]) that *"this strikes the correct balance between NOT sharing income, which is proscribed, and applying my discretion in the wife's favour as respects amortisation"*. Therefore the wife's net return from capital was taken to be £52,000;

    d. *step four* – assess the recipient party's budget. This was assessed as being £120,000 pa; and

e. *step five* – the result. On the basis that the wife's net return on capital is £52,000 pa, the correct figure for periodical payments should have been £68,000 pa (and not the £150,000 pa ordered by the judge).

85. Francis J accepted (at [35]) that it might seem unfair to the wife that she would now have to start living on her capital straightaway (whether or not amortised) rather than have it preserved for the term of the periodical payments order (i.e. until 8th November 2022 being the husband's 66th birthday),[14] as the judge had intended, whereas the husband did not. However he stated that this was the *"inevitable and direct consequence of the fact that an earning capacity is not subject to the sharing principle"*.

86. In *CB v KB (Financial Remedies: Calculation of Income Streams and Child Support)* [2020] 1 FLR 795 Mostyn J observed as follows:

a. *On the analysis required by the law*

[52] Will the wife have sufficient income to meet her reasonable needs? As explained above, the application of the equal sharing principle gives to her net assets, after discharge of all liabilities, of £5,110,079. I have observed before that is almost a truism that someone living in the Home Counties with assets of £3 million has sufficient to meet her needs. *A fortiori*, if you have just over £5 million. However, the law requires that a more detailed needs analysis is undertaken.

b. *On amortisation*

[53] Notwithstanding the relatively young age of the wife I consider it reasonable to work on the whole-life provision implicit in the *Duxbury* formula. This was a long relationship and there have been six children born. It is reasonable in such circumstances for the wife to be provided for until the end of her life. It is pre-eminently reasonable that the wife should be required to amortise – that is to say, to spend – her *Duxbury* fund. Indeed, I struggle to conceive of any case where in the assessment of a claimant's needs it could be tenably argued that it was reasonable for her not to have to spend her own money in meeting them. After all, that is what money is for. The endgame of the contrary argument is that it would be reasonable for a respondent to have to fund a claimant's testamentary ambitions. I cannot conceive of any case where that could be said to be reasonable.[15]

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[14] At paragraph [46] Francis J stated that *"I am not going to interfere with the term .... I accept that the term could have been different, but I do not think it appropriate, in an appeal, to substitute my discretion for that of the Judge who heard the case."*

[15] It is arguable that this last statement is inconsistent with the view of Lord Nicholls in *White v White* [2000] 2 FLR 981 at p993/994 that:

I agree that a parent's wish to be in a position to leave money to his or her children would not normally fall within para (b) as a financial need, either of the husband or of the wife. But this does not mean that this natural parental wish is wholly irrelevant to the s25 exercise in a case where resources exceed the parties' financial needs. In principle, a wife's wish to have money so that she can pass some on to her children at her discretion is every bit as weighty as a similar wish by a husband. A *Duxbury* type fund is intended to provide money for living expenses but not more. The amount of the *Duxbury* fund is calculated on the basis that the capital as well as the income will be used. The calculation assumes that nothing will be left when the wife dies. …

In my view, in a case where resources exceed needs, the correct approach is as follows. The judge has regard to all the facts of the case and to the overall requirements of fairness. When doing so, the judge is entitled to have in mind the wish of a claimant wife that her award should not be confined to living accommodation and a vanishing fund of capital earmarked for living expenses which would leave nothing for her to pass on. The judge will give to that factor whatever weight, be it much or little or none at all, he considers appropriate in the circumstances of the particular case.

87. The truism Mostyn J identifies, namely that £3m in the Home Counties is sufficient to meet needs, is set against an acknowledgment that the law nevertheless requires greater consideration. This rather reflects the observations made by the same judge in *FF v KF* – namely 'needs' are a term of art.

88. Though the approach to amortisation taken is unambiguously clear, this arguably goes further than the broader consideration advocated by Moylan LJ to assessing whether deployment of capital to meet income needs is fair in the individual case. One has to wonder whether, in an appropriate case, the '*endgame*' Mostyn J identifies would indeed be fair in all the circumstances.

89. It is also of note that having identified full amortisation over a lifetime as the appropriate metric, Mostyn J had no hesitation in applying the *Duxbury* formula.

H. Stockpiling

90. In a number of cases (for example *Fields v Fields* [2016] 1 FLR 1186 per Holman J and *AB v FC (Short Marriage: Needs: Stockpiling)* [2018] 1 FLR 965 per Roberts J) the court has provided for periodical payments in excess of needs so as to allow a former spouse to stockpile for the future.

91. Such an approach (i) allows a court to comply with its obligations under MCA 1973 s25A; and (ii) survives the needs-based approach of *Waggott v Waggott* [2018] 2 FLR 406. In practice:

    a. it requires an identifiable short period of earnings – *McFarlane v McFarlane* [2009] 2 FLR 1322 per Charles J and *SA v PA (Pre-Marital Agreement: Compensation)* [2014] 2 FLR 1028 per Mostyn J;
    b. it must be for specific identifiable need - *Fields v Fields* [2016] 1 FLR 1186 per Holman J and *AB v FC (Short Marriage: Needs: Stockpiling)* [2018] 1 FLR 965 per Roberts J; and
    c. it must identify a target sum.

I. Quantification of Child Periodical Payments

92. In *CB v KB (Financial Remedies: Calculation of Income Streams and Child Support)* [2020] 1 FLR 795 Mostyn J expressed the view that when calculating child maintenance, the CMS formula should be adopted as a starting point for incomes up to £650,000 gross and that thereafter greater discretion would be deployed depending on the excess (paragraph [49]).[16]

93. Mostyn J reiterated this view in *OG v AG (Financial Remedies: Conduct)* [2021] 1 FLR 1105 (at paragraph [101]).

94. This approach was applied in *W v H (Divorce: Financial Remedies)* [2020] EWFC B10 per His Honour Judge Hess at [28 iii)] and in *G v T* [2021] 1 FLR 57 per Nicholas Cusworth QC (sitting as a Deputy High Court Judge) at [70]. However it is not beyond criticism – see (for

[16] I suggest that in every case where the gross annual income of the non-resident parent does not exceed £650,000, the starting point should be the result of the formula ignoring the cap on annual gross income at £156,000. For gross incomes in excess of £650,000 I suggest that the result given by an income of £650,000 should be the starting point with full discretionary freedom to depart from it having regard to the scale of the excess.

example) *Applying the CMS Formula in High Income Cases* by Joshua Viney and Henry Pritchard.[17]

95. Jurisdiction to capitalise child periodical payments in an appropriate case was confirmed in *AZ v FM* [2021] EWFC 2 per Mostyn J.

96. A CMS maximum assessment is required for the court to exercise 'top up' jurisdiction per *Dixon v Rennie* [2015] 2 FLR 978 (absent the parties' agreement).

97. Permission is required for a party's financial disclosure to be provided to the CMS. Pursuant to FPR 12.73(1)(b) permission is required to communicate information relating to proceedings held in private (unless the communication is to an individual or organisation named in sub-rule (a) or (c) neither of which apply).[18]

J. Variation Applications - is a *de novo* analysis necessary?

98. *Morris v Morris* [2017] 1 WLR 573:
    a. the husband appealed against what he regarded was too modest a downward variation in a periodical payments order. It was argued on the husband's behalf that the first instance judge had not complied with the s25 / s31 exercise required of him, but had isolated one factor alone and used it as the entire basis for the decision appealed against whereas, it was argued, established authority dating back to the 1980s and 1990s required the court on a variation application to consider the case 'de novo', and again to carry out the entire evaluation process.

    b. Moylan J (as he then was):

> [87] … On a variation application is the court required to consider the matter de novo? In my view, the simple answer is that it is not. The court must conduct an exercise which is proportionate to the requirements of the case. They might warrant a complete review but they can also justify … a light touch review. In this respect, Mr Duckworth was right to acknowledge that the court can confine its consideration to factors relevant to the variation application.
>
> [90] Further, although not referred to during the course of the hearing, the overriding objective requires the court to deal with cases proportionately. Thus, although section 31(7) requires the court to have *"regard to all the circumstances of the case"*, this is not the same as requiring the court to undertake the section 25 exercise de novo. …
>
> [92] The court has *"enormous flexibility"* to determine *the "nature"* of the substantive hearing. This includes … focusing on the relevant factors and in my view also, where appropriate, conducting a light touch review. Specifically, to *require* the court to undertake the exercise de novo would be contrary to the overriding objective and the obligation for a case to be dealt with proportionately.

99. *Morris* was (i) applied and approved in *Joy-Morancho v Joy* [2018] 1 FLR 727 by Sir Peter Singer; and (ii) cited in *Haskell v Haskell* [2019] EWHC 3434 (Fam) (see below).

[17] *https://www.familylawweek.co.uk/site.aspx?i=ed221925*

[18] Sub-rule (c) refers in part to PD12G which permits disclosure to the CMS when making or responding to an appeal from a CMS assessment but not the initial assessment itself.

100. For applications issued on or after 4th June 2018, the Family Procedure (Amendment) Rules 2018 (SI 2018/440) introduced new (or amended) provisions at rr. 9.3, 9.9B and 9.18 – 9.20 as to 'fast-track' and 'standard' procedures in relation to an application for a financial remedy.[19]

101. As a consequence as from this date:

    a. an application where the only financial remedy sought is an order for periodical payments is dealt with under the fast-track;
    b. an application for any other financial remedy is dealt with under the standard procedure;
    c. an application for the variation of a periodical payments order is dealt with under the fast-track unless the applicant seeks the dismissal (immediate or otherwise) of the periodical payments order and its substitution with a capital or pension order; and
    d. an application for any other type of variation is dealt with under the standard procedure.

    r.9.18A sets out the mechanism as to how to apply for a change of procedure.

    It is often overlooked that r.9.20(1) provides that under the fast-track procedure (emphasis added) *"[i]f the court is able to determine the application at the first hearing, it **must** do so, unless it considers that there are good reasons not to do so".*

K. Variation Applications – the utility of the proportionate approach

102. A proportionate approach has been used – as a cross-check - in cases where there has been a (significant) increase in the payer's income between the date of the original order and the date of the order made on a variation application: *Lauder v Lauder* [2007] 2 FLR 802 per Baron J (35% of H's income originally and c. 30% on variation); *VB v JP* [2008] 1 FLR 742 per Sir Mark Potter P (c. 34% of H's income originally and 32% on variation); and *Hvorostovsky v Hvorostovsky* [2009] 2 FLR 1574 per Thorpe LJ:

> [33](iii) I fear that the judge did not stand back from the figures to judge the overall proportionality of his conclusion. In both of the reported cases by which he directed himself (*Lauder v Lauder* and *VB v JP*), the utility of a percentage comparison between the original order and the order on variation was commended … Had he done so, I wonder if he would not have adjusted the award upwards …

103. In *B v S (Financial Remedy: Marital Property Regime)* [2012] 2 FLR 502 Mostyn J referred to *Hvorostovsky* before stating (at [78]) *"Moreover at para [33](iii), Thorpe LJ commended the utility of a percentage comparison between the original order and the order on variation, which would seem to suggest some kind of sharing approach. In this regard I note that the well known and binding decision of Lewis v Lewis* [1977] 1 WLR 409 *was not referred to in judgment, where Ormrod LJ specifically disapproved such an approach and stated that 'the court should have as unfettered a discretion as possible to deal with the situation as it is when the matter comes before it'".*

[19] Changes to the procedure on an application for variation of a financial remedy order had previously been made with effect from 22nd April 2014. The Family Procedure (Amendment No. 3) Rules 2013 (SI 2013/3204) amended the FPR 2010 so that the accelerated (or shortened) financial remedy procedure applied to a variation application.

104. Query the appropriateness of such an approach where there has been a decrease in the payer's income. Although in *Hvorostovsky* Thorpe LJ stated (at [35]) that *"In 2001 … Charles J in the case of Cornick v Cornick (No 3)* [2001] 2 FLR 1240 *clearly stated a rule of fairness, namely just as an income fall justifies an application for downward variation, so an income rise justifies an upward variation. In neither case is the outcome bounded by the family's standard of living immediately before the breakdown"* the consequence of adopting a proportionate approach in such case is that it (arguably) fails to take account of the impact upon the recipient (i.e. although a payer may have had a 25% decrease in their income the payee is unlikely to have had a 25% reduction in their needs).

L. Variation and enforcement

105. *Corbett v Corbett* [2003] 2 FLR 385 per Thorpe LJ:

> [29] So it does seem to me, as a matter of pragmatic management, that the court must ensure that the application for variation, which includes a full investigation not only of means but also of motivation and good faith, precedes the determination of the summons under the Debtors Act 1869. That application for variation is a freestanding process invoked by the payer, and its preparation and determination can safely be conducted within the framework of the other provisions of the Family Proceedings Rules 1991.
>
> [30] Once that essential issue has been determined, if it has been determined in such a way as to satisfy the court of the payer's good faith and responsibility, then inevitably the Debtors Act process falls away. If, on the contrary, the court is not satisfied of the payer's good faith and responsibility then the Debtors Act process can come into immediate play. It does seem to me that that is a more realistic way of approaching these problems and a way that would have relieved Hedley J of the uncertainties and misgivings which he expressed during the course of the hearing.

106. However in *Tattersall v Tattersall* [2019] 1 FLR 470 (in which no reference is made to *Corbett*) Moylan LJ said as follows [emphasis added]:

> 32. (i) Turning then to the first ground of appeal, namely that the judge should not have determined the wife's application to enforce until his variation application had been determined. **In my view there is no principle which requires a judge to adjourn an enforcement application pending determination of a variation application**. The objections to such a principle are obvious. It would enable the process to be too easily manipulated, if not subverted. It is a question for the judge to determine having regard to the circumstances of the individual case. In this respect I would agree with the comment made in the Law Commission's Report on Enforcement of Family Financial Orders (Law Com. No. 370), paragraph 2.47:
>
> *"... we think it is important to emphasise that a variation application should not inevitably lead to an adjournment of any enforcement proceedings; the appropriate action will depend on the circumstances of each case."*
>
> That observation was based on concerns which had been expressed in consultation responses (as referred to in paragraph 2.45)
>
> 33. The judge dealt with the existence of the variation application by staying payment of part of the arrears. In my view, this was a decision which she was entitled to make and for which she gave sound reasons. **There is, as I have said, no legal principle involved** and there is nothing in the circumstances of this case which meant the judge should have stayed enforcement or payment of all the arrears until the variation application had been determined.

107. In *Haskell v Haskell* [2019] EWHC 3434 (Fam) Mostyn J (in the context of dealing with a judgment summons in relation to arrears of maintenance pending suit and interim

periodical payments (including a legal costs allowance)) and where this had been met by an application for a downwards variation) said as follows [emphasis added]:

5. … variations of orders that are made pending suit are, for obvious reasons, dealt with only in situations of demonstrated changes of circumstances where it would be unjust to perpetuate what was by necessity a provisional assessment made to abide the final resolution of the case.

6. … I agree entirely with the view of Johnson Lam J sitting in the Court of Appeal of Hong Kong in *YBL v LWC* [2016] HKCA 629 **that variation applications should be heard before, and not together with, the hearing of a judgment summons**. That is a pure view with which I entirely agree. My only modification to that view would be that it could not reasonably be sustained if the court were satisfied that the variation application was no more than a strategic filibuster.

9. The way the case had been argued by both counsel … was to see the court's powers as being limited to the binary choice of whether to vary the order for maintenance pending suit as to quantum or not. I expressed the view yesterday that a third way of dealing with the case was to seek what I described as a stay, but which I should perhaps more accurately have categorised as being a suspension of sums due pending a private FDR.

10. … Where the application is to vary an interim order made pending suit, then if a variation is to be ordered it must be a clearly and distinctly proved that there has been a change of circumstances of a serious nature. This much is clear from the decision of the Court of Appeal in *Morris v Morris* [2017] 1 WLR 573 and the decision of Charles J in *G v G* [2003] 2 FLR 72. So there must be a material change of circumstances proved by full and compelling evidentiary disclosure. I agree with Mr Harvey that there is not a sufficiency of evidence to reach the threshold in those authorities for the purposes of making an order which varies the existing maintenance pending suit order so as to permanently discharge the liabilities thereunder.

11. However, I expressed the view in submissions, and I maintain the view, that a lesser degree of change of circumstances, and a lesser sufficiency of proof, is needed to be shown where the relief sought is suspension rather than variation. The reason why a lesser change of circumstances and a lesser degree of evidential proof is needed are almost too obvious to state. The answer is that the suspension does not eliminate the liability; it merely defers it to a later date. In those circumstances, the court exercises its discretion where it is satisfied in my judgment that there is a real risk, to use the language commonly used in public law cases, that there has been a halt to the resources that had hitherto been judged to be available to meet the order for maintenance pending suit.

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