Sex & Drugs & Ancillary Relief

Add-Backs after *MAP v MFP* [2016] 1 FLR 70 and *Rapp v Sarre*

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[**A**] Introduction

1. Divorce is often likened to a car crash.

2. In fact, anyone who has been in a car crash will know that the experiences are quite different, at least from a legal point of view. Causation is almost always a major issue after a road traffic accident, whereas in ancillary relief, causation (e.g. whose conduct caused the marriage to breakdown) is normally irrelevant.

3. Which, for many clients, is deeply frustrating; and which would have been frustrating to me if, after a drunken lunatic had driven into and written off my stationary car, my lawyer advised:

> "…the court isn't interested in who's to blame; it's more a question of quantifying the value of the cars and reaching a fair redistribution of their value".

4. As we all know, conduct is taken into account in ancillary relief[1] only where it would inequitable to disregard it (a.k.a. it is 'gross and obvious'[2]). It's difficult to conceive of the circumstances in which behaviour such as adulterous affairs, alcoholism, drug taking and unnatural sexual demands could pass this threshold:

> "[**65**] … in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today.

[1] If the expression is still good enough for Mostyn J , it's good enough for me (see *AB v CB* [2015] 2 FLR 25 at [2])

[2] *Miller; McFarlane* [2006] 1 FLR1186 per Baroness Hale at [14]: "…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

> Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party's conduct, the statute permits that conduct to be taken into account" *Miller; McFarlane* [2006] 1 FLR 1186, per Lord Nicholls
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> "[**283**] In modern conditions, where, except in the most egregious cases when s 25(2)(g) comes into play, we no longer have regard to spousal conduct, let alone to the concept of the 'guilty party', and where the court is rarely called upon to exercise its jurisdiction in relation to the traditional 'marriage settlement', these now increasingly elderly authorities have to be used with very considerable care." *Ben Hashim v Al Shayif* [2009] 1 FLR 115, per Munby J (as he then was)

5. But conduct which has a financial impact? That's potentially quite a different matter…

[**B**] The Add-Back: A Short History

6. In the early days of the MCA 1973, the Court of Appeal heard *Martin v Martin* [1976] Fam 335[3], a case in which, post-separation, H had a relationship[4] with a Mrs Freame (NB no anonymity for third parties in 1976) who H set up in business in a post office in Haywards Heath with funds charged against the FMH. When that didn't work, H helped Mrs F acquire a B&B in Somerset, and (when that also failed) he purchased a farm; thereby depleting his resources. Per Cairns LJ

> "…Another question which arose was whether the husband's **conduct** in relation to the financial matters after the separation was relevant... [conduct] … which has the effect of reducing the funds available to provide for the needs of both parties after divorce… must be taken into account because 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 is left as he would have been entitled to if he had behaved reasonably."

7. Secondly, the case which for a period became synonymous with 'add back' claims[5] was *Norris v Norris* [2003] 1 FLR 1142, in which W sought to add back

[3] Not to be confused with *Martin(BH) v Martin (D)* [1978] Fam 12 which dealt with extended charges;
[4] "The judge was not satisfied that their relationship was ever a sexual one, though he found that it was a close one"
[5] i.e. "The *Norris* add-back"

£322,699 H had 'overspent' in two years. The key section of Bennett J's judgment is as follows:

> "[**77**] The overspend, ie the expenditure over income of £350,000 in a little over 2 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 into 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"** (my use of emphasis)

8. Thirdly, in *Vaughan v Vaughan*[6] [2007] EWCA Civ 1085; [2008] 1 FLR 1108, H was a pilot who, following a depressive illness, lost his pilot's licence and gambled away over £80,000. DJ Jenkins sitting in Oxford County Court described the conduct as 'bizarre and inexplicable and, objectively, profoundly irresponsible', but did not re-attribute any capital to H.

> 'there are, apparently, no legal principles to be applied, nor any guidance from the Court of Appeal as to how [he] might approach [it]', the district judge rejected the wife's submission."

Au contraire, as the CA made clear: per Wilson LJ (as he then was) in the leading guidance on the law of add-backs:

> "[**14**] ...[counsel referred us to] *Norris v Norris* [2003] 1 FLR 1142. Although such was a decision at first instance, it is the last in a line of authority which stretches back to the decision of this court in *Martin v Martin* [1976] Fam 335 that, in the words of Cairns LJ, at 342H:
>
> > '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.'
>
> The only obvious caveats are that **a notional reattribution has to be conducted very cautiously, by reference only to clear evidence of dissipation (in which there is a wanton**

[6] Not to be confused with *Vaughan v Vaughan* [2010] EWCA Civ 349; [2010] 2 FLR 242

> **element) and that the fiction does not extend to treatment of the sums reattributed to a spouse as cash which he can deploy in meeting his needs, for example in the purchase of accommodation.** At all events the district judge's failure to despatch the issue by reference to the relevant legal principle, in my view, conferred upon the circuit judge an entitlement, at any rate in principle, to despatch it differently"
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> "[28] In that re-attribution has to be conducted very cautiously and in that, following more detailed argument than we have received, the circuit judge identified the parameters of the total sum dissipated by the husband as being between £100,000 and £175,000, I propose in my calculations to adopt the minimum figure."

9. I expect you're wondering... whither Mostyn J?

10. In *BP, KP and NI (Financial Remedy Proceedings: Respondent Judicata)* [2012] EWHC 2995 (Fam); [2013] 1 FLR 1310, Mostyn J cited Mostyn J who had… cited Mostyn J:

> *Add-back*
> **[31]** In my decision of *BJ v MJ (Financial Remedy: Overseas Trusts)* [2011] EWHC 2708 (Fam), [2012] 1 FLR 667 I attempted to summarise the law concerning the technique of add-back at paras [50] and [51]:
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> > '[50] On 1 July 2009 H gifted C £18,000 and this was followed by further gifts of £57,010 on 3 July 2009, £50,010 on 10 July 2009 and £15,010 on 12 August 2009; a total of £140,030. W seeks that these sums be added back to the pool of divisible assets as a wanton dissipation. I attempted to summarise the principles applicable to this technique in my decision of *N v F (Financial Orders*: *Pre-Acquired Wealth)* [2011] 2 FLR 533 where I stated at para 39:
> >
> > > "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 of the 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."
> >
> > [51] 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 C 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.
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> **[32]** It can, therefore, be seen that W faces a stiff climb to meet the test…

11. Where there is no surplus of assets over needs, it is also worth considering the following warning expressed by Roberts J in *US v SR* [2014] EWHC 175 (Fam):

> [**63**] … In circumstances where, as I have already described, the majority of the visible assets in this case are likely to be required to meet the future needs of these parties and their children in their different circumstances, **absent findings that either the Husband has a continuing and substantial income stream and/or has access to significant assets which he has yet to disclose, needs are likely to dominate the distribution process. In these circumstances, and in the light of the need for caution highlighted above, I may need to tread with care before proceedings down the road to reattribution** depending on the findings I make after my analysis of the evidence.

[C] Overview

12. Surveying the law of 'add-backs', pre-*MAP v MFP*, and pulling some threads together:

    a) The court may re-attribute/ add-back sums which have been dissipated, although the language deployed has developed from 'frittered away' (*Martin*) to 'recklessly deplete' (*Norris*) to 'wanton' (*Vaughan* at [14], *N v F* [41]);

Query if this development in the language is significant, or an example of individual judge using a different word to describe what is basically the same thing.

b) An 'add-back' argument is a species of "conduct". The threshold is, accordingly, a high one ('…a stiff climb to meet': *BP* at [32]);

c) The exercise has to be conducted "very cautiously" (*Vaughan*, [14]), i.e. with witness statements, frequently with *Scott* schedules, and well in advance of the final hearing;

d) Unlike a Section 37 set aside application, the exercise does not bring assets back into the matrimonial pot. The court should not lose sight of the fictional nature of the exercise - or ignore the other Section 25(2) factors such as meeting financial / housing needs, which may in some cases be the magnetic factor (*US v SR* at [63]);

e) 'Add-back' arguments can be expensive and time-consuming. In some cases, there may be a single transaction (e.g. purchase of a property), in others, it will be a pattern of spending with several hundred transactions – many in cash – which may not all come up to proof. In some cases, the argument is framed so widely, with so many transactions, that it is only a matter of time before the case collapses under it's own weight.

f) Always bear in mind, the innocent party typically receives 50% of the net benefit (i.e. when faced by an alleged add-back, discount for litigation risk and then halve what you're left with – this can often concentrate the mind in terms of the proportionality of taking the point);

13. It is also worth bearing in mind: as a rule, judges *don't like* add-back arguments. They take a long time to resolve and divert the court from the often-delicate balancing exercise into a quasi- trial of heads of claim. Hence, in several reported cases, the court has declined to add back (e.g. *McCartney* [2008] 1 FLR 1508; *GS v L* [2013] 1 FLR 300; *R v R* [2013] 1 FLR 120).

[**D**] *MAP v MFP (Financial Remedies: Add-Back)* [2015] EWHC 627 (Fam); [2016] 1 FLR 70

14. The facts:

a) This was an extremely long marriage of 40 years, during which H had established a successful property maintenance company. The assets were worth £25.1m of which the bulk represented the net value after CGT of the company. At the time of the hearing before Moor J, H was 62 and W 61.

b) W's open offer was for an equal division of assets, of which approximately half would be received in two years time. Crucially, W sought an additional £750,000 in respect of H's 'wanton and reckless expenditure' over the preceding two years.

c) H did not dispute an equal split, but sought five years (not two) to pay the balancing lump sum. He disputed that any money should be added back. There were also a host of comparatively minor issues to do with tax liabilities, arrears etc.

d) Given the parties' overall wealth, the issues were accordingly relatively narrow (summarised at [56]). Recall: the "iron law of ancillary relief":

> "[**5**] It seems to be an iron law of ancillary relief proceedings that the final difference between the parties is approximately equal to the costs that they have spent" *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] 2 FLR 533 per Mostyn J

15. Nature of the allegations

a) H's "personal demons" [**76**] included cocaine addiction, depression and prostitutes. He had spent significant sums on unsuccessful drug treatment;

b) Moor J concluded that H was in mortal danger

> "[**76**] … I sincerely hope that, once this divorce is behind U.K., he will be able to get rid of this problem for ever. If he does not, *it will probably kill him*" (my italics)

16. In some respects, *MAP v MFP* is a typical add-back case: it demonstrates a number of familiar features:

a) Evidential difficulties

Bank statements rarely have debits which are titled "Payment Out: Drug dealer" or "Prostitute(s)". By its nature, this behaviour is often covert, or the paper trail runs out (payments are often in cash). Over time, it can be genuinely difficult to get to the bottom what the payments were for;

b) Net cast too widely

The temptation to plead the highest number possible (NB as a rule of thumb, only one-half is gained) often leads to items being added which with hindsight should have been jettisoned, e.g. drug therapy of £229,290 – which Moor J firmly rejected at [89]);

c) Natural evaporation/ Litigation risk

Add-back arguments rarely come fully up to proof.

Almost invariably at trial, some payments will turn out to be kosher. It is *extremely easy* to fall into the trap of relying on payments that were in fact made for the benefit of one's own client [MAP at 84] –

or to fail to take a broader view, e.g. where generous payments have been made in favour of the innocent party (see MAP at [83]);

d) The total amount claimed as dissipated was £1.5m [81]: W sought a lump sum for one-half of the amount;

17. An add-back is a classic '*noise cancelling*' area of law:
Client's (rightly or wrongly) feel extremely strongly about these issues. However, there is every reason to tread carefully, err on the side of caution and keep to the strongest point: Just how easy is this going to prove? As a general rule of thumb, the more examples of spending, the more can go wrong. Few judges willingly trawl through hundreds of pages, and cross-reference, unless the amounts at stake are really significant – and where the auditing has been properly done.

Moor J's innovations

18. What makes MAP an especially interesting read is the following sections of the judgment:

a) Moor J confirms that an add-back remains an arguable area of law, and rejects H's counsel's argument that it infringes on the principle of equality [88]. If fact (this is often overlooked), Moor J did add-back £271,000 which represented the additional tax W paid as a result of H sacking her and therefore W losing her entrepreneurs relief rate for CGT [95];

b) However, Moor J concludes that H did not overspend to reduce W's claim: "…he could not prevent himself from doing it. It was down to flawed character" [89]: "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"

c) In other words, the requisite *mens rea* (so to speak) has changed from reckless (*Norris*) to deliberate intention (specific intent?)

d) In words which have afforded some comfort throughout trading rooms in the Square Mile and Canary Wharf:

> "[**91**] …a spouse must take his or her partner as he or she finds them. Many very successful people are flawed… 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"

[**E**] Response and *Rapp v Sarre*

19. *MAP* raises a number of fascinating[7] questions:

a) Was *MAP* limited to its facts, i.e. the case of a man whose addictions were (as the judge found) life-threatening, or did they apply to the more everyday situation of a trader working hard and playing hard?

b) Did *MAP* sound the death knell of add-backs for all but the exceptional cases where a party had deliberately dissipated assets in order to defeat a claim?

c) To what extent was *MAP* a restrictive interpretation of the law, as set out by the Court of Appeal in *Vaughan*?

20. *Rapp v Sarre* [2016] EWCA Civ 93

In many ways, Rapp was too good to be true.

An appeal to the Court of Appeal, heard less than a year after *MAP*, where there were several remarkable similarities (cocaine addiction, non-engagement by H

[7] i.e. moderately interesting to a family lawyer

with proceedings, female escorts) – and H even engaged the same legal team used by the husband in MAP at the Court of Appeal.

21. Broadly the same arguments were advanced by H, who appealed the decision of HHJ Everall (admittedly at a hearing at which H failed to properly participate) for a 54.5%/45.5% division of assets of £13.5m in W's favour; and where allegations of dissipated capital had been dealt with broadly:

> [**30**] …The first reason was that it was necessary in order to cater for the wife's needs and would still leave the husband with sufficient to meet his needs. The second reason was the husband's conduct, which the judge accepted had led to "the reckless frittering away of family money". **The judge did not adopt the sort of approach adopted in *Norris v Norris* [2003] 1 FLR 1142 and *Vaughan v Vaughan* [2008] 1 FLR 1108, notionally re-attributing dissipated sums** to the spouse responsible, because he did not think it was possible. However he accepted the wife's submission that it was appropriate to adjust the distribution of the assets from a 50% division in order to take account of this factor. **He proceeded on the basis that in the 12 months to November 2014, the husband had received £168,000 more than the wife by way of income from the investments (in addition to the extra sum that he required to pay his rent), noting that Mr Huggins had told the wife that he believed the sums paid to the husband had been excessively large and were in part due to the husband's addiction issues.** The judge calculated that if the same occurred in each of four years since separation, that alone would amount to over £600,000 and there was in addition an unquantified waste of money during the marriage. **He also took into account the distress caused to the wife by the husband's conduct and concluded that "it would be inequitable to disregard the [money] wantonly expended and the distress to the wife of the husband's addictive behaviour" which, along with the need factor, he considered justified "the modest departure from equality" in his order** (paragraph 135).

22. Unfortunately, the judgment of the Court of Appeal is an extremely damp squib. As practitioners, we are increasingly used to judgments which range over issues, entertain controversies head-on, and summarise the law in Roman sub-paragraphs.

23. What is less frequently reported (for obvious reasons) is the more traditional exercise of the appellant art, where the appeal court simply says words to the effect that 'we are satisfied that the trial judge's decision was within the generous ambit of discretion', frequently coupled with a reference to how

experienced the trial judge is, and that he had the advantage of seeing and hearing the parties evidence.

24. In particular, in *Rapp*, the CA (Black LJ, Patten LJ, Baker J) was satisfied that the original order (in W's favour) was justifiable on the basis of need. MAP was entirely side-stepped:

> [**42**] … It follows that even if the husband were to succeed in establishing, as he seeks to do, that the judge placed undue weight on the husband's behaviour and its consequences for the family finances, this court would not interfere with his order, because the view that he took of the addiction aspect of the case was not a necessary part of the justification for it. In these circumstances, I do not propose to consider further the interesting and challenging question (recently considered by Moor J in *MAP v MFP* [2015] EWHC 627 Fam) of whether behaviour such as the husband's should be reflected in the court's ancillary relief order, and if so, how. It seems to me undesirable to engage with this issue in a case where there has not been a full exploration of it at first instance, involving evidence and submissions from both parties.

25. By way of summary:

a) A party planning to run an 'add-back' argument should bear in mind the points summarised at paragraph 12 and 16 (above). Add-backs should be conducted with great care;

b) The development of the law in *MAP*, which suggests a raising of the threshold from 'reckless' to 'deliberate' conduct to defeat a claim, is yet to be considered by the higher courts;

c) In the short term, *MAP* is good news for the wealth generator/ flawed character. Hopefully it won't be long before the argument returns to the Court of Appeal.

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