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## Case Update Flyer Issue 6 **Lauder v Lauder [2007] EWHC 1227 (Fam)**

### **Introduction:**

**1.1** Although the facts of the case were a little unusual, this judgment is a further decision, which continues to add to the weight of authority supporting the approach that the Court is now to address in many cases, the element of compensation for either the loss by a spouse of a career or a loss of the other spouse's higher earnings base following a divorce as a relationship generated disadvantage arising from the way the parties have adopted their respective roles in the marriage (and in this case also subsequent thereto in the care of children).

**1.2.** There is, undoubtedly, a present broad reluctance in the judiciary at the district judge level to step into the waters of compensation willingly. It is to be hoped this will be as short lived as it is short sighted.

### **The Case:**

**2.1** A decision of Baron J, on appeal from the county court, which involved a wife's application for a variation of an order for periodical payments made originally in 1988. The parties' marriage had lasted for 24 years and there were three children who on the divorce (in June 1988) aged 20, 18 and 14. The parties had owned a holiday property abroad and had had a good lifestyle. On divorce the wife, who was by then aged 50,(now 70) was awarded periodical payments of £8,000 p.a. during joint lives basis, (i.e. 35% of the husband's then net income) and 26% of the net assets (a pre *White v White* [2000] 2 FLR 981 decision).

**2.2** Unusually, the order were not implemented for a number of years as a result of the parties agreement that the wife should remain in the matrimonial home with the children and the husband would meet the property outgoings and provide the wife with £50 per week. The wife had continued after the separation to care for the youngest child for 6-7 years and she had worked as a secretary, earning up to £23,500 p.a. before retiring at age 62. The Court specifically found that her income resources were never enough for her to be able to save significant sums so as to enable her to be financially secure and self sufficient in retirement.

**2.3** The matrimonial home was sold in 2003 whereupon the wife received £414,000 (the husband £314,000) from the proceeds of sale and she then applied for an upward variation and capitalisation of maintenance.

**The District Judge Decision:**

3. The district judge found that the husband, now 68, was now worth c £4.5m and had a net income of £200,000 p.a. for the foreseeable future and, therefore, a surfeit over his “needs” of over £150,000 p.a. net. The wife’s assets amounted to £487,900, mainly held in her home, and her net income was £6,600 p.a. plus her periodical payments. The district judge awarded the wife periodical payments of £40,000 p.a. capitalised at £500,000. The wife had claimed her income needs to be £43,600 pa net. The wife appealed.

**The Appeal Decision:**

4.1 On appeal, Baron J found that when contrasting the wife's attempts to become self sufficient in obtaining work as a secretary at age 50, her earning capacity before her retirement had been limited as a consequence of a long marriage and the parties’ agreement that she would be a housewife and mother (a “relationship generated disadvantage”). Her pre-retirement income (£23,500 pa net) had been insufficient, the Court found, to enable her to save enough for a secure and comfortable retirement.

4.2 The Court granted the appeal and awarded the wife capitalised periodical payments of £725,000, reflecting (Duxbury) net spendable income in the region of £65,000 p.a. inclusive of net pension and benefits.

4.3 The Court’s approach was to apply the **section 25** considerations in the light of the guidance given by the House of Lords in [McFarlane / Miller \[2006\] UKHL 24, \[2006\] 1 FLR 1186](#).

“65. In the context of a marriage which lasted 24 years and produced three children, this lady did her best after divorce and continued to spend many years caring for the younger child of the family. Despite her disability, given that she was 50 years old when the parties separated, the wife had a modest earning capacity. This was a direct result of the marriage and the parties' decision that she should be a wife and mother. This disadvantage requires proper compensation. The District Judge was therefore plainly wrong in her interpretation of generous provision in the context of this case and in the light of the subsequent decision of *Miller v McFarlane*. I do not seek to ascribe blame to the District Judge because she did not have the benefit of their Lordships' decision. However, given the amount of additional capital, her decision was plainly insufficient to cover any generous view of needs.....

66. The 1988 deal provided this wife with a high proportion of the husband's net income. This is a relevant circumstance under **section 25** which I must take into account. I accept it is not solely determinative in percentage terms but it is one of the background factors in this case.

67. So far as compensation is concerned, the assertion on behalf of the husband is that this lady has not suffered any relationship generated disadvantage. This submission is made in part because so many years have passed since the final divorce in 1985. I do not accept that assertion. This wife, who suffered ill health during the course of the marriage, could never,



after 24 years of marriage at the age of 50 years, be expected to earn substantial sums of money which would enable her to save sufficient to look to her own resources in old age. Her salary, at its zenith, was just over £23,000 per annum gross that was about one tenth of the husband's net income. Her caring role within the family inevitably affected her ability to generate income or assets as she grew older. When this marriage came to an end she was past the age of being able to start a career anew.

68. Despite the fact that these parties divorced in 1985 (separated finally in December 1987) and came to terms so far as capital was concerned in June 1988, they did not implement the order. Their agreement was based on the fact that the wife would continue to receive proper support for the rest of her life. The fact that they did not implement the order means that they both agreed to go into economic limbo so far as the other was concerned. They both accepted that this was the right way forward for them. The economic result of this is that the wife did not make any applications in the intervening years for an increase in her maintenance. By the same token, the husband did not apply to dismiss her claims. To that extent this is a very unusual case.

69. The result is that the economic disadvantage to the wife, because of their agreement, is much greater than that of the husband. To an extent it has endured in the intervening years. On analysis, therefore, this case merits an award which includes an element of compensation for relationship related disadvantage. This wife cannot claim to be a Mrs McFarlane, but there can be little doubt that the length of the marriage and her age at separation put her at a severe disadvantage in the labour market. She did not have an ability, given the manner in which these parties conducted their life and their suspension of the 1988 order, to make herself fully independent given that she is 70 years old.

70. I do not consider that this case merits any provision for "sharing" the husband's wealth. Even though this is an unusual case the capital claims have already been dealt with and I am clear that this application cannot be used as a basis to distribute capital by the back door. Accordingly, where the husband has been successful since the separation and some 20 years have elapsed, no element of sharing is to be provided.”

**4.4** In summary, therefore, the Court determined as follows, namely, that:-

(a) The wife's needs, in the circumstances of the case, should be "generously interpreted" (see **Cornick (No 3) (2001) 2 FLR 1240**, as approved by Lord Nicholls in **McFarlane / Miller (2006)**, where the resources now available to the payer so enable) ;

(b) The facts justified an element of compensation because the wife had suffered a severe disadvantage in the labour market an, I the circumstances this was “ relationship generated”;

(c) It was relevant that being a pre-White case, the wife’s income receipt, post the original order, had been a high proportion of the husband's income, possibly reflecting her lower receipt proportionately of the available capital and this was a relevant circumstance, although not determinative;



(d) Upon the variation, sharing was not appropriate, in this case where there had been a previous capital distribution, since to do so would result in “a second bite of the capital cherry” (see **Pearce (2003) 2 FLR 1144**).

#### **“Conclusions**

79..... I consider that the district judge was plainly wrong when she assessed this wife's variation claims at a level of £40,000 per annum and capitalised it at £500,000. I consider that the figure was plainly too low in the context of this case, the wife's needs as "generously interpreted". I take into account her right to have an element of compensation. I do not consider it is right to seek to separate those two factors in delineating my figure. I consider that the right lump sum for the termination of her periodical payments is a total of £725,000. On a Duxbury type of formulation this would provide the wife with somewhat less than £60,000 per annum net, in addition to which she will have £6,600, being her attendance allowance and net pension. She will then have a total net spendable income in the region of £65,000, if she decides to spend all her income in that way. However, if she uses her funds more wisely it would enable her to have sufficient additional capital to deal with unforeseen circumstances (even giving allowance for the small amount of her own capital that I have already outlined). This will enable her to deal with the additional expenditure which often comes with age and increasing ill health. The House of Lords made it clear that there is no reason why one party to the marriage should die with no savings.

80. I consider this to be fair in the outcome of this case. This wife is entitled to spend her latter years without undue concern so far as finances are concerned. She will have an income of about £60,000 under a Duxbury type of calculation together with her own income and this represents about 30 per cent of the husband's net spendable income. It is in line with what was originally agreed and is a fair division, given his additional work since 1985 and the wife's needs and rights to compensation. In fact, the Duxbury figure for £60,000 is £734,000 but I have rounded it down because I consider that is fair. That is the figure that this husband will pay to capitalise her claims.”

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