

WESTGATE CHAMBERS



Spousal Maintenance. An open discussion...

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Introduction

1. I have been asked to prepare this note as a starting position for those wishing to understand spousal maintenance in financial remedy proceedings. Due to the nature of financial remedies, there are many limbs which are not fully explored in this note in depth and where not fully explored shall be marked to encourage additional further reading [AFR]

Definition

2. In this note I shall use the term spousal maintenance, but officially called it is called a spousal periodical payments order, is the continuing obligation for one party to provide regular payments on either a weekly or monthly basis. The duration of spousal maintenance payments can vary, up to and including a life order which is explored further below.
3. It is specifically an order which goes against the clean break principle – that being the general principle that where it is just and reasonable the parties whom are separating should strive to have a clean break from one another and no continuing obligations. The clean break arises from §31(7) of the Matrimonial Causes Act 1973 (MCA).
4. The power of the Court to make a spousal maintenance order is held within §23(1) (a) & (b) of the MCA. There are also equivalent provisions for the making of the same order in Civil Partnerships under Schedule 5 of the Civil Partnership Act 2004.
5. The Court can make a SM order on or after an order for divorce, nullity, and/or judicial separation.
6. SM is often used to achieve fairness in the outcome of proceedings where an adjustment is required on the financial resources of the parties upon separation, taking into account the factors as set out in §25 MCA. There is an obligation on the Court to consider if the SM should only be made whilst the payee is adjusting to the separation of the parties, §25A(2).
7. SM should not be confused with other types of periodical payments available upon separation such as periodical payments for child maintenance.

Purpose and principles

8. SM is used to achieve a fair outcome upon divorce applying the principles of need, compensation, and sharing as set out in case law such as *McFarlane v McFarlane*[2006] UKHL 24. [AFR]
9. Mostyn J has also given his view that the principles of need, compensation and sharing should be applied when assessing spousal maintenance payments with an emphasis on transitioning to independence as soon as just and reasonable. *SS v NS (spousal maintenance)* [2014] EWHC 4183 (fam). [AFR]
10. In the case of *SS v NS*, Mostyn J also helpfully sets out the principles practitioners should remember the Court apply when considering applications for SM;
 - Evidence should show that choices during the marriage have generated the claimant's future needs. The marriage's duration and the presence of children are pivotal factors.
 - An award should only be made by reference to needs, save exceptionally where the sharing or compensation principle applies.
 - Where needs are not causally connected to the marriage, the award should generally only be made to alleviate significant hardship.
 - The Court must consider terminating sm with a transition to independence as soon as just and reasonable. A term should apply unless the payee would be unable to adjust without undue hardship to payments being terminated. A degree of (not undue) hardship during the transition to independence is acceptable.
 - If the choice between an extendable term and a joint lives order is finely balanced, the statutory steer should be to the former.
 - Marital standard of living is relevant to the quantum of spousal maintenance but is not decisive and should be weighed against the objective of eventual independence.
 - The judge must consider whether the spousal maintenance represents a fair proportion of the respondent's available income.

- Where the respondent's income comprises a base salary and discretionary bonus, the award can be equivalently divided, with needs of strict necessity met from base salary and additional discretionary items met from the bonus on a capped percentage basis.
- There is no criterion of exceptionality on an application to extend a term order. The court should examine whether it has been impossible for the payee to achieve independence, and if so, why.
- On an application to discharge a joint lives order, the court should examine the original assumption that it was too difficult to predict the eventual independence.
- If the choice between an extendable and non-extendable term is finely balanced, the decision should usually favour the economically weaker party

Key principle of need

11. The principle of need has developed widely within financial remedies, in particular in how the Court have adopted their approach when assessing spousal maintenance.
12. In *B v S (Financial remedy: Martial Property Regime)* [2012] EWHC 265 (fam) it was Mostyn J's views that spousal maintenance payment should be assessed on needs basis alone.
13. However, subsequently he took a more lenient approach in *FF v KF* [2017] EWHC 1093 (fam) that there is almost an unbound discretion when applying the needs principle. In particular in this case, it was a matter that a short marriage would in fact apply the needs principle more broadly and will be fact-sensitive. [AFR]
14. It should be noted that unfortunately the needs principle in financial remedies is so vague, that the *Law Commissions Consultation Paper no 343: Matrimonial Property, Needs and Arrangements*, recommends the Family Justice Council prepare full guidance on the same.

Compensation Principle

15. Spousal maintenance can also be used by a means to balance the parties, and compensate the lesser party for sacrifices they have made during the marriage. For example, if the couple discussed one giving up work for the benefit of the family, upon separation that individuals earning capacity may be significantly diminished due to lack of training, qualification, or experience they otherwise could have gotten if they continued to work.

16. SM could therefore be ordered on a basis that it compensate the weaker party for this collective decision during the marriage.

'...a periodical payments order whose object is to furnish compensation in respect of future economic disparity arising from the division of functions adopted by the parties during their marriage. If the claimant is owed compensation, and capital assets are not available, it is difficult to see why the social desirability of a clean break should be sufficient reason for depriving the claimant of that compensation.'

-Lord Nicholls in McFarlane-

17. If considering spousal maintenance under a compensatory approach, the Court should take a generous assessment of the spouses continuing needs. It should not be restricted by budgetary considerations given the contribution of the spouse to the marriage and the sacrifice of their own individual advancement or ability to provide for their own needs. This was the guidance given by Potter P in *VB v JP [2008] EWHC 112 (fam)*.

18. Mostyn J also summarised (obiter) his views on which a compensation view should be based in *SA v PA (Pre-martial agreement Compensation)[2014] EWHC392 (fam)*;

- The compensation principle will only be successfully applied in a very rare and exceptional case.
- Such a case will be one where the court can say without speculation (that is with almost near certainty) that the claimant gave up a very high earning career, which had it not been foregone, would have led to earnings at least equivalent to that presently enjoyed by the respondent.
- Such a high earning career will have been practised by the claimant over an appreciable period during the marriage. Proof of this track record is key.

- Once these findings have been made, compensation will be reflected by fixing the periodical payments award (or the multiplicand if this aspect is being capitalised by *Duxbury**) towards the top end of the discretionary bracket applicable for a needs assessment on the facts of the case. Compensation should not be reflected by a premium or additional element on top of the needs-based award.

19. *A *Duxbury* award is the assessment of a lump sum to account for income for a number of years, usually the remainder of the payees life, based on predictions and approximations. *Duxbury v Duxbury* [1981] 1 FLR 7. As such there are *Duxbury* tables to assist those wishing to calculate the same. [AFR]
20. In *RC v JC* [2020 EWHC 466 (fam)] an applicant wife was awarded a lump sum as compensation for the relationship generated disadvantage.
21. The Court of Appeal has proposed a test to assist in the application of the consideration of compensation in the case of *Waggott v Waggott* [2018] EWCA civ 727 (fam). This ‘test’ is one that the Court should determine, on balance, the weaker parties career would have resulted in them having greater resources than those awarded under the needs or sharing principles. The court should then determine whether, and how, compensation can be reflected to ensure fairness.

Sharing Principle

22. The sharing principle is applied to provide each party with an equal share of the assets in appropriate cases. In effect, has the weaker party received their share of marital assets during the marriage, and if not should periodical payments be used to correct this. One such example would be a return on investments. The income of parties is rarely amenable to the sharing principle, unless needs demand otherwise.
23. To put this into the context of spousal maintenance, recent case law for variation of payments demonstrates the Court will cross check the potential payments against the original percentage division of income achieved in the original orders. See *Lauder v Lauder* [2007] EWHC 1227 (Fam).

Duration of Spousal Maintenance

24. Spousal maintenance payments can begin as soon as the original application for the same is made. It is possible for the Court to backdate payments to the date on which an order could have been made, save for unreasonable delay of the respondent.
25. Additionally, if there has been undue delay on behalf of the applicant or it was not brought promptly the Court cannot allow backdating to occur.
26. The length of spousal maintenance is at the discretion to the Court dependant on the circumstance son each case, and may be Term order or a joint lives order. A Term order can be directed to cease on the subsequent remarriage or civil partnership of the payee, or for a set period of time.
27. The Courts approach to Terms orders was set out in *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26 where Ward J outlines the two issues to consider are;
 - Whether the payee can adjust, not should they adjust (without undue hardship), to the end of financial dependence and if so when.
 - What evidence there is to support the expectation that the payee can and will become self-sufficient.

For term orders is it also appropriate to set out on the face of the order the Court justification and reasoning for any set term. This can include but is not limited to the Court reasoning as well as the intentions of the parties, such as an applicant confirming they intend to re-train, or not to cohabit.

28. This is because a Term order can be either an extendable or non-extendable order. the power to extend, and vary, an order is under §31 MCA.
29. Where a term cannot be extended , the Court imposes a §28(1A) bar, per the same § in the MCA, where it feels it is appropriate or that although payments are required it would be unjust to allow them to continue beyond the term established.
30. Such an example is where the Court considers the weaker party should be able to be in a position to be independent, without undue hardship, within a number of years but takes no reasonable steps during that time period to reach independence. See *N v N*

(Financial orders: Appellate role) [2011] EWCA civ 940, and Waggott for further information, where on appeal the Court imposed a §28(1A) bar.

31. A Term order can also be established on the basis of the actions of the parties. For example, cohabitation can have an effect. It can be directed by the Court that should the payee cohabit for a period of more than 6 months, the spousal maintenance may cease.
32. It can also be used in a 'step down' approach, gradually reducing the payers obligations as the expectation and timeframes for the payee's independence increases.
33. A Term order is in effect a deferred clean break order, in particular where it has a §28(1A) bar.

Joint Lives Order

34. A joint lives order is dependent on the death of one of the parties and is made under the powers of §28(1) MCA.
35. These joint lives order are becoming less favourable due to the views of the Court set out above for clean breaks and independence as soon as just and reasonable without undue hardship on either party.
36. On a secondary note, currently there is a private member's bill introduced by Baroness Deech, which has had its first reading before the House of Lords. This proposes, amongst many other things, that spousal maintenance payments should only be for a fixed period of time not exceeding three years.

Quantifying Spousal Maintenance

37. In considering spousal maintenance payments, the Court will have regard to the general principles of equality being the starting position, and then have to divert for the above reasons if it feels the needs, compensation, or sharing requiring continued financial commitment.

38. To that end the earning capacity of the parties is important, as touched upon under compensation. When quantifying payments the Court has particular regards to;
- The payee's age.
 - The payee's qualifications and role in the marriage.
 - Whether the payee is the primary carer of children.
 - The length of time since the payee was in the workplace.
 - The payee's recent work experience.
 - The availability of suitable jobs for the payee.
39. The Court have taken a rather stern approach to the circumstances of the parties and the obligations of the payer. In *A v A (financial provisions) [1998] FLR 180* the Courts found it would be unjust to expect the payee to work to reduce the payers obligations when this was not the status quo during the marriage.
40. For those representing respondents to applications, often the stronger party, if they seek to argue the applicant can return to work, particularly if there are the primary career for children, there is the onus on them to show and evidence what type of jobs they are expected to do.
41. It has been raised, and considered by the Court if earning capacity was a marital asset, to which the weaker party was entitled to a continuing income from. However, this has been firmly rejected as to do so would defeat the fundamental principles, and requirement of the Court to consider a clean break.
42. It would also defeat the principles set out in *Miller*, and *McFarlane* that sharing future resources could only be justified by needs or compensation.
43. However, bonuses are treated different. The Court can and will order a percentage share of the payers future bonus's if during the marriage they contributed significantly to the marital assets. Given that bonuses are variable within themselves, this is typically on a periodical percentage basis. See *H v W [2013] EWHC 4105 (Fam)*

Stockpiling

44. In appropriate cases, the Court will allow the payee to stockpile spousal maintenance to allow for future provisions. One such example is the case of *Fields v Fields* [2015] EWHC 1670 (fam).
45. The family enjoyed a high standard of living. Health issues meant the husband was unlikely to work beyond 65 and the wife was not expected to earn in future. On a needs basis, Holman J awarded the wife £2.5 million and annual global maintenance of £270,000, together with £100,000 per annum for her to build up pension provision, given the husband's age and diminishing earning capacity.

Nominal Spousal maintenance

46. A nominal spousal periodical payments order is a safety net to allow for a future variation application should the circumstances of either party change.
47. A nominal order tends to be made where a payee has young children living with them and where they can support themselves, but circumstances may change during the children's minority.
48. A nominal order may be appropriate, for example, where:
- The payer's financial position might improve with a promotion at work or the payee's financial position may deteriorate due to illness or redundancy;
 - The payer may have artificially depressed his income for the purposes of proceedings and where there is a possibility that that income will increase in the future.
49. Applications for upwards variation of nominal spousal periodical payments orders are rare as it has to be shown that there has been a significant change in circumstances, as with any application under §31 MCA.

50. *North v North [2007] EWCA Civ 760* is the leading case, but the Court have warned that the payer cannot be used as an insurer for the mismanagement of funds by the payee.

Variation of Spousal Maintenance

51. The Court has the power under §31(1) to vary and order for spousal maintenance and is allowed to exercise discretion in doing so, however must be minded to the factors in §31(7) being;

(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen, and the circumstances of the case shall include any change in any of the matters to which the court was required to have regard when making the order to which the application relates, and—

(a) in the case of a periodical payments or secured periodical payments order made on or after the *making of a divorce or nullity of marriage order*, the court shall consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made or secured only for such further period as will in the opinion of the court be sufficient (in the light of any proposed exercise by the court, where the marriage has been dissolved, of its powers under subsection (7B) below) to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments;

(b) in a case where the party against whom the order was made has died, the circumstances of the case shall also include the changed circumstances resulting from his or her death.

52. This also includes a consideration to implementing a clean break after a period of adjustment is considered §31(7)(a). This is a danger for those making an application to vary a spousal maintenance order as the Court may make an order terminating the payments even if the matter is not raised as an issue by the parties.

General principles of Variation

53. In *Pearce v Pearce* [2003] EWCA civ 1054, a three-pronged assessment of the following was established as the guidance for the consideration of the variation of spousal maintenance;

54. These considerations are;

- The variation, if any, that should be made in the order for spousal periodical payments.
- The date from which this variation should take effect.
- The appropriateness in all the circumstances of substituting a capital payment (normally calculated according to the *Duxbury* tables) to replace the income stream being terminated, with a narrow discretion to depart from the tables to reflect special factors generated by an individual case.

55. The Court can and should also consider other relevant factors such as; a significant change in circumstances, evidence justifying variation, fairness, finances, balance of responsibilities (second families), any financial mismanagement, and proportionality.

Varying life orders

56. The Court can and will look to vary a joint lives order if it is just and equitable to do so, such as when an expectation of intentions of the payee has not been met. In *Mr X Mrs X* [2015] EWFC B17 the payments were varied due to the payers declining income, and affordability when he retired was of concern. The payee, and primary carer, had made no effort to return to work despite the Judge at first instance indicating it was clear they could return to part time work once the children were old enough.

Self – Varying

57. The Court may make an order for index linking, to avoid the need for multiple applications for variation to order. Index linking is used to increase the payments inline with inflation. It can be linked with index's such as the retail price index (RPI), consumer price index (CPI), and RPIX which is the same as RPI but excludes mortgage interest payments.
58. As per *Sharp v Sharp [1984] FLR 752*, the Court may also order the automatic increase by the same percentage as the payers salary.

Security for Spousal Maintenance

59. A very rare use of spousal maintenance is those that are secure. These orders require a fund, or backing to be provided to protect against financial changes or circumstance. This type of order is often ordered following very early difficulties in making payments, along with evidence of lies or misconduct of the payer. It can also be on the concerns of the payer not continuing with their obligations with a move out of the jurisdiction such was the case in *C v C (financial relief; short marriage) [1997]2 FLR 26*.
60. The effect of such order is;
- A secured periodical payments order does not automatically end on the death of the payer as the fund will remain after death (*section 28(1)(b), MCA 1973*).
 - The payments are safe and guaranteed so that even if the payer were to declare bankruptcy, lose all their assets or their job, the payments would continue.
61. The payer may also make an undertaking upon consent, to provide for the payee in event of the payers death during the subsistence of any order.