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Mapping out Wanton Behaviour: MAP v MFP

Barrister, Ashley Murray Chambers, Liverpool

Ashley Murray is one of the few senior Circuit specialists outside London with a recognised big money ancillary relief practice. He is known for his knowledge and ability in this area of the law and his detailed preparation and attention to his brief.

Introduction

The Court of Appeal in *Vaughan v Vaughan* [2007] EWCA Civ 1085, [2008] 1 FLR 1108, established the current test for reattribution within a divorce financial remedy claim where there has been a wanton dissipation of resources. In *MAP v MFP (Financial Remedies: Add-Back)* [2015] EWHC 627 (Fam), [2015] 2 FLR (forthcoming and reported at [2015] Fam Law 522) it is suggested, Moor J has sought to introduce a requirement of proof of an intention to reduce the other spouse's share of the resources as part of the definition of what constitutes wanton behaviour – a suggestion which is unsupported by the prevailing case law. For the purposes of illustration, it is necessary to set this position in the context of the development of the principle of reattribution both pre and post the decision in the *Vaughan* case.

Relevant conduct

Consideration of 'Conduct' under s 25 of the MCA 1973, as first introduced, was described as follows:

> 'It shall be the duty of the court in deciding whether to exercise its powers . . . in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say –
>
> > … and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.'

The current wording of the section following amendments under the Matrimonial and Family Proceedings Act 1984 is:

> '25(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, or 24A above and, if so, in what manner, to 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.
>
> (2) As regards the exercise of the powers . . . in relation to a party to the marriage, the court shall in particular have regard to the following matters –

(g)the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it …'

Both Lord Nicholls and Baroness Hale in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 confirmed that the changes introduced by the 1984 amendments had not altered the established approach by the courts to the way conduct should be taken into account. Lord Nicholls stated (at para [63]):

> 'Parliament gave effect to this recommendation in paragraph (g) in the new section 25(2) introduced by the Matrimonial and Family Proceedings Act 1984. One of the matters to which the court should have regard is "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it". It is implicit in this provision that conduct outside this description is not conduct which should be taken into account.'

Baroness Hale stated (at para [145]):

> 'Section 25(2)(g) is quite clear: the court has to have regard to the parties' conduct if it would be inequitable to disregard it. In the olden days, when all the assets were assumed to be the breadwinner's and he was making an allowance to enable his wife to live separately from him, the wife's conduct might reduce the allowance she would otherwise have needed or even extinguish it altogether. She had therefore to be 100% blameless in order to be sure of her conventional one-third share of his income. In theory, if she were 50% to blame, her share might be halved, although in practice the divorce courts were more flexible than that (but see, for example, the approach in *Ackerman v Ackerman* [1971] 3 All ER 721, [1972] Fam 1, where a wife who was assessed as 25% to blame for the breakdown of the marriage was subject to a 25% discount from what she would otherwise have received). But once the assets are seen as a pool, and the couple as equal partners, then it is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in*Wachtel v Wachtel* [1973] 1 All ER 829 at 119, [1973] Fam 72 at 80, the conduct had been "both obvious and gross". This approach is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases. Yet in *Miller v Miller*, both Singer J and the Court of Appeal took into account the parties' conduct, even though it fell far short of this. In my view they were wrong to do so.'

Financial misconduct

(A) CASE DEVELOPMENT

In *Martin v Martin* [1976] Fam 335 financial misconduct in a divorce case was first highlighted by Cairns LJ who said:

> 'A spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what was left as he would have been entitled to if he had behaved reasonably.'

In the *Martin* case the conduct in question was that the husband had undertaken a number of unsuccessful property transactions with his cohabitee after his separation from the wife and had thereby given rise to significant financial losses to the parties. The parties were farmers whose childless relationship had lasted 26 years. Whilst the facts of *Martin* gave rise to a consideration of extravagant or reckless spending – it is unlikely that on any reading of those same facts, a court today would regard what the husband did as 'wanton'. In particular, he with his cohabitee had bought and attempted to develop small businesses in the form of a guest house and a small farm, the latter having lost money. By contrast, the wife who had stayed on the marital farm had in the same post separation period built up its value. The Court of Appeal's analysis, therefore, was that in fact the husband post separation had spent his half of the parties' money in a way he would not have done had he remained living on the marital farm and overall under the s 25 exercise, as then worded, it would not be fair to the wife to ignore the losses the husband had incurred. The key to understanding the approach then being adopted by the Court of Appeal is to remember that at that time the conduct provision was still linked to the statutory ambition of attempting to place the parties back into the financial position they would have been in had the marriage not broken down.

Post the 1984 amendments, in *Primavera v Primavera* [1992] 1 FLR 16, CA, the wife had inherited a house under her mother's will and subsequently she gave effect to her late mother's wish that the equity of the house should be shared with the wife's two daughters, even though there was no legal obligation to do so. Thereafter, in the divorce financial proceedings, the husband argued that the wife's conduct in disposing of such an asset should be taken into account. The judge determined this would be unfair and the Court of Appeal likewise, in dismissing the husband's appeal, were of the view that the wife's conduct, whilst relevant, was not unreasonable in the circumstances, and had to be set against the fact that the husband was a man of substantial wealth. However, the Court intimated that the result could have been different had the parties' resources been more modest. Both Ralph Gibson and Glidewell LJJ held that what the wife did was relevant under 'all the circumstances of the case', whilst alone Butler-Sloss LJ also considered it could amount to 'conduct which it was inequitable to disregard'.

Thereafter, in *L v L* [1994] 1 FCR 134, Thorpe J dealt with a case where the parties had been married 40 years and had two adult children. The husband claimed financial provision on the divorce. The parties had acquired several properties in the marriage in the wife's sole name, albeit essentially the husband had had sole control of the parties' finances throughout their relationship. Initially, the parties had prospered but then the financial decisions of the husband resulted in a significant decline in the finances exacerbated by the husband's gambling addiction. The wife had eventually taken over control resulting in the family wealth

becoming more secure. When the breakdown occurred however, the husband only had his pension, whereas the wife retained the property portfolio. The husband sought a half share overall after such a long marriage. Thorpe J disagreed and had particular regard to the husband's gambling. He stated:

> 'I am quite satisfied that the husband has throughout the marriage been a regular gambler. I am not in a position to determine the scale of that but gambling is an addictive habit, once it becomes addictive then self control is often powerless to contain its scale, and, whether the habit of gambling in its most obvious form or whether the habit of gambling in trade, I am perfectly satisfied that some of the family's financial decline and certainly the occasional crises that the wife describes were the products of this weakness.'

In consequence, Thorpe J determined that it was only the husband's needs which would be determinative of the outcome under the statutory exercise. Accordingly, the husband recovered only a reasonable provision for his needs capitalised in a *Duxbury* award to meet his future expenses including renting alternative accommodation – a recovery substantively below a half share.

In *Beach v Beach* [1995] 2 FLR 160, the parties had been married for 10 years. Here, too, the husband owned a farm which at the outset of the marriage had secured creditors. The wife agreed to invest monies in the farm on the basis she would get her money out by a set time. That date passed by and it was later agreed she could get her money out by a sale within a further given period. Again that date passed and the marriage broke down when the husband refused to sell and also became violent towards her. The parties separated and subsequently the husband was made bankrupt. The wife recovered some of her money within the bankruptcy.

After being discharged as a bankrupt and living on benefits, the husband claimed that he should be entitled to a lump sum from the wife, who was now living in financially improved circumstances. Thorpe J provided the husband with a lump sum of £60,000 for a modest home. In doing so, he stated that at the heart of the case was the husband's own responsibility for his financial misconduct which had unrealistically continued to financial disaster. The lump sum award would, therefore, be provided only to meet his basic needs rather than his claim to be entitled to additional capital to enable him to start up business again. Thorpe J stated (para [536]):

> 'He obstinately, unrealistically and selfishly trailed on to eventual disaster, dissipating in the process not only his money but his family's money, his friends' money, the money of commercial creditors unsecured and eventually his wife's money in so far as the disaster that eventually developed did not even pay for her specified agreed sum. It would have been in her interest, it would have been in his interest, had she forced him into accepting a properly marketed sale in the 1980s. She cannot be blamed for having failed to achieve that result. She secured formal agreement, she obtained orders in Chancery. But I can understand how difficult it must have been for her, living under the same roof with somebody so deluded. The responsibility is, in my judgment, not shared, not hers, but his'.

In the same year Thorpe J again dealt with a claim where financial conduct was relevant to the eventual distribution. In *M v M (Financial Provision: Party Incurring Excessive Costs)* [1995] 3 FCR 321, the parties had been together 14 years and had two children. The husband was a builder and entrepreneur. Three homes had been developed by the parties, the last one only of which was left when the court determined the matter and this had realised on sale c £780,000.

The court concluded that the husband had during the few years since the parties separated, excessively indulged in numerous and mainly unnecessary applications before the courts resulting in significant litigation costs in the process. Thorpe J observed that whilst normally this would be seen as 'litigation conduct' to be addressed in an order as to costs alone, the scale of this misconduct meant it was to be regarded as 'conduct which it was inequitable to disregard' under s 25(g). Thorpe J stated (para [33]):

> 'Conduct is only relevant in so far as the wife relies upon the manner in which the husband has conducted these proceedings. Ordinarily speaking, it seems to me that the manner in which proceedings are misconducted is to be reflected in orders for costs rather than directly in the scale of the awarded sum. However, this seems to me to be a quite exceptional case where the husband's strategy has been so gross and so extreme that it would be inequitable to disregard it. It seems to me that it is appropriate to look to the quantification of the wife's share not of what remains today but of what would remain today had that policy of waste and destruction not been pursued.'

These decisions were followed by *Clark v Clark* [1999] 2 FLR 498, CA where undue influence had been exercised by a wife in a short marriage resulting in part of the husband's significant assets being brought under her sole control. The wife's actions were held to be serious financial and general misconduct resulting in the court providing her with a limited distribution only to meet her basic needs.

In *Norris v Norris* [2002] EWHC 2996 (Fam), [2003] 1 FLR 1142 the court considered the divorce distribution in a 16-year marriage where there was one child. The wife had received considerable capital gifts from trusts and inheritance. The husband for his part had operated a computer company with a large turnover. In determining what was fair, Bennett J determined on the wife's application that when providing for her to retain a one half share of the parties' resources it was appropriate to take account of the husband's high over spending over income during the 2 years before the hearing. Bennett J stated (at para [77]):

> 'The overspend, i.e. the expenditure over income of £350,000 in a little over two years, at a time when he was about to and then did enter into protracted litigation with the wife, can only be classified as reckless, and particularly at a time later on when the dot.com and the stock market collapsed. A modest overspend in the context of a rich man would be understandable and could not be classified as reckless. But in the circumstances of this case, as I have set them out, in my judgment the scale and extent of the overspend was reckless. I do not think it appropriate to add back the entire overspend, but I do not consider it unfair to add back into the husband's assets the figure of £250,000. In my judgment there is no answer that the husband can sensibly give to the question, "Why should the wife be disadvantaged in the split of the assets by the husband's reckless expenditure?" A spouse can, of course, spend his or her money as he or she chooses, but it is only fair to add back in to that spouse's assets the amount by which he or she recklessly depletes the assets and thus potentially disadvantages the other spouse within ancillary relief proceedings.'

Thereafter, in *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 the same judge notionally added back or re-attributed monies into the wife's settlement to reflect what he found as her reckless post-separation spending, which, in the judgment itself, formed just part of his Lordship's overall judicial denouncement of the wife's level of claimed 'needs' spending as one which was simply ridiculous.

(B) TAKING STOCK

The test as to whether financial conduct should or should not be taken into account had by this stage reached an unsatisfactory position, it is suggested, whereby the practitioner could have been excused for some degree of confusion as to whether the same was to be regarded as part of the s 25(2)(g) general conduct '. . . which it was inequitable to disregard' and which had to be both 'obvious and gross' to be accounted for or whether there had developed a distinct separate class of conduct in a financial context, the test of which depended upon whether it was to be regarded as having been the result of 'reckless' behaviour.

Indeed, this emergence of recklessness as the measure of such relevant financial conduct had itself developed unsatisfactorily from the Court of Appeal's earliest assessment (see the *Martin* case above) in this arena wherefrom it appeared that simply the unsuccessful (as opposed to reckless) financial investment of one spouse when compared with the financial prudence of the other spouse had justified under the repealed legislative tail of seeking to put the parties back into their pre breakdown position, a judicial readjustment on divorce of the parties' eventual resources merely because it was considered just to do so.

The author recalls that this lack of consistency in approach led to there being many cases at a local level where it was only necessary for one of the parties to allege of the other that he/she had been responsible for extravagance in spending or his/her financial dealings had resulted in an unexpected loss to the resulting resources for distribution to result in the evidence being admitted by the court, if for no other reason than it was potentially relevant under 'all the circumstances of the case'. In turn, this led to the issue of the parties' spending both during and after the end of the marriage, becoming almost the default issue in every case on a contested divorce ancillary relief claim – resulting in both higher costs and delay in gathering the disclosure required and ultimately in a greater level of uncertainty as to what would be the fair outcome – thereby, in turn, reducing the incentive to and the likelihood of achieving settlement. Such a position was often eventually exposed as entirely wasteful of both the parties' resources and the court's time, when in judgment the court found reason to ignore the impact of the alleged spending conduct as irrelevant to the fair distribution outcome.

(C) *VAUGHAN*

In Vaughan (see above) the Court of Appeal in the guise of Wilson LJ (as he then was) took the opportunity to place a restraint on this growing area of wasteful dispute between divorcing spouses. The facts of that case are not essential to an understanding of the point at issue save that the court below had ordered a sale of the family home and for the wife to receive an imbalance of the net proceeds substantially in her favour. The husband confessed to having spent a large sum of money since the separation on gambling. The district judge found that in that regard the husband's conduct had been 'bizarre and inexplicable and, objectively, profoundly irresponsible' but that it had been largely attributable to his illness and that no moral blame was to

be attached to it. The wife submitted that, irrespective of the morality of the spending, she should not be prejudiced by such irresponsible expenditure and therefore the sum spent by the husband should be re-attributed to him. Wilson LJ referred to the long line of authority, which he maintained supported the approach of a court taking account of such conduct but added:

> 'The only obvious caveats are that a notional re-attribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton element) and that the fiction does not extend to treatment of the sums re-attributed to a spouse as cash which he can deploy in meeting his needs, for example in the purchase of accommodation …'

The question of moral blame in the light of the husband's suggested mental health problems was to be considered later in the judgment (at para [28]) where it was said that:

> '(The Circuit Judge found) "… the simple fact [is] that the husband dissipated, without any explanation that satisfied the district judge, sums of between £100,000 and £175,000 . . .
>
> Whatever the mitigation, and irrespective of the district judge's finding that this was all part and parcel of his mental illness at the time, it remains a fact and it seems to me that the district judge was wrong in not reflecting that fact in some way."…
>
> No doubt there are cases in which the mental incapacity of the dissipating spouse is such as to render reattribution unfair; but I agree with the circuit judge that the husband's problems were not of that severity.'

Accordingly, in *Vaughan* the Court of Appeal reaffirmed the imbalance of distribution between the parties of their resources on divorce as reflecting amongst other matters the 'wanton' expenditure incurred by the husband.

Post *Vaughan*, therefore, it appeared that to establish the ground for a re-attribution or notional adding back of already dissipated resource value there needed to be:

a)'clear evidence of dissipation'; and
b)'a wanton' element; and
c)in the adding back process, the notional amount that is to be taken account of must not be that needed to meet the other spouse's needs, including accommodation etc.

Of course, the use of the word wanton is itself not without some uncertainty in meaning or boundary. Wanton has a number of meanings beyond those suggested by the above cases and in definition can be taken to mean 'unrestrainedly excessive', but can also mean 'to squander or waste' or to do something 'without motive, provocation or justification'. In addition, during the course of his judgment in Vaughan, Wilson LJ approved a quote from *Norris* in regard to such behaviour in which, of course, Bennett J had referred to the requisite financial conduct as requiring 'reckless' behaviour. Whether 'wanton' or 'reckless' it remained uncertain to what degree motive would affect the weight of such behaviour.

(D) CONTINUED DEBATE

Of course, no discussion in any area of divorce distribution currently could be considered complete without the intervention of Mostyn J. In *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] EWHC 586 Fam, [2011] 2 FLR 533, when dealing with a wife's claim for re-attribution on the basis that the husband had alienated marital resources into their child's account and a family charity, Mostyn J rejected the claim for the following reasons (para [39]):

> 'Quite apart from the fact that these sums are de minimis in the context of the case I roundly reject W's criticisms. In this country we have separate property. If a party disposes of assets with the intention of defeating the other party's claim then such a transaction can be reversed under s 37 MCA 1973. Similarly, where there is "clear evidence of dissipation (in which there is a wanton element)" then the dissipated sums can be added back or re-attributed (see *Vaughan v Vaughan* [2008] 1 FLR 1108 at para 14). But short of this a party can do what he wants with his money. What is not acceptable is a faint criticism falling short of either of these standards. If a party seeks a set-aside or a re-attribution then she must nail her colours to the mast.'

In *GS v L (Financial Remedies: Pre-Acquired Assets: Needs)* [2011] EWHC 1759 (Fam), [2013] 1 FLR 300, King J (as she was then), in declining on the facts before her to find any basis for reattribution, summarised the court's approach to its reattribution powers as follows:

> '91. In the reported cases the courts have, therefore, taken into account the extent, timing and nature of the alleged wanton dissipation and set it against the backdrop of its general assessment of the overspending party. Against that backdrop, the courts have then moved on to consider to what extent fairness requires there to be a degree of 'add back' and, in doing so, exercised considerable caution, bearing in mind that fictional money cannot be used to meet a party's housing or other needs.'

In *BJ v MJ (Financial Order: Overseas Trust)* [2011] EWHC 2708 (Fam), [2012] 1 FLR 667, when also rejecting the adding back of gifts made by a husband to an adult child, the stance adopted by Mostyn J was that a court should be very cautious in undertaking an add back exercise and the power exercised only when justified where the dissipation had been 'demonstrably wanton'. Applying such a test meant in his view these gifts could qualify. However, Mostyn J was obviously concerned about the approach at law to add backs generally. He stated:

> 'Although intellectually pure, the problem with this technique is that it does not re-create any actual money. It is in truth a process of penalisation. In my judgment it should be applied very cautiously indeed and only where the dissipation is demonstrably wanton. I am not satisfied that here the gifts to Care are to be characterised in this way. True, the timing is suspicious, but other than that there was no evidence that the gifts were anything other than bona fide. They would represent sensible IHT planning anyway. I therefore decline to add the gifts back. Generally speaking, I suggest that it would be altogether better where a reversal of a transaction is sought, that it is made pursuant to s 37 MCA 1973, where the disponee can be heard and where strict statutory criteria must be met.'

In *BP, KP and NI (Financial Remedy Proceedings: Res Judicata)* [2012] EWHC 2995 (Fam), [2013] 1 FLR 1310, Mostyn J again dealt with the issue of re-attribution within a number of preliminary issues of the case. His Lordship could find no justification at such a preliminary stage to deny the wife's pursuit of re-attribution, but cautioned that such re-attribution claims would only be upheld 'very sparingly indeed' and where the 'dissipation is deliberately wanton'.

Mostyn J further rejected the proposal that he should deal with the merits of the add-back arguments at a preliminary stage and considered that such allegations would have to be scrutinised at the final hearing in cross-examination of the parties and inspection of the relevant documents. It had been argued that based upon an earlier decision of Purchas LJ in *Scallon v Scallon* [1990] 1 FLR 194 re-attribution was a matter concerned with excessive dissipation of assets after a breakdown of marriage only. Unable to see the logic of such a limitation, Mostyn J unceremoniously despatched this submission by reference to the 'sea change' in the court's approach since *White* where the key function was now to determine the size of the resource pool against which the sharing principle was to be applied – a notion or approach which Mostyn J stated had not existed in the earlier authorities on financial conduct.

In *AC v DC (No 2)* [2012] EWHC 2420 (Fam), [2013] 2 FLR 1499, Bennett J considered the issue of whether side letters agreed to by the husband or on his behalf by his attorneys as his agents and which had allegedly resulted in a pending loss to the parties of resources had been intended to have such a consequence in view of the husband's alleged lack of capacity. His Lordship considered, following *Vaughan*, that such considerations of the husband's mens rea were irrelevant an inapposite concept in this area of the law' (see para [82]).

These authorities, therefore, clearly suggested that the pre-*White* approach to such financial conduct was now less instructive and that indeed financial conduct giving rise to the discretionary power to consider re-attribution was but another category of 'conduct which it was inequitable to disregard' under s 25(2)(g). However, inconsistency of description had continued in the use of 'wanton', 'demonstrably wanton' and 'deliberately wanton'.

In *Evans v Evans* [2013] EWHC 506 (Fam), [2013] 2 FLR 999, the husband's alleged excessive post separation spending ($1.5m) was claimed by the wife to justify an add back against him. In judgment, Moylan J considered a power of re-attribution was required since without the same:

> '(a) Parties would have little incentive to behave reasonably but rather would have an incentive to spend what they could pending resolution. However, in addition, reattribution must be justified in the context of the case. It is a form of conduct and as such it must be inequitable to disregard it;'

And:

> '(b) There is, therefore, an evidential element – is there clear evidence of wanton dissipation – and a legal/discretionary element – would it be inequitable to disregard it or, to put it another way, is notional reattribution required in order to achieve an outcome which is fair?'

In Moylan J' assessment of the case before him, the wife had not made out her full allegation against the husband and such as she had established was not a level of spending which would have made any significant difference when set against the overall values involved.

In *US v SR* [2014] EWHC 175 (Fam), Roberts J dealt with a number of complex issues in a 62 page judgment involving multiple cross allegations of misconduct between the spouses. Part of these allegations was that the wife had disposed of some of the parties' assets at a substantial undervalue and Roberts J had to consider the position as to the court's powers of reattribution. In line with *N v F* and the cases following (as above), Her Ladyship determined that the established principles were that one spouse could not be permitted to 'fritter away or dispose recklessly' of resources and then claim on divorce distribution a share as they would have been entitled to had they behaved reasonably. However, notional re-attribution had to be exercised very cautiously by reference only to clear evidence of dissipation, which included a wanton element and when the reattribution did not undermine the real resources to meet that spouse's needs. Where the resources had been disposed of, the court's powers could only be deployed where there had either been an actual intention to defeat the other party's claims or there had been such a wanton dissipation.

(E) *MAP V MFP*

Into this setting has now appeared the case of *MAP v MFP* (see above) in which Moor J dealt with a divorce involving a very successful family business in which he rejected a claim of an add back in relation to dissipated funds. The parties had been married 40 years. The husband held 95% of the shares in the family company and the wife the remaining 5%. The court found all the asset values had emanated from the marriage and the parties had made equal contributions.

The husband had serious problems with cocaine and alcohol addiction. It was estimated that c £230,000 had been spent on his unsuccessful treatments and that the husband had spent a further c £6,000 per week on his drug and alcohol habit. He had been in rehab and discharged himself and at the trial his problems with cocaine reportedly continued. In addition to this, the husband had spent excessively in other areas resulting in findings by Moor J of wastage of the parties' capital and he had been engaged with prostitutes. The husband had further authorised the wife being locked out of the business and she was summarily dismissed for gross misconduct, her salary was stopped and she had been forced to live on her savings. Both parties lifestyle spending had been high generally.

The family had non company assets of £4.5m with liabilities of (£2.8m), the majority of which were held by the husband and substantially related to a tax liability of (£871,000) and a director's loan of (£1.81m). The husband's company net value was c £20m and the wife's 5% was valued at c £1m, though she had lost her entrepreneur's relief by her suspension and dismissal from the company. The company could pay c £1.1m to £1.2m income and the husband was able to borrow secured loans of £3.185m personally. The wife claimed half of the asset values and an add back of an additional £750,000 (based on an alleged overall loss by dissipation of the parties' resources of c £1.5m) as compensation for the loss of half of the husband's excessive spending, including that on his addictive and personal expenses.

Moor J found this was clearly a case where needs could be met and it was plainly a sharing case. He then, in reviewing the financial conduct cases set out above, determined that, in making findings about wanton dissipation of funds justifying intervention by the court, findings by the Court as to motivation were very important to that exercise. His Lordship found that the husband was a very complicated personality in the light of 'his demons'. He had behaved foolishly in respect of the litigation and he had been wholly responsible for the wife's suspension and dismissal from the company, and her income being abruptly ended and he found that suspension and dismissal had cost her £271,800 by way of lost entrepreneur's relief, which sum he found little difficulty in attributing back to her account.

The wife's case as to the add back of £1.5m, represented monies spent by the husband on credit cards, cash, personal, holiday property works, drugs, prostitution and drug rehab expenditure, over a two year period post separation. Moor J concluded that the family expenditure during this period was £1.7m pa and part had in fact been spent on the family or on the wife in this amount, but that the husband had spent overall £250,000 on cocaine and prostitution and significant other sums in avoidable works to both parties' overseas villas.

Moor J commented that, whilst he noted the wife had made an open proposal ignoring any add-back which was rejected by the husband, this fact did not undermine her argument for an add-back. The parties were to be encouraged to make open proposals as early as possible and it remained open to the court to ignore any

proposal completely and decide a case entirely on its merits, awarding more than offered in the appropriate case. Moor J stated (at para [87]):

> 'Before I deal with my conclusions, I propose to deal with two matters raised by Mr Molyneux in relation to add-back that I do not accept. First, it is correct that in October 2014 the Wife did make an open proposal to divide the assets equally without add-back. Mr Molyneux attempted to rely on this as evidence of the injustice of add-back. I reject that submission. Now that we no longer have *Calderbank* offers, litigants must be encouraged to make open proposals as early as possible that are designed to encourage settlement. If the other party spurns such an offer, the court is entitled to ignore it completely and decide the case entirely on the merits. I will have no hesitation in a suitable case in awarding an applicant more than an open offer he or she has made if that is justified.'

Moor J referred to the test of re-attribution in such cases as set out by the Court of Appeal in *Vaughan*. He agreed that such re-attribution powers were based upon conduct which it would be inequitable to disregard under s 25(2)(g) of the 1973 Act. He referred to the court having to be satisfied that there had been a 'wanton dissipation of assets' and cited the phraseology of earlier case authorities of *Martin* as to 'extravagant living and reckless speculation' and in *Norton* 'recklessly depletes the assets'. There was no specific reference, however, to the other several post *Vaughan* High Court authorities (above). His Lordship, having referred to the commentary in *Vaughan* of the potential impact of mental illness on wanton behaviour, stated (at para [68]):

> 'Mr Molyneux, in closing submissions, argued that there needs to be deliberate, unprovoked and morally culpable conduct. The most obvious example would be where a spouse deliberately dissipates a fund simply to prevent his or her former partner receiving a fair share of that fund. The court cannot permit such conduct. I further accept that there will be other situations where conduct justifies a financial penalty although such cases will undoubtedly be rare.'

Of importance, against the legal principles set out, Moor J found that although the husband had overspent significantly, this was not with the intention of reducing the wife's claim, therefore he would not add-back the expenditure on improving the parties' Spanish villas which the wife had claimed were wholly excessive or on monies spent on the husband's obsession with perfection, nor would he do so in respect of the funds spent on his rehab.

The judge found most difficult the money spent on cocaine and prostitutes, but overall he found that since this was part of the husband's flawed character and a spouse should take their partner as they find them, this could not be said to be wanton either and would not be added back. In other words, as, in His Lordship's view, the wife was content to share in the monies the husband had helped to create, she must, therefore, take him as she found him, warts and all.

> '90. I do not find, however, that the Husband overspent to reduce the Wife's claim. In part he did it because he could not prevent himself from doing it. It was down to his flawed character. This court could not possibly add-back the expenditure on drug therapy. This was him trying to put matters right. Whilst I accept that he did not always take advice, I reject Mr Pocock's description of him going to this therapy as a "holiday" to get away from the pressures of life or the litigation. He was ill and he needed treatment. The same illness, however, prevented him at times from accepting the treatment.
>
> 91. Equally, I cannot add-back items of expenditure that were simply extravagant or part of his obsession with perfection. I have had the most difficulty with the expenditure on cocaine and prostitution. I have, however, come to the clear conclusion that I should not add-back even these items. As I have already noted, a spouse must take his or her partner as he or she finds them. Many very successful people are flawed. This is true of this Husband. I have decided that it would be wrong to allow the Wife to take advantage of the Husband's great abilities that enabled him to make such a success of the company while not taking the financial hit from his personality flaw that led to his cocaine addiction and his inability to rid himself of the habit. It may have been morally culpable. Overall, it was irresponsible. But I find that this was not deliberate or wanton dissipation. It would be wrong to add it back.'

(F) WITH INTENTION OF REDUCING THE WIFE'S CLAIM

Moor J cited counsel's submission, in apparent approval as to the test of wanton behaviour, as requiring 'deliberate, unprovoked and morally culpable conduct'. His Lordship suggested that a clear form of wanton behaviour was where the husband had deliberately embarked upon dissipation to reduce the wife's claim and although there were other examples which justified penalty they would be rare. Thereafter, he appears to

have assessed the wantonness of this husband's activities against the measure only as to whether it had been shown he had harboured such an intent.

It is, at least, doubtful, however, that this was indeed part of the required test suggested by *Vaughan*. In *Vaughan* the husband there had by gambling or other improvidence used a large amount of the parties' monies of between £100,000 and £175,000, conservatively approached by the Court of Appeal at the lower level. However, Mr Vaughan had, according to the district judge, with which finding the Court of Appeal in this respect did not interfere, acted in a way which had been:

> ' "bizarre and inexplicable and, objectively, profoundly irresponsible" but that it had been largely attributable to his illness and that no moral culpability attached to it'

The district judge had, therefore, rejected the claim that the monies dissipated should be added back against the husband's account. Nevertheless, the circuit judge on appeal and then the Court of Appeal were clear that on the decided cases the district judge's approach was incorrect and they had no doubt that whether or not it was attributable to some extent to an illness, this level of dissipation had to some degree to be reflected against the husband in the overall distribution under the principle of conduct requiring a re-attribution.

The Court of Appeal had readily accepted that there may be circumstances where the extent of the mental illness involved may make it unfair to exercise re-attribution against that spouse – but they did not regard Mr Vaughan's depressive illness, even against the district judge's findings, of a severity to justify exercising that discretion and it is important also to recognise that the Court of Appeal did not suggest that even if it had have been that such behaviour would have been other than of a wanton nature. Accordingly, Moor J's determination that the husband's dissipation was a reflection of his flawed character and obsession with perfection and, therefore, not deliberately aimed at reducing the wife's recovery and accordingly not wanton appears to attempt to limit the *Vaughan* test unjustifiably.

Certainly, and despite the findings of Moor J as to the trials and traumas experienced by this husband in his pursuit to recovery, many observers would consider that the husband's behaviour judged objectively had not only the effect of substantially reducing the quantum of resources available between the spouses, but, as judged by Moor J himself, had been both 'irresponsible' and 'morally culpable' and it is difficult to imagine a starker example of wanton behaviour.

References by His Lordship to the dissipation having been the result of the individual's character and personality are, with respect, almost universally applicable to one or other spouse's dissipations within a divorce context. Indeed, the justification expressed in not taking an account of the dissipation in question arising from prostitute use and cocaine abuse as wanton in nature because many very successful people are so flawed and a spouse must take their partner as he or she finds them could arguably also justify behaviour in many other cases where in a wider context 'gross and obvious' conduct is alleged.

It is, therefore, submitted that Moor J's approach as expressed in his judgment, is not to be supported, having departed from that set out in *Vaughan* albeit His Lordship alternatively, upon a final analysis, would have been entitled to weigh the husband's wanton behaviour against all the circumstances of the case – in deciding if it was fair to account the resulting dissipation fully against him. As expressed by Moylan J in *Evans*, not to take account of wanton dissipation or arguably, as Moor J required in *MAP* case, to solely require proof of an intent to reduce the other spouse's share as a pre-requisite of re-attribution would be tantamount to creating a position where:

> 'Parties would have little incentive to behave reasonably but rather would have an incentive to spend what they could pending resolution.'

In applying the touchstone of fairness in divorce distribution, it is submitted that there remains the need to retain a mechanism of accounting between the parties where one spouse has wantonly spent excessive amounts of the marital funds which has resulted intentionally or otherwise in a significant reduction of the resources available for distribution.

Conclusion

There is no doubt that the issue of add backs in the light of the current law are still being raised far too frequently. It is also clear that because of the emotion which is often accompanied with the allegation and the sense of indignation that this money has been lost to the sharing process to be undertaken, the allegation once raised is allowed to run too readily by those acting for the accuser in a court environment where a no order as to costs is the default position. However, the existence of an add back argument is often the fly in the ointment which actually prevents a settlement with one side insistent it should be accounted for and the other

presenting unlikely accounting reasons why it would be unjust to do so or maintaining it's a case of the pot calling the kettle black.

Mostyn J has suggested (see above) that the court has no power to deal with the allegation on a preliminary basis – and if this is indeed so it may yet again speak eloquently of the need to enhance the court's case management powers to deal with such issues. However, in any event, just like general conduct allegations, the court can both cajole and dissuade a party at the First Appointment and the FDR stage in relation to the often wholly wasteful exercise being embarked upon. In addition, a carefully worded open letter specifically dealing with the allegation when raised and reserving the right to bring the matter before the judge on costs conduct at the end of a contested hearing could still be effective. If such a stance should not have its desired effect after a judgment in which the allegation is rejected then again arguably the present costs approach requires amendment.

Principally, of course, it is in the solicitor's office when the issue is first raised where the law needs to have its clearest message in order to limit the occurrence of these allegations and where the client should be made aware that the law currently is that:

(i)the court will only accede to an add back most sparingly and will not do so where in real terms having regard to the other asset values it will make a minimal difference only.
(ii)such allegations of dissipation have to be significant in terms of the resources under consideration and evidentially to be very clear; and
(iii)the dissipation in question must be wanton ie deliberate or at least reckless in the sense the accused spouse must have realised the irresponsible and extravagant nature of the spending being embarked upon; and
(iv)even with (i) to (iii) in place, the add back proposed must not artificially affect the provision of the needs of the spouse in question; and
(v)the court must before adding back conclude that having regard to all the circumstances of the case, including, in particular, the actions of the other party, it would be fair to do so.