



JUDICIARY OF
ENGLAND AND WALES

Speech by Mr Justice Mostyn to the Devon and Somerset Law Society
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SPOUSAL MAINTENANCE

Where did it come from, where is it now, and where is it going?

1. When the court decides to make an order for spousal maintenance we all know what the legal power for the award is: sec 23(1)(a) MCA 1973. But what is the legal basis for the exercise of the power? Put another way, what are the moral factors that guide the exercise of the power?
2. In his speech *Changes over the centuries in the financial consequences of divorce* (Address to the University of Bristol Law Club) on 20 March 2017 Lord Wilson set out the historical background. He engaged in deep legal archaeology and explained how the Victorian obsession with sex, guilt and fault were the main drivers in the formulation of the originating principles.
3. To recap, briefly, the history: when secular divorce arrived in 1857 sec 32 of the Act of that year empowered the court to award secured alimony after divorce. Unsecured alimony arrived by sec 1 of the 1866 Act. The principles the court applied were those applied by the ecclesiastical court. But that court only awarded maintenance while the marriage endured. It did not do more than to implement the common law duty of a husband to support his wife. That duty, which endured only while the marriage subsisted, derived from the doctrine of Couverture. That ancient doctrine stated that on marriage all the wife's property became that of the husband. In return she gained from him the duty of support which among other things allowed her to pledge his credit for necessaries. Strangely, notwithstanding the economic independence gained by wives by sec 12 MWPA 1882 that privilege endured until 1970, when it was abolished by sec 41 of the MPPA of that year. The common law duty of a man to maintain his wife was not formally abolished until the passage of the Equality Act 2010.
4. Time does not permit me to expound on those many extraordinary cases where tradesmen sued husbands for credit incurred by their wives. I refer only to McCardie J's remarkable judgment in *Callot and others v Nash* (1923) 39 TLR 291, where that far-sighted judge stated:

'The dress of woman has been ever the mystery and sometimes the calamity of the ages... In Mrs Nash's numerous wardrobes there were always fifty or sixty evening dresses for use night by night. Even the most expensive dress she would wear but three times only. Her prodigality was on the same scale in other articles of attire. The price of her stockings was 200 francs per pair. She had many pairs. She would purchase shoes not in pairs, but in several dozen pairs of various sorts at a time. I see that her accounts for shoes with two only of the firms who supplied her amounted in less than a year to more than 10,000 francs. Everything was on the same scale, whether for hats, lingerie or the like. Her catholicity of profusion was remarkable. She threw herself beneath the fatal curse of luxury. She forgot that those who possess substantial means are trustees to use them with prudence, charity and propriety. She forgot that ostentation is the worst form of vulgarity. She ignored the sharp menace of future penury. Dress, and dress alone, seems to have been her end in life. She sought felicity in the ceaseless changes of trivial fashions. Self-decoration was her vision, her aim, her creed. I observe no record of any act of beneficence, no trace of unselfish aid to others; she computed her enjoyment of life by the reckless indulgence of her extravagance. Well was it said by Mr Hazlitt, in one of his essays: "Those who make their dress the principal part of themselves will, in general, become of no more value than their dress."

... When I observe the consequences of Mrs Nash's slavery to fashion, I might well apply the words of Victor Hugo in his "Notre Dame de Paris", and say: "Les modes ont fait plus de mal que les revolutions"; that is, "Fashions have wrought more mischief than revolutions." It is deplorable to observe the unceasing egotism of the defendant's wife and the recklessness with which she plunged into the tide of illicit profusion. She was the mere devotee of fashion, and thus she trod the path which so often leads to financial dishonour. It is a profoundly regrettable story. It springs into prominence at a time when women have gained a full measure of citizenship and wide opportunities for beneficent service. It is revealed at a period when the calls for social efforts are unceasing, and when the contrasts between the different ranks of our national life grow ever more vivid and more significant and more momentous.

It only remains to be said that Mrs Nash disdained the high standard which has been created by the best and most gracious portion of English womanhood. She renounced her duties at the call of empty pleasure. She sacrificed her privileges of social service for the allurements of ignominious folly.'

See [2017] Fam Law 790.

5. It is important to recognise that the power to award alimony after divorce granted by the 1857 and 1861 Acts was entirely novel. As I have said, the common law recognised only a duty to support while the marriage endured and the awards of alimony by the ecclesiastical courts were only for the same term. Thus, there was no duty to support after a decree of nullity. In *Anstey v Manners* (1818) Gow 10, another action in respect of the pledging of credit by the wife, there had been a decree of nullity, as the parties had never in fact been married. Park J said

“..therefore, Mr. Dalrymple [the husband] ceased to be liable for debts contracted by the defendant. The liability of a husband for the debts of his wife does not continue after a [decree of nullity]. If the wife becomes a single woman by operation of law, it is the same as if she had always remained single.”

6. Why did Parliament break the age-old law and create a liability to support after divorce? In *Hyman v Hyman* [1929] AC 601 Lord Atkin explained (at 629):

“I think, however, that the wife is entitled to succeed upon another ground. Her marriage has been finally dissolved upon her petition. The Legislature has invested the matrimonial Courts in such a case with powers to make such provision for the future maintenance of the wife as the Court may think reasonable. Some powers were given by the Matrimonial Causes Act of 1857. They have been extended by the Acts of 1866 and 1907, and are now contained in ss. 190–192 of the Judicature Act of 1925. The necessity for such provisions is obvious. While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife, who can pledge his credit for necessaries as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay her an agreed allowance or fails to make her any allowance at all; or, if she lives apart from him under a decree for separation, he fails to pay the alimony ordered by the Court. But the duty of the husband is also a public obligation, and can be enforced against him by the State under the Vagrancy Acts and under the Poor Relief Acts. When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears. In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse to the poor law authorities. In my opinion the statutory powers of the Court to which I have referred were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support.”

7. Although Lord Atkin is one of my heroes I have to say that the first explanation (“to provide a substitute for this husband's duty of maintenance”) does no more than beg rather than answer the question. The duty of support had a clear legal basis, as I have explained. Why was it in the public interest that this duty should be replicated once the parties' marriage has been dissolved and they were no longer a single economic unit controlled by the husband? The second explanation (“to prevent the wife from being thrown upon the public for support) is as good as far as it goes but again is arguably arbitrary when you reflect that even then there were many couples living together who were not married where on breakdown there was no obligation imposed on the stronger economic party to support the weaker to save her from penury. And, of course, very many more such couples are now living together unmarried.
8. As the old duty had been “substituted” into the new law, conduct inevitably loomed large in the exercise of discretion. Normally it was the wife's conduct that was under scrutiny, but not always. Thus in *Constantinidi v Constantinidi and Lance* [1905] P 253 Stirling LJ held that 'in the exercise of every discretion which is vested in the [Divorce] Court, the Court should endeavour to promote virtue and morality and to discourage vice and immorality'. In that case it was the husband's

conduct that was in question. He had been guilty of desertion and adultery; his claim for a variation of the wife's settled property in his favour was rejected.

9. But, as stated, it was almost always the wife's conduct which was under the microscope. This was logical for as long as the power was based on what has been called the contractual analogy, which reasoned that had she remained married, she would have been entitled to her husband's support and that, since she had lost that entitlement only as a result of his misconduct, he should compensate her. Thus, an innocent wife would be awarded alimony; a guilty wife would not.

10. Sometimes even a guilty wife might be awarded a "compassionate allowance" by way of alimony. Lord Wilson cites the case of *Squire v Squire and O'Callaghan* [1905] P 4. The wife had obtained a decree of Judicial Separation based on the husband's cruelty. Later she formed a relationship and the husband was able to divorce her on the ground of adultery. She was awarded a compassionate allowance of £1 a week, *dum sola et dum casta*. Why? Sir Francis Jenue P (later Lord St Helier) explained:

"In my view, the main ground for ordering him to make her an allowance is not his own conduct in the past, but that she may be reasonably safe from the terrible temptation which might otherwise assail her. The conduct of the husband is not, in my view, materially in issue in dealing with this matter. But, in the view I take of this class of case, it is material that the *dum casta* clause should be inserted. The wife should know and should be made to feel that her livelihood depends on her leading a chaste life in the future. In cases where the wife has not been proved to have committed adultery I should be slow to insert the *dum casta* clause. But, where the wife is proved guilty of adultery, I am of opinion that the strongest pressure ought to be put upon her not to lapse again into sin. I cannot bring myself to believe that Sir James Hannen could have intended as a consequence of his decision in *Lander v. Lander* that a husband should be called on to support a wife who was leading a life of prostitution."

11. Thus, we can see that the law had some kind of underpinning of logic, namely the contractual analogy. But even in the old days things were hardly clear. Cretney states in *Family Law in the Twentieth Century* (OUP 2003) at p 400 "the existence of unarticulated assumptions, coupled with a lack of empirical data about the orders which the court did in fact make over the years mean that it is difficult to determine quite what were the principles upon which the court worked and how far those principles changed over the years"

12. The revised discretionary powers were introduced in 1970. *Wachtel v Wachtel* in 1973 effectively abolished litigation about conduct. 1984 sees the arrival of the steer to the clean break by the enactment of sec 25A in 1984. A new moral or philosophical approach to alimony had surely arrived. Or so we hoped.

13. I tried to analyse all this in *SS v NS* [2015] 2 FLR 1124. At [25] I said

"Although spousal maintenance (formerly known as alimony, but which now perhaps should now be known more accurately as ex-spousal maintenance) has been with us for generations it is a strange fact that there is not much discussion in the jurisprudence of the moral or ethical question of why after the dissolution

of a marriage the law permits the imposition on a party of the obligation to pay spousal maintenance potentially until the death of the payee (even, in the case of a secured periodical payments order, after the death of the payer). While the marriage subsisted the common law imposed a duty on a husband to support his wife. ... Thus in the absence of a power to dissolve a marriage the courts, both common law and Ecclesiastical, enforced that duty by making long term maintenance awards. Prior to the advent of judicial divorce in 1857 a divorce could only be obtained by a private Act of Parliament. The terms of such an Act would invariably require that the husband make some suitable, albeit moderate, provision for his former wife. So there was some kind of precedent for post-divorce alimony.”

14. At [30] I went on:

“In *Miller* Baroness Hale at para 138 explained that the most common rationale for imposing the obligation to maintain into the future is to meet needs which the relationship has generated. Obviously this is a very sound rationale and it is for this reason that the factors of duration of marriage and the birth of children are so important. It is hard to see how a relationship has generated needs in the case of a short childless marriage, although this is not impossible. But where it can be argued that the relationship has generated hard needs why should meeting them be for longer than, say, the Scottish limit? The answer is best given by Lord Hope at para 118 where he explains why the Scottish limit is so unfair: "the career break which results from concentrating on motherhood and the family in the middle years of their lives comes at a price which in most cases is irrecoverable". For many women the marriage is the defining economic event of their whole lives and the decisions made in it may well reverberate for many years after its ending.”

15. A causal connection between the marriage and the claimed needs was affirmed by Lord Wilson in *Wyatt v Vince* [2015] UKSC 14 at [33]:

“In order to sustain a case of need, at any rate if made after many years of separation, a wife must show not only that the need exists but that it has been generated by her relationship with her husband: see *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, para 138 (Lady Hale)”.

16. I attempted to summarise the relevant principles in *SS v NS* at [46] in eleven points:

- (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.

17. This seems to have stood the test of time. It has been loyally followed by Roberts J in *AB v FC* [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”

18. Thus, in making its award the Court looks at causation (relationship generated disadvantage) and seeks to place the claimant on the road to independence. But what of the assessment of the quantum of need? In *B v S* [2012] EWHC 265 (Fam) at [79] I said: “Of course needs are elastic in concept and there is much room for the exercise of discretion in their assessment.”

19. In similar, but fuller, vein in *FF v KF* [2017] EWHC 1093 (Fam), (an early appeal under the new regime of routes of appeal) I said this at [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."

20. It was with some trepidation that I learned this time last year that there was an appeal about spousal maintenance about to be heard in the Court of Appeal. Some so-called friends have described my relationship with the CA as similar to that of the Bourbons with everybody (as stated by Talleyrand): they learn nothing and forget nothing. This I reject although it is fair to say that there have been some differences of opinion.

21. *Waggott v Waggott* [2018] 2 FLR 406 was decided on 7 April 2018. I was surprised and, it must be said, quite relieved when I read the judgment of Moylan LJ to see that *SS v NS* had not, it seems, been cited: there is no reference to it in the judgment. I would venture that the judgment of Moylan LJ is completely consistent with my eleven points. I would highlight the following passages:

"[104] Further, on any application under section 31, subsection (7) requires the court to consider the termination of periodical payments, in the same terms as under section 25A(2). This is combined with the power under section 31(7B) to make a lump sum, property adjustment or pension sharing order and to prohibit the making of any further application. Therefore, if a clean break could not be effected fairly at the time of the first order, it can be implemented on a subsequent application".

[121 – 122] ...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 an entitlement to share? ... In my view, there are a number of reasons why the clear answer is that it is not.

[153] I appreciate that the husband may well have continued to generate a very substantial income and that his financial position will have been enhanced as a result. But, first looking specifically at s 25A(2), it is plain to me that the wife would be able 'to adjust without undue hardship' to the termination of maintenance. To require her to use the above proportion of her award [£950,000] would not be unfair having regard to all the s 25 factors. She would still have free capital of £3.6m and housing of £2.75m. For these purposes, I have not specifically factored in the judge's finding that the wife would be able to obtain employment from late 2019."

22. This was a welcome decision as the idea that a wife receiving total assets of just under £10m should receive in addition life-long spousal maintenance of £115,000 p.a. is frankly ridiculous. My quibble is why the CA, having emphasized the need to consider a clean break went on to award four years of periodical payments. Seriously? Quite apart from the counter-intuitive nature of the award, given the

amount of cash available that surely could have been rolled up and paid upfront, thereby achieving an immediate clean break. The answer is probably that that was what the husband was proposing and the CA might have felt vulnerable had the husband done better than he was suggesting!

23. The case of *Mills v Mills* [2018] UKSC 38 was seen by some as an opportunity for the Supreme Court to consider in depth the modern principles applicable to the law of spousal maintenance. Indeed, leading and junior counsel for Mr Mills had prepared a very full written argument to that end. But those hopes were dashed, the Supreme Court holding closely to the single very limited ground of appeal that had been given. The decision did no more than to affirm that it was wrong to expect a husband to be an insurer of his ex-wife's financial folly and to require him to pay for her accommodation twice over.

24. I revert to the speech of Lord Wilson. He referred to Baroness Deech's Bill which would impose a 5-year limit on periodical payments (extendable in the case of hardship):

"Another hot potato is the possibility under our current law for periodical payments to continue to be made by the husband to the wife for many years following the divorce, sometimes (unless she remarries) even until one of them dies. I well understand that it is a running sore for husbands to have to continue payments long after the divorce; and my experience is that their new wives are often even angrier about it than they are! The obligation can eat into their married life in more ways than one. The trouble is that it is usually unrealistic to tell a wife, left on her own perhaps at age 60 after a long marriage, that, following payments for say three years, she must fend for herself. So we judges have to strike a difficult balance. In my view it betrayed a lack of insight when, last month, one of these peers suggested that, when we do decide to award long-term maintenance, we are motivated by antiquated notions of chivalry."

25. This fetched a furious repose from Baroness Deech [2017] Fam Law 785. She thundered:

"It is also quite wrong that a senior judge should express resentment of Parliamentary scrutiny of the law. The law in question has not been debated for about 40 years and it is high time to question whether it reflects reality and public opinion. It is for Parliament to make the law, and then for the judges to interpret it, not to stifle change.

Moreover, the comments by Lord Wilson do not represent the actual provisions of the Bill. It proposes a 5-year limit on maintenance extendable where there is hardship – and this is in the Bill's context of equal division of matrimonial property, binding pre-nups and longer support of children. The reform has attracted considerable support inside and outside Parliament."

26. In the circumstances I will only say that I support Lord Wilson. But my support will endure only for as long as judges closely follow the messages from the higher courts about giving meaningful effect to the steer in the 1984 Act. The road to

independence is one on which every successful claimant of periodical payments should be set.

27. Finally, I would return to the history. I have referred to Stirling LJ's dictum that "the Court should endeavour to promote virtue and morality and to discourage vice and immorality". You might have thought that such views were locked in the world of 1905, and no more alive now than is Jeremy Bentham's corpse in the foyer of University College. You would be wrong. I have noticed that at the Conservative party conference on 2 October 2018 Lord Farmer gave speech which was reported in the Huffington Post as follows:

'Farmer, who converted to Christianity age 35 and is on the right of the party, said one or both partners should take blame when they "fail to live up to the promises made" at their wedding.

He said: "It is simply another example of the hyper-liberalism that treats family breakdown as inevitable.

"Making marriage easier to exit and sanitising divorce may make it less painful to the adults involved, but it is far more likely to weaken the institution of marriage than strengthen it.

"It will render marriage more voluntaristic and like cohabitation with its assumption that a couple may only stay together whilst it works for both of them.

"Marriage on the other hand is a solemn vow, an explicit statement of commitment, 'until death'. Saying it's no-one's fault when one or both parties fail to live up to the promises made empties those promises of all meaning."

He added: "I would go further and say support for no-fault divorce is lacking in morality."

28. In response to this I would refer to the speech of Sir James Munby to the Law School, University of Edinburgh, on 20 March 2018: *Changing families: family law yesterday, today and tomorrow – a view from south of the Border*. In it he explains with his usual clarity just how long ago the judges lost the battle to be *custos morum*; that the philosophical battle between Stephens J and Mill in the 19th century and between Devlin J and Herbert Hart in the 20th, was well won by the philosophers. Thus, Sir James rightly states:

"Judges are no longer *custos morum* of the people, and if they are they have to take the people's customs as they find them, not as they or others might wish them to be. Once upon a time, as we have seen, the perceived function of the judges was to promote virtue and discourage vice and immorality. I doubt one would now hear that from the judicial Bench. Today, surely, the judicial task is to assess matters by the standards of reasonable men and, of course, women."

29. So, too, parliamentarians, I suggest. I would further respond to Lord Farmer by citing, as did Sir James, the Victorian wit, writer and Anglican cleric Sydney Smith (as quoted by ES Turner in *Roads to Ruin: The Shocking History of Social Reform*,

first published in 1950 and dedicated to Colonel Blimp: “Gad, sir, reforms are all right as long as they don’t change anything.”). The Reverend famously said:

“There are always worthy and moderately gifted men who bawl out death and ruin upon every valuable change which the varying aspect of human affairs absolutely and imperiously requires.”

30. I conclude by repeating Sir James’s final citation from Turner’s book:

“Our ancestors thought it absurd that wives should wish to keep their own earnings; our descendants may be astonished at our system which forces a man to maintain a woman, sometimes for life, after a hopeless marriage has been disrupted. It is likely that our descendants will derive ... much heartless fun from contemplation of our divorce laws, and the reasons we use to defend them.”