St John's CHAMBERS

Spousal Maintenance – where are we now?

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Published on 28th November 2016

<u>The Starting Point?</u>

SS v NS (Spousal Maintenance) [2014] EWHC 4183 (Fam) Mostyn J

- Review of applicable law

"46. Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:

> i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.
>
> ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.
>
> iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.
>
> iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.
>
> v) If the choice between an extendable term and a joint lives order is finely

balanced the statutory steer should militate in favour of the former.

vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.

vii) The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.

viii) Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis.

ix) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.

x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.

xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party."

Fields v Fields (Rev 1) [2015] EWHC 1670 (Fam) Holman J

- "needs based" case
- H 59 ½ y/o
- W 42 ½ y/o
- 2 children aged 7 and 5
- 9 ½ year relationship – held not <u>short</u>
- Total assets c. £6.2m
- H income £1.3m p.a. (g)
- High standard of living during marriage - £800k p.a.
- W budget £400k
- H budget £560k
- W had chronic fatigue syndrome and other health issues - held was unable to work
- Spent £1m on costs

Stockpiling:

> "56. Mr Marks lays stress upon the respective ages of the parties and the likelihood that the wife will survive the husband by many years. In any event, even if the husband is blessed with a long life, his earning capacity must ultimately diminish and the level of maintenance reduce, probably during the dependence still of one or both of the children. Mr Marks submits that, as well as meeting her annual needs, payments must also be made to the wife to enable her (in his words) to "stockpile". He submits that, just as the husband has included £100,000 per annum in his budget under a heading "Pension", she needs to be able to make some similar provision of pension or stockpile for herself. In principle I accept and agree with that argument on the facts and in the circumstances of this particular case, having regard in particular to the respective ages of the husband, the wife and the children in relation to each other. If, however, there is an element of stockpile, it must of course be saved and in some way ring-fenced, so that it is indeed available for future needs and can be identified and taken into account if or when the husband's income drops and he seeks to reduce the level of periodical payments or discharge them altogether."

- Held: Spousal PPs to W £370k p.a. inc. £100k 'stockpiling'

W v W [2015] EWCA Civ 201 Pitchford LJ (appeal from Wright v Wright [2014] EWFC B17 (26 June 2014) Roberts J)

Original Order: DJ Cushing 25/04/08 Spousal PPs £33,200 p.a. joint lives plus £10,400 child PPs until 17 y/o = 22% of H's income

November 2012 – application to vary – reduction in income and order now 34%

- judge accepted the H's case that W had been on strict notice that she would be expected to make a contribution towards her own maintenance.
- the reason why joint lives order was that it was not possible to predict how things would develop. But expectation W would contribute financially.
- W previously worked before her marriage as a legal secretary and as an administrator. W had done nothing since 2008 to look for work or to retrain or to prepare herself for work. The judge rejected all the reasons put forward by the respondent to explain her inactivity.
- judge applied the test in section 31(7) of the 1973 Act and concluded that it was appropriate to vary the order. Her objective was to scale down the spousal maintenance during the following 6 year period to enable W to use and improve her earning capacity as she gathered experience and training and her childcare responsibilities reduced.

- Order: variation of Spousal PPs as follows: From 1 November 2013 to 31 October 2014, H -> W £32,000 at the rate of £2,667 per month. From 1 November 2014 to 31 October 2015 £24,000 at the rate of £2,000 per month. From 1 November 2015 to 31 May 2016 £1,500 per month. From 1 June 2016 to 31 December 2019 £12,000 per annum at the rate of £1,000 per month, at the conclusion of which the payments would cease.
- Application for permission to appeal dismissed:

36. It seems to me that the principal question that arises in this application is whether there is a real prospect of establishing before the full court that Judge Roberts gave inadequate justification for her conclusion that the petitioner should no longer be expected to make any provision for the respondent during his postponed retirement. There are consequential questions, but for the most part they hinge on this central argument.

37. I do not consider it reasonably arguable that there should have been no variation of District Judge Cushing's order in the petitioner's favour, which was the position taken by the respondent before Judge Roberts. The issue, therefore, is whether the respondent has a real prospect of undermining the judge's scaled reduction in spousal maintenance.

38. In my view, there is no such prospect. Judge Cushing did not embark on a consideration of the respondent's earning capacity. Judge Roberts did. Over the course of a 2 day hearing, the respondent was questioned closely about her working experience and missed opportunities since the original order of 2008. In effect, the judge accepted the propositions being advanced on behalf of the petitioner.

39. By way of illustration, if the respondent earned £20,000 gross in an administrative or clerical capacity, her net income would be £16,555 per annum. With tax credits, child benefit and the continuing payments in respect of the children, the respondent would have a household income of over £46,000 without depending on spousal maintenance.

40. While Mr Johnstone criticises the judgment for failing to make explicit the figures upon which the judge was acting, it is perfectly plain to me that she was acting upon the figures presented to her in detail in the written arguments before her.

41. The judge calculated that during the following 2 years the respondent would be able to meet her reasonable costs without working, although it was imperative that she take immediate action to contribute financially to her own future. The respondent had, she found, experience as a legal secretary and as an administrator.

42. While I accept that the judge could have been more specific in setting out the foundations of her order, in my view, she gave sufficient reasons for departing from the provisional view of Judge Cushing."

WD v HD [2015] EWHC 1547 (Fam) (28 April 2015) Moor J

SMALL MONEY

- H 46 y/o

- W 36 y/o

- 2 children 10 & 13

- 8 year marriage

- consent order in 2011 – Spousal PPs £500 pcm until youngest child 18 or finished secondary school

- H application to vary 05/03/13

- W cross-application

- W conceded Nominal Maintenance Order

- key issue: school fees

- W income c. £45k

- H income £163,692 p.a. (plus 2nd W £54k p.a.)

Order – clean break & W to pay £15,405 of school fees

Appeal:

55. It follows that I am quite satisfied that the Deputy District Judge fell into error in requiring the wife to pay half of SD's school fees, whilst, at the same time, reducing her spousal maintenance by £6,000 per annum. The order was made in 2011. The husband's net income at that time was £104,057. It is now £106,763. Why should he, therefore, be relieved of the burden of paying the wife £6,000 per annum in those circumstances, particularly when her income has fallen during that period, unless he is to take on the balance of SD's school fees as a *quid pro quo*?

56. Both parties want their children to attend private school and both have to make sacrifices as a result. I am satisfied that the Deputy District Judge erred in finding that the wife could afford SD's school fees in their entirety, as well as doing without her £6,000 periodical payments. Therefore, I allow the appeal in that regard.

- Appeal in relation to clean break not successful.

Calderbank Offers on Appeal:

65. This is a tricky little issue about whether or not a Calderbank offer is admissible in relation to an appeal. I am slightly surprised that the issue has not arisen before. It has arisen before Mostyn J in the case of KS v ND (Schedule 1: Appeal: Costs) [2013] EWHC 464 (Fam), when he did admit Calderbank letters. However, as Mr Horton has rightly pointed out, that case concerned Schedule 1 of the Children Act, to which the principle of 'no order as to costs' does not apply.

66. The rules of financial remedy proceedings do impose a presumption of no order as to costs. They say, at FPR 28.3(8):
"(8) No offer to settle which is not an open offer to settle is admissible at any stage of the proceedings, except as provided by rule 9.17 [which does not apply in this case because it relates to financial dispute resolution hearings]."

67. Therefore, I have to construe the words "at any stage of the proceedings". Mr Leech draws my attention to the definition of financial remedy proceedings both in (4) of that rule and in Rule 2.3. He says that there is absolutely no mention there of appeals. He also relies on the case of Judge v Judge [2008] EWCA Civ 1458, in which the Court of Appeal determined that an application to set aside a consent order was not financial remedy proceedings, because it was a different type of application.

68. There is also, in my view, the issue of encouraging litigation to settle. I am acutely aware of the need for parties to be able to protect themselves in relation to the damaging cost of appeals. I have come to the clear conclusion that when it says, in Rule 28.3(8), "No offer to settle which is not an open offer to settle is admissible at any stage of the proceedings" it is referring to first instance proceedings. I take the view that an appeal brings it out of that regime, in the same way that the application to set aside in the case of Judge was not within that regime.

69. By coming to that conclusion, there is the added advantage that litigants are able to protect themselves in appeals where the costs of the appeal can be totally disproportionate to the amount at stake. Therefore, I am prepared to admit any Calderbank offer.

No Calderbank offer in this case but H ordered to pay 75% of W's costs.

BD v FD (No 2) (Application of the Principle of Need) [2016] EWHC 594 (Fam) (17 March 2016) Moylan J

- W seeking £29m
- H proposing £8m
- Difference based on W's future financial needs
- W £500k p.a. for life = £17m Duxbury plus housing £10.5m plus £1.1m for housing her parents and costs of Children Act proceedings
- H £150k p.a. for life = £4.2m plus housing £2.8m
- H 49 y/o
- W 41 y/o
- 4 Children 5 – 10 y/o
- 11 year marriage
- H £58m in assets plus trust assets £105m
- Costs £1.4m – disproportionate
- W MPS budget £392k
- H net income £800k p.a.
- Standard of living £250k p.a. – described by W as 'mean'
- Not a "sharing" case

114. In my view, the starting point for the assessment of needs is the standard of living during the course of the marriage. This was the view expressed by the Law Commission in its 2014 report, *Matrimonial Property, Needs and Agreements* (Law Com. No 343) (para 2.34/2.35) in respect of "very wealthy cases": "needs are still assessed primarily by reference to the marital standard of living". This does not mean that it is either a ceiling or a floor but, as Mr Howard agreed during the course of his submissions, it provides a benchmark or starting point against which to assess needs.

115. In *Miller; McFarlane* Baroness Hale said [para 138]: "In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living enjoyed during the marriage …". In *G v G (Short Marriage: Trust Assets)* [2012] 2 FLR 48 Charles J said [para 136(iii)(a)]: "the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties."

116. Usually, due to finite resources, it will not be possible for the marital standard of living to be maintained. Additionally, it may well not be fair for the applicant spouse to have his or her needs provided for at this level either at all or for longer than a defined period (i.e. not for life) due, for example, to the length of the marriage.

117. However, in my view, if this benchmark is not to be applied, at least initially, it would assist in the development of certainty if some specific

justification was identified such as, for example, in *B v B (Ancillary Relief: Post-Separation Income)* [2010] 2 FLR 1214, where the marital standard of living had not adjusted to the dramatic increase in the husband's earned income in the later years of the marriage. Although of limited assistance, as it involved variation of maintenance, a similar approach can be seen in *Hvorostovsky v Hvorostovsky* in which the Court of Appeal noted that [para 35]:

"In 2001, in the aftermath of the decision of the House of Lords in *White v White* [2001] 1 AC 596, [2000] 3 WLR 1571, [2000] 2 FLR 981, 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."

This is not to introduce an element of sharing but to state that an assessment of needs has to take into account the level of the available resources. Although relied on by Mr Howard, *Hvorostovsky* provides no assistance in this case because the husband's income will inevitably fluctuate (up and down) over the years and the increase which has occurred since the parties separated has not effected any sufficiently significant shift in the financial landscape.

118. The use of the standard of living as the benchmark emphatically does *not* mean that, as referred to above, 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). Often, as Baroness Hale said in *Miller v Miller; McFarlane v McFarlane* [para 158]: "The 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." In *G v G*, Charles J said:

"[136] What I take from this guidance on the approach to the statutory task is that the objective of achieving a fair result (assessed by reference to the words of the statute and the rationales for their application identified by the House of Lords):

(i) is not met by an approach that seeks to achieve a dependence for life (or until remarriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households), but:

(ii) is met by an approach that recognises that the aim is independence and self-sufficiency based on all the financial resources that are available to the parties."

He then goes on to identify a number of factors including the marital standard of living (as quoted above), the length of the marriage (of particular relevance to

determining the level and duration of any needs claim) and continuing contributions to caring for children.

119. I must also not be taken to be saying that the marital standard of living is "the lodestar", quoting from Mostyn J's decision in *SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124, in the sense of an unchanging guide to the assessment of needs. As he says, and I agree: "As time passes, how the parties lived in the marriage becomes increasingly irrelevant. And, too much emphasis on it imperils the prospect of eventual independence" [para 35].

120. However, in broad terms and in the context of this case, in which contributions will have been made over a 30 year period, *where* the resources are available, the longer the length of the period(s) referred to in paragraph 113(i) and (ii) above (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 the court will decide that the applicant's spouse's needs should be provided for at a level which is similar to the standard of living during the marriage.

121. Further, the longer the duration of (i) and (ii), the more likely that those needs will be assessed on a lifetime's basis. As Holman J said in *Murphy v Murphy* [2014] EWHC 2263 (Fam) [para 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. Far from it, she would no doubt have continued to work at Selfridges, or in similar employment, and at the point of the breakdown of their marriage and divorce there would have been a fair capital division and a clean break and each would have gone their own way. 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."

122. This is, to repeat, inevitably subject to the available resources in the case, but it is also subject to the important caveat that the *level* at which future needs are assessed will depend on the duration of the period for which they are being met. The longer that period, the more likely that the court will *not* assess those needs at the marital standard of living throughout that period. There are many examples of orders having been made on this latter basis by, for example, assessing the award on the basis that the needs, both in terms of housing and/or in terms of income, will reduce in the future. I have been referred to two

examples of the latter, namely *AR v AR* and Baron J's decision of *Y v Y (Financial Orders: Inherited Wealth)* [2013] 2 FLR 924.

Order:

- W's housing need £3.6m
- £500k furniture
- W income needs £175k – lump sum £5.5m
- Add-back of £300k for 'profligate expenditure'

Rapp v Sarre (Formerly Rapp) [2016] EWCA Civ 93 (18 February 2016)

Patten, Black & Baker J

- H mid 50s
- W late 40s
- Marriage 16 years
- H taking cocaine, drinking excessively and using 'female escorts'
- H had received £48k per month from assets, W £20k per month
- H refused to engage w proceedings
- Assets c. £13.5m
- 54.5% to W 45.5% to H

35. I will start with Mr Molyneux's criticism of the judge's treatment of the question of need. It is argued on behalf of the husband that the parties' needs should have been treated as identical (leading to an equal division of capital assets) and also that, in any event, 50% of the assets in this case must be sufficient to satisfy the reasonable needs of the wife and her budgetary calculations could not possibly justify more.

36. I am not persuaded by this argument. I consider that the judge's approach to need was open to him. It is well established in the authorities that "need" is a flexible concept and that the assessment of a spouse's "needs" includes a consideration of the way in which the parties led their lives whilst together. When approaching the wife's budget, the judge was entitled to take account, as he did, of the parties' high standard of living during the marriage. The wife had taken the trouble to itemise her budget, which the judge considered critically, deciding that she could reasonably be expected to trim it a little more, but no further. The husband had provided no budgetary information at all, leaving the judge to do the best he could to forecast what his needs might be and to ensure that his order would leave the husband with sufficient for them.

37. It was reasonable for the judge to suppose, in approaching the husband's needs, that the husband would continue to rent accommodation, given his choice to remain living in the flat since the separation without taking

any steps towards purchasing a property. A considerable proportion of the rent would be covered by income from the husband's investment in Stars and Bars, which it was fair to assume would continue to produce returns of the level predicted by the husband in his Form E. The rest of the husband's capital, used as a Duxbury fund, would produce approximately £200,000 per annum. There was nothing unreasonable in assuming that an income of this sort would cover the balance of the husband's needs. Accordingly, Judge Everall could make provision for the wife's trimmed budget whilst also providing properly for the husband's needs.

38. The judge is criticised for requiring the husband to live off his capital, with an attendant risk that he would run out of money for his needs at some point in the future. However, it is clear that, whilst the judge used the Duxbury model as a tool to test out the sufficiency of his award to the husband, he did not consider that the husband would actually have to deploy (and use up) his capital in this way. On the contrary, he found that the husband remained a shrewd and knowledgeable businessman and was likely to continue to invest successfully in business ventures (paragraphs 89 and 123 of the judgment). This finding was not challenged in the grounds of appeal and Mr Molyneux's attempt in oral argument to dislodge it made no headway. It is an important part of the foundation for the judge's whole approach. On the judge's findings, whereas marriage had left the wife with no effective earning capacity and constrained to rely on a Duxbury fund, the husband was not confined to conservative investment of his capital but would be able to make it work for him. This was something that the judge was entitled to take into account in sharing the assets between them.

…

42. Finally, in so far as the judge's substantive order is concerned, I turn to Mr Molyneux's argument that the judge erred in his approach to the husband's addictive behaviour. As I have already said (paragraph 32 above), in my view the order that the judge made was justified on the basis of the wife's needs alone. It follows that even if the husband were to succeed in establishing, as he seeks to do, that the judge placed undue weight on the husband's behaviour and its consequences for the family finances, this court would not interfere with his order, because the view that he took of the addiction aspect of the case was not a necessary part of the justification for it. In these circumstances, I do not propose to consider further the interesting and challenging question (recently considered by Moor J in *MAP v MFP* [2015] EWHC 627 Fam) of whether behaviour such as the husband's should be reflected in the court's ancillary relief order, and if so, how. It seems to me undesirable to engage with this issue in a case where there has not been a full exploration of it at first instance, involving evidence and submissions from both parties.

Appeal dismissed.

26. Interesting though the debate generated by the judgment of Mostyn J in *B v S*, on the one hand and the judgments in White, Miller and *McFarlane* on the other may be, that debate has no relevance to the present case. Both counsel accept that the valuation of periodical payments in this case was undertaken entirely on a "needs" basis. Although the deputy district judge uses the phrase "split equally" to indicate the proportion to be attributed to each party from the element of the husband's income that is liberated following H's departure from school, Mr Johnson accepts that this was not a "sharing" case. Fairness was to be achieved within the proceedings by apportioning the capital and income resources of the parties in order to meet their respective needs for housing and ordinary maintenance.

27. On the basis, therefore, that this is a "needs" case, and on the basis that the deputy district judge had reached an assessment of the wife's need for periodical payments, which he fixed at the round figure of £1,000, the question arises as to the basis upon which he then concluded that she should then be entitled to an increase, after a period of some four years, which would effectively double that payment. Unfortunately the answer to that question is not to be found within the deputy district judge's judgment. As the point was not apparently canvassed with either of the parties or their counsel at any stage during the hearing, it is also not possible to identify the principle being relied upon from anything that the judge may have said during the hearing.

28. Mr Johnson is right in pointing to the "known known" change in the husband's outgoings once H left school. Looking at paragraph 45 in the deputy district judge's judgement if that paragraph had ended at the conclusion of phrase "it is right that upon H ceasing full time secondary schooling there should be provision for a review" with a full stop and without the remainder of that paragraph, the judgment would be unexceptional. A review may well be justified at such a stage. But it must be impossible to predict, as the deputy district judge sought to do, in August 2014, what the result of that review would be in the summer of 2018.

29. This element of the deputy district judge's decision is, in my view, plainly within the parameters which rightly limit the scope for appellate intervention in financial provision cases described by Thorpe LJ in *N v N.* If a district judge in an ordinary financial provision case determined current periodical payments solely by reference to only one element in the needs versus resources equation there would be little dispute that the exercise of judicial discretion was "plainly wrong". In like manner such a decision,

based upon only one element in the equation, would be "wrong" as a matter of law in that it would not be possible to demonstrate that the court had had regard to each of the relevant factors set out in the checklist in Matrimonial Causes Act l973, s 25.

30. As Mr Love submits, the point at which H leaves school may generate or coincide with other significant changes in the parties' respective financial circumstances. For example, H, who currently lives at home and who is no doubt a draw upon the wife's income, may go away to university thereby, in that respect, reducing the wife's needs to an extent. The wife's earning capacity, which was necessarily a matter for informed conjecture at the 2014 hearing, will be more readily identifiable. The husband's finances may have changed either as a result of systemic alterations in the NHS or through personal choices he may make.

31. In addition, I consider that the deputy district judge was wrong to regard the cessation of school fees payments as a 100% net gain to the family finances to be split by a calculation entirely limited to the size of the previous year's school fees bill, and without any regard whatsoever to the likelihood (as it surely is) that H will require further financial support in the period that then follows.

32. At the conclusion of his submissions Mr Love summed up the central point in the appeal as follows:

> "If a court is going to exercise discretion, it has to do so on an informed basis. The only known fact here was that H's education would cease and the school fees bill would no longer need to be paid. The rest is pure speculation."

I found myself in complete agreement with that submission.

33. For the reasons that I have given, I conclude that the deputy district judge was wrong as a matter of law and plainly wrong in the exercise of his discretion, by making an advance variation order based upon only one known element with respect to the parties' finances, and the needs of H, some four years hence. I would therefore allow this appeal so as to strike out paragraph 18 of the order of the deputy district judge dated 18th August 2014 in its entirety. Should the circumstances justify it, it remains open to the parties, either upon H leaving school or, indeed, at any other point, to apply to the court to vary the periodical payments order. Should they do so, the court will evaluate that application in the light of all of the known relevant factors at that time.

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28th November 2016