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Extension of term – how exceptional should the gateway to extension be?

Introduction:

1. In a recent speech by Mr Justice Mostyn to the Devon and Somerset Law Society on 16 October 2018 '*SPOUSAL MAINTENANCE - Where did it come from, where is it now, and where is it going?*', His Lordship has suggested that his guidelines in relation to claims for maintenance as set out in his judgment in ***SS v SN (Spousal Maintenance)*** [2014] EWHC 4183 (Fam) had prevailed in tact since:

> '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'

2. In one respect, at least, His Lordship's claim remains debatable where in the set of guidelines he suggests:-

> '(i) '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.'

3. Contrary to the above, it is suggested that 'exceptionality' does, indeed, remain at the forefront of the Court's consideration when dealing with an application under **s 31** to extend a term order for maintenance.

4. Curiously, the fact that it does is entirely consistent with Mostyn J's further assertion in his speech to the west country lawyers (relating to the view of Lord Wilson that a call for a general statutory limit to the spousal maintenance period was 'unrealistic') that:-

> '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.'

The Threshold Test:

5. As cited by Mostyn J above, a number of recent High Court decisions, following His Lordship's guidance in ***SS v SN*** have likewise purported to suggest in relation to term extension variation applications that there is a different threshold test to apply to that laid down in earlier decisions by the House of Lords and the Court of Appeal in this area .

6. Suffice it to say – the present President of the Family Division (in ***Sharp*** [2017] EWCA Civ 408) was recently presented with a similar position relating to conflicting High Court decisions compared to earlier House of Lords and Court of Appeal decisions and – as any law student would suggest was obvious – *precedent prevailed* - whatever the views of the High Court Bench - and the President, predictably and correctly, followed the law laid down by the House of Lords and the Court of Appeal

7. The principal authority upon the exercise of the power to extend is, of course, the Court of Appeal decision in ***Fleming*** [2003] EWCA Civ 1841.

8. In that case, the wife had applied to extend a 4year term maintenance order in her favour made as part of a final financial remedy order on divorce. The husband had appealed the first instance judge's decision to permit the extension and to replace the term order with a joint lives order. The Court of Appeal allowed the appeal. Thorpe LJ stated:-

> "*11. However, the general thrust of Mr Spon Smith's argument to the effect that the conclusion reached by Judge Taylor was unprincipled seems to me to be well made out. The judge had before him an application for the variation of a periodical payments order under* ***Section 31*** *of the* ***Matrimonial Causes Act 1973****. By an amendment to that section which was brought into force on 12 October 1984, in such circumstances the court is under an obligation to consider whether it would be appropriate to terminate continuing financial responsibility between the parties provided that that outcome is achievable without undue hardship to the payee. That provision contained in* ***Section 31 (7) (a)*** *mirrors the provision introduced at the same date to* ***Section 25*** *with the arrival of* ***Section 25A****.* ***Both these legislative amendments were intended to underline the court's obligation to bring about a clean break between divorcing spouses wherever that was achievable without undue financial hardship****. The court's power to bring about that conclusion was subsequently extended by the addition to* ***Section 31 (7)*** *of the additional paragraphs contained in subsections* ***(A)*** *to* ***(F)*** *inclusive which were enacted with effect from 1 November 1998.*

12. Accordingly from a date prior to the making of the original consent order the judge exercising the power to vary under ***Section 31(7)*** *held both the duty to terminate, if achievable without undue hardship, and also power to do so by making a lump sum order in substitution for continuing periodical payments.*

13. ***Those obligations are much enhanced in any case where there has been a previous term ordered. The undoubted intention of the parties and of the court in December 1998 was that the payer's obligations would terminate absolutely on 1 December 2002. In such circumstances the exercise of a power to extend obligations requires some exceptional justification****."*

9. Subsequent to this decision, the House of Lords in **Miller v Miller; McFarlane v McFarlane** [2006] UKHL 24, was asked to consider in relation to the Court of Appeal's decision to limit Mrs McFarlane's maintenance provision to one of a 5 year term, the test to be applied to extend a term maintenance order. Both Lord Nicholls (at para 97) and, in the majority speech, Baroness Hale (at para 155) endorsed the **Fleming** test:-

"97. That is something which will merit careful consideration at a suitably early date. But I do not see how this leads to the conclusion that the district judge's joint lives order should be set aside in favour of an extendable five years' order. ***The practice in the family courts seems to be that on an application for extension of a periodical payments order made for a finite period the applicant must surmount a high threshold: Fleming v Fleming [2003] EWCA Civ 1841****. In the present case it would be altogether inappropriate, indeed unjust, to make a five-year order and place the wife in that position when five years has elapsed. In the present case a five-year order is most unlikely to be sufficient to achieve a fair outcome.*

Further financial provision of some sort will be needed. So, far from compelling the wife to apply for an extension of a five-year order, ***and requiring her to shoulder the heavy burden accompanying such an application****, it is more appropriate for the husband to have to take the initiative in applying for a variation of a joint lives order when he considers circumstances make that appropriate. Certainly, the district judge cannot be said to have erred in principle in making a joint lives order, especially when this was common ground between the parties. I would allow this appeal and restore the order of District Judge Redgrave". **Lord Nicholls.***

And

"155. She does, of course, have to consider what she will do in the future. The children will eventually take up much less of her time and energy. She could either return to work as a solicitor or retrain for other satisfying and gainful activity. She cannot therefore rely upon the present level of provision for the rest of her life. But the Court of Appeal was wrong to set a limit to it on the basis

that she would save the whole surplus above her requirements with a view to providing for herself once the time limit was up. They were wrong to place the burden upon her of justifying continuing payments, ***especially now that they have set a high threshold for doing so: see Fleming v Fleming [2003] EWCA Civ 1841; [2004] 1 FLR 667****. On any view she will continue to be entitled to some continuing compensation, even if the needs generated by the relationship diminish or eventually vanish (although that cannot be guaranteed, despite her best endeavours, given the length of time she has been out of the labour market and the difficulties of repairing her pension position). The burden should be upon the husband to justify a reduction. At that stage, the court will again have to consider whether a clean break is practicable, as it could be if the husband has generated enough capital to make it realistic."* **Baroness Hale.**

10. It will be seen in both **Fleming** and the House of Lords speeches in **Miller/ McFarlane** that once by consent or otherwise a court order has been made limiting the spousal maintenance provision to a term order, then it is important to highlight that this records:-

> i) that the parties' and/or the original court's intention was that the payer's obligation to make maintenance provision was to terminate at the end of the stated period; and
>
> ii) that upon the making of the original court order it was anticipated that the payee under the term order would be able to adjust without *undue hardship* at the end of the term specified.

11. Against such an order already made – the payee has to '*surmount a high threshold' / shoulder the heavy burden accompanying such an application (…to extend)*' so as to establish some '*exceptional justification'* for the exercise of the power to extend.

12. The principal two High Court cases in which this well-established test was first questioned were the variation application made before Charles J (**McFarlane v McFarlane** [2009] EWHC 891 (Fam)) by Mrs McFarlane of **Miller/McFarlane** fame and **SS v SN (Spousal Maintenance) [2014]** EWHC 4183 (Fam) in which, in essence, Mostyn J. agrees with the observations made by Charles J that the **Fleming** test on an application to extend is to be replaced by the Court instead examining:-

> *"104 …the reasoning behind the earlier order that a party seeks to vary is a relevant circumstance of the case, and therefore on an application to vary it can be assessed whether the purpose of the earlier order has been fulfilled and, if it has, this would be a relevant (and perhaps a decisive) factor in favour of refusing an extension or variation."* Charles J.

13. However, it has to be stated that the **McFarlane** 2009 case was not an application, like the present, for variation by extension of a term order, since the House of Lords had set aside that previous term limitation in 2006 – but rather, it was an application for a variation by increase of the wife's then joint lives order of £250,000 pa to which Charles J eventually acceded.

14. Charles J's comments, as above, as to the **Fleming** test being no longer applicable were comments in a wider context of the approach generally under **s 31** of the **MCA 1973.**

15. Charles J's own lack of confidence in his rejection of the **Fleming** test is then revealed a little later in the judgment where he states:-

*'109….. my view is that the **Fleming** test or approach does not survive but the reasoning behind the term imposed on the variation is relevant and could be a magnetic or determinative factor. If that view is wrong and the **Fleming** test or approach does survive the wife would have to overcome the hurdle it sets.'*

16. Mostyn J (who had been counsel for the wife in the 2009 **McFarlane** case) in **SS v SN** merely adopted in the paragraph cited above from the **SS case**, without more, Charles J's statement that the '*exceptional test*' to extending a term order had since been replaced and in his subsequent '*pulling the threads together guidance*' in the **SS case.**

17. It is submitted that neither High Court observations, nor those which have followed since (as mentioned in Mostyn J's speech) – since that is what they are - change the law as established by **Fleming** and as endorsed by **Miller/McFarlane,** as set out above.

18. The '*heavy burden*', therefore, remains upon the payee where a term order has been made for an extension of that term to show why there is '*exceptional justification*' requiring the exercise of the Court's power to vary.

19. Accordingly, under **s 31 (7),** the Court is, when exercising its variation powers, 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… 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*….. ".

20. The statute requires the Court to have regard to '*all the circumstances of the case*', which will, obviously, include the reasons for the making of the term order originally and expressly that includes also having regard to '*any change in any of the matters*' the Court originally was required to have regard to. This must, therefore, involve exploring (per Mostyn J as above)

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"whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve..."

21. However pursuant to the Fleming test above, it is submitted that an '*exceptional justification*' to extend would ONLY be established if the payee could show that outside his/her power or control, the anticipated income independence without undue hardship had become impossible to achieve within the term period. In line with the recent decision of ***Mills v Mills*** [2018] UKSC 38 by the Supreme Court, in any such analysis, poor decision making by the applicant during the term in question, which had made such independence more difficult to achieve could be expected to count against a finding of exceptionality

Ashley Murray.

March 2019

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