

IN THE COURT OF APPEAL OF GUERNSEY

**MATRIMONIAL CAUSES DIVISION – APPEAL
NO. 524**

6 April 2020

Before: **George Bompas QC**
Sir Michael Birt
Sir Wyn Williams

Between: **Q** **Appellant**
-and-
Q **Respondent**

Advocate C Fooks for the Appellant
Advocate E Couch for the Respondent

Birt JA

This is the judgment of the Court

Introduction

1. In this case the Appellant (“the husband”) appeals against the judgment of Sir Hugh Bennett, Lieutenant Bailiff, dated 20th December 2018 whereby the Lieutenant Bailiff made various orders in respect of the application of the Respondent (“the wife”) for financial relief on termination of their marriage.
2. The appeal, however, is only against a limited part of the Lieutenant Bailiff’s decision. Amongst other orders, the Lieutenant Bailiff ordered the husband to pay maintenance to the wife in the sum of £110,000 per annum (index linked) until 31st December 2021 reducing thereafter by £20,000, with such maintenance to be payable during the joint lives of the parties (but subject to review, as explained below).
3. In ordering continuing spousal maintenance the Lieutenant Bailiff was exercising the discretionary power given by Article 47 of the Matrimonial Causes Law (Guernsey), 1939 (as amended). This provides in the following terms:

“(1) Where a decree for divorce, judicial separation, [...] or nullity of marriage has been granted, the Court may, if it thinks fit, having regard to the circumstances of the case, including the financial position and conduct of the parties, order that the one party shall

pay or make provision for the payment to the other party during any term not exceeding the life of such other party of such annual or other periodic sum of money for or towards the support of such other party as the Court may deem reasonable, and that the party against whom such order is made shall secure the payments to be made under such order in the manner directed by the Court.”

4. Before the Lieutenant Bailiff the husband’s contention as to spousal maintenance had been that, rather than the joint lives order sought by the wife, there should be a rapidly reducing taper in a series of stages (broadly speaking yearly stages) from more than £100,000 for 2019 down to £40,000 for 2022, and then dwindling down to nothing after a final £18,666 for an 18 months period ending in June 2030.
5. On this appeal, the husband does not challenge the amount of the spousal maintenance ordered by the Lieutenant Bailiff; he only challenges the duration of the order. He contends that, rather than being an order payable during the joint lives of the parties (subject to review), the order should be a term order for some £90,000 per annum terminating on 20th June 2030, i.e. some 11½ years from the date of the Lieutenant Bailiff’s order. That is the only issue we have to decide.

Factual background

6. We take the factual background from the Lieutenant Bailiff’s judgment and, in view of the limited nature of this appeal, we can do so comparatively briefly.
7. At the date of the hearing before the Lieutenant Bailiff, the wife was 45 and the husband nearly 44. Both are graduates. After university the wife worked in various sales organisations in London. The husband became professionally qualified.
8. The parties met in October 2002 and started cohabiting in London in April 2003. They married and settled in Guernsey in 2005.
9. It was about this time that the wife left her employment with a redundancy package and has not been employed since then. Her overall employment package when she ceased employment was about £60,000 pa gross. The husband has continued to work for a professional firm in which he is a partner.
10. There is one child of the marriage, a daughter who was 10 at the time of the hearing before the Lieutenant Bailiff. At that time, she was at school in Guernsey but there was uncertainty as to whether her secondary education would continue in Guernsey or at a school in the United Kingdom.
11. The first matrimonial home of the parties in Guernsey was a property to which we shall refer as ‘the First Property’. Subsequently, in May 2013, the parties purchased a second matrimonial home (“the Second Property”). The First Property was then let.
12. The parties separated at the end of August 2016 and the wife has continued to live at the Second Property. In February 2017 the husband purchased an alternative property where he lives.

The Lieutenant Bailiff’s decision

13. After having resolved various disputes as to the value of the capital assets and which of those assets were to be treated as matrimonial assets, the Lieutenant Bailiff held that the assets (which in total came to £3,435,006) should be divided equally, giving each party assets totalling £1,717,503. This involved a lump sum payment by the husband to the wife of £185,135 with the wife retaining the Second Property (value £808,500), the First Property (value £539,000), her two pension pots, her bank accounts and a debt of £58,500 due from her brother. The husband

retained the property in which he was then living together with his capital account in the firm and his bank accounts and pension plans.

14. As to income, the husband's net income (after tax etc.) had exceeded £900,000 for the previous two years and was expected to exceed £900,000 for the year ending June 2019. The Lieutenant Bailiff reminded himself (at paragraph 64 of his judgment) that he should "*not ... go down a path leading to the wife sharing the husband's future income.*" But he added that "*surely a very large net future income of the husband must have some bearing on the level of the wife's periodical payments for the future ...*".
15. The Lieutenant Bailiff rejected the husband's suggestion that the wife only needed £70,000 to live on and assessed her income needs at £110,000 per annum. He then considered whether this should be adjusted to take account of the standard of living during the marriage, the length of the marriage, the wife's age and health and the scale of the husband's likely income, but concluded that no adjustment was necessary.
16. The Lieutenant Bailiff next, at paragraph 68 of his judgment, asked himself this question: "*How then are the wife's annual needs for £110,000 to be met?*" And he turned first to consider what might be available by reference to the First Property and the Second Property.
17. The Lieutenant Bailiff then considered the important question of the wife's earning capacity. The key factor was that she had been out of the employment market for the duration of the marriage. He found that she could realistically start a two year retraining course in book-keeping in January 2020 and would therefore be able to be employed from January 2022 onwards. He considered that her net earning capacity would then be £20,000 per annum and he specifically found that it was unlikely that she would go further up the salary scale. It was most unlikely that she would get back into the type of work she had been doing prior to the marriage and he considered her choice of career as book-keeper to be suitable and reasonable.
18. On that basis the Lieutenant Bailiff held that maintenance should be awarded in the sum of £110,000 per annum and that this should be index linked. However, he held that that sum should be reduced by £20,000 per annum as from January 2022 because by that stage the wife would have her earning capacity of £20,000 per annum. In effect therefore, using the values at the date of judgment (which we shall do throughout this judgment) he awarded maintenance of £90,000 per annum (index linked) as from January 2022.
19. As to the duration of the spousal maintenance, the Lieutenant Bailiff recorded that the wife was seeking payment during joint lives (subject to review when the husband retired from his firm) whereas the husband proposed a series of reducing amounts which would dwindle to zero by 2030.
20. The Lieutenant Bailiff held at para 87 that the spousal maintenance should be for joint lives or until the wife's remarriage or further order but directed that there should be a review on the occurrence of the following events as listed in the Act of Court recording his decision:
 - (i) the husband retiring as a partner of his firm;
 - (ii) the daughter completing full-time secondary education;
 - (iii) if the daughter was not educated at the proposed school in the UK, to reflect the income available to the wife from the First Property;
 - (iv) upon the sale or letting of any property in the UK purchased from the proceeds of sale of the First Property.

The background to (iii) and (iv) was the uncertainty over the daughter's future education. The Lieutenant Bailiff held that, if she were to attend school in the UK, it would be reasonable for the wife to sell the First Property and buy a property for her and the daughter to live near the school. As to (iii), the Lieutenant Bailiff considered that, if the daughter stayed at school in Guernsey, the wife could let the First Property and the amount of maintenance should be reviewed to reflect the income available to the wife from such rental.

21. The Act of Court giving effect to the Lieutenant Bailiff's judgment directed that the spousal maintenance "*shall be reviewed to such sum as the parties shall agree or in default of agreement as ordered by the Court on the occurrence of each and every*" of the events just mentioned. Further, the Act of Court provided for the maintenance to be payable only during the parties' joint lives or until the wife's remarriage or "*further order*".

The respective contentions

22. As already noted, before us the husband has submitted that the Lieutenant Bailiff erred in ordering payment for joint lives, albeit subject to review as just described. Although the husband no longer contends for a tapering payment, he asserts that the amount ordered to be paid by the Lieutenant Bailiff should terminate in June 2030.
23. In seeking to challenge what was an exercise of a discretionary power given to the Lieutenant Bailiff, Advocate Fooks has submitted before us that the Lieutenant Bailiff failed to give any or adequate reasons for his decision and that in any event his decision was plainly wrong. She sought also to criticise the Lieutenant Bailiff's decision on the basis (to quote from her written submissions) that he "*failed to consider at any point whether, so armed*", that is armed with spousal maintenance in the order of £90,000 per annum index-linked paid to her up to 2030 together with her capital and earnings, the wife "*would ever be able to achieve independence without suffering undue hardship*".
24. Advocate Fooks' essential submission was that the English cases show that in the overwhelming majority of cases, joint lives maintenance is a thing of the past. Maintenance orders, if made at all, are only made for a term with a view to the receiving spouse in due course attaining self-sufficiency and independent living. She elaborated this point by asserting that '*very few*' joint lives orders had been made in England in recent years and that '*the once ubiquitous joint lives order is now virtually extinct*' (para 11 of her skeleton argument).
25. She accepted that the approach in England and Wales is heavily influenced by the fact that section 25A(2) of the Matrimonial Causes Act 1973 requires the Court to consider this aspect. Section 25A is in the following terms:

"(1) Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under s.23(1)(a), (b) or (c), 24, 24A or 24B above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

(2) Where the court decides in such a case to make a periodical payments ... order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made ... only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party."

However, she submitted that, although there is no such statute in Guernsey, the principles established by the courts in England and Wales tend to be followed in Guernsey because the policy objectives that underpin the law of England are exactly the same as those in Guernsey. Thus the policy of the courts in both jurisdictions is to enable and encourage both parties to a failed marriage to put the past behind them and to move on. There is, she submits, no difference in this respect between the law of Guernsey and the law of England and it was important that this be so in order to discourage forum shopping.

26. In support of her assertion that joint lives orders are now comparatively rare in England, she referred to a substantial number of authorities, articles and texts. We have carefully considered these but, in the interests of brevity, we propose to refer only to those which seem to us to encapsulate most clearly the point which she seeks to make.
27. Advocate Fooks began with the well-known case of Miller –v- Miller, McFarlane –v- McFarlane [2006] UKHL 24 and the dictum of Lady Hale at [133]:

“133. Section 25A is a powerful encouragement towards securing the court’s objective by way of lump sum and capital adjustment (which now includes pension sharing) rather than by continuing periodical payments. This is good practical sense. Periodical payments are a continuing source of stress for both parties. They are also insecure. With the best will in the world, the paying party may fall on hard times and be unable to keep them up. Nor is the best will in the world always evident between formerly married people. It is also the logical consequence of the retreat from the principle of the life-long obligation. Independent finances and self-sufficiency are the aims.”

Lady Hale went on at [144] to say:

“The ultimate objective is to give each party an equal start on the road to independent living.”

28. Advocate Fooks submitted that Miller gave an impetus to the trend against joint lives orders such that very few of them are made nowadays in England. The objective of achieving a clean break is repeated time and again in English authorities and she gave as a useful statement of the principles the observation of Charles J in G –v- G [2012] EWHC 167 (Fam) at [136] as follows:

“136. What I take from this guidance on the approach to the statutory task is that the objective of achieving a fair result (assessed by reference to the words of the statute and the rationales for their application identified by the House of Lords):

(i) is not met by an approach that seeks to achieve a dependence for life (or until remarriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households), but

(ii) is met by an approach that recognises that the aim is independence and self-sufficiency based on all the financial resources that are available to the parties. From that it follows that:

(iii) generally, the marital partnership does not survive as a basis for the sharing of future resources (whether earned or unearned).”

29. Advocate Fooks ceased her quotation at that stage but Charles J went on immediately in the same paragraph to say:

“But, and they are important buts:

- (a) *the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties,*
- (b) *the length of the marriage is relevant to determining the period for which that level of lifestyle is to be enjoyed by the payee (so long as this is affordable by the payer), and so also, if there is to be a return to a lesser standard of living for the payee, the period over which that transition should take place,*
- (c) *if the marriage is short, this supports the conclusion that the award should be directed to providing a transition over an appropriate period for the payee spouse to either a lower long-term standard of living than that enjoyed during the marriage, or to one that is not contributed to by the other spouse,*
- (d) *the marriage, and the choices made by the parties during it, may have generated needs or disadvantages in attaining and funding self-sufficient independence that (i) should be compensated, and (ii) make continuing dependence/provision fair,*
- (e) *the most common source of a continuing relationship generated need or disadvantage is the birth of children and their care,*
- (f) *a continuing relationship generated need is often reflected in a continuing contribution to the day to day care of the children of the relationship, that contribution being recognised by the continuing financial contribution of the paying spouse (which is a continuing contribution to the day to day care of the children),*
- (g) *the choices made by the parties as to the care of their children are an important factor in determining how that care should be provided and shared both by reference to day to day care and the funding of the independent households and,*
- (h) *the provisions of s.25A must be taken into account.”*

30. Advocate Fooks submitted that the most helpful summary of the position is to be found in the judgment of Mostyn J in SS –v- NS (Spousal Maintenance) [2014] EWHC 4183 (Fam) where he said at [35]:

“It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence.”

31. Mostyn J then went on to summarise the position at [46] in the following terms:

“46. Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:

- (i) *A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.*
- (ii) *An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.*

- (iii) *Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.*
- (iv) *In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.*
- (v) *If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.*
- (vi) *The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.*
- (vii) *The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.*
- (viii) ...
- (ix) *There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.*
- (x) *On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.*
- (xi) ...”

32. Advocate Fooks submitted that (iv), (v) and (vi) of the above quotation are particularly relevant to this case. She emphasised (iv) in particular. She said that this makes clear that a term order should normally be made even where there would be hardship in making the transition to independence provided that the hardship is not ‘undue’. She further submitted that this summary by Mostyn J summarises the law of Guernsey as accurately as it does the law of England because, as mentioned at paragraph 25 above, the courts in Guernsey tend for good policy reasons to follow decisions of the courts of England and Wales in this area. She submitted therefore that joint lives orders are also a rarity in Guernsey.
33. Turning to the facts of this case, Advocate Fooks pointed out that, as a result of the Lieutenant Bailiff's orders, the wife has capital of some £1.7m including two properties, two small pensions and a lump sum of over £185,000. She will also receive maintenance of £110,000 per annum reducing to £90,000 from 2022. That maintenance is index linked and she will also have an earning capacity of £20,000 per annum.
34. She submitted that the Lieutenant Bailiff failed to consider whether, in these circumstances, the wife would be able to achieve independence without suffering undue hardship. She submitted that had he done so, he would have found that, on the balance of probabilities, the wife would be able to adjust without undue hardship. She would probably have to make certain economies but it was impossible to say that she would, on the balance of probabilities, be left in a position of undue hardship at the end of the maintenance term. On that aspect, although the appeal

suggested June 2030 as the termination date, Advocate Fooks accepted that an alternative formulation might be until completion of the daughter's tertiary education, which might be slightly later. Whatever the exact point, Advocate Fooks submitted that at that stage the wife would have two properties available to her but would only require one. She could either sell one or rent it. She would have additional capital to meet her needs such as the lump sum and the money her brother currently owes her. She would have received over 11 years of maintenance at a high figure from which she could, if she chose, make savings and she would also have had her earning capacity for 10 years or so. Leaving aside the Second Property as a home, she would have capital assets worth some £900,000. On the basis of the Duxbury tables, this could be expected to produce £50,000 - £60,000 per annum for a person of 58.

35. As we have said, Advocate Fooks also suggested that the Lieutenant Bailiff had given no reasons as to why the husband's submissions on this point were rejected and why he concluded that a joint lives order was appropriate. In those circumstances, she maintained that this Court should intervene and substitute a term order at the same level as ordered by the Lieutenant Bailiff but such order to expire in June 2030 or, if the Court preferred, on completion of the daughter's tertiary education.
36. On behalf of the wife, Advocate Couch supported the Lieutenant Bailiff's decision as to the duration of the maintenance order. As to the alleged lack of reasons, she submitted that the husband should have pointed this out when the draft judgment was circulated and asked the Lieutenant Bailiff to clarify or amplify his reasons for the making of a joint lives order. As this had not occurred, he could not rely on the point now. In any event, she disputed that the Lieutenant Bailiff had not given adequate reasons. If one analysed the judgment as a whole it was perfectly clear why he had opted for a joint lives order.
37. Advocate Couch accepted that the Guernsey courts will always give consideration as to whether a clean break is achievable on divorce and is fair and reasonable. However, there is no statutory equivalent to section 25A with its mandatory steer and its reference to 'undue hardship'. She referred to I -v- I [2003-04] GLR N36 where it was put rather differently from the wording of section 25A. In that case, the Royal Court (Finch LB) said:

“The court should also consider the possibility of self-sufficiency and a clean break, but the latter should not be imposed unless it is obvious that the parties will achieve self-sufficiency.”

38. In any event, Advocate Couch did not accept that the momentum against joint lives orders in England and Wales was as great as Advocate Fooks suggested. In this connection she referred to the observation of Ward LJ in the Court of Appeal in C -v- C (Financial Relief: Short Marriage) [1997] 2 FLR 26 at 46 where, in the context of whether a maintenance order should be for a term or for joint lives the judge said this:

“(6) Financial dependence being evident from the very making of an order for periodical payments, the question is whether, in the light of all the circumstances of the case, the payee can adjust – and adjust without undue hardship – to the termination of financial dependence and if so when. The question is, can she adjust, not should she adjust. In answering that question the court will pay attention not only to the duration of the marriage but to the effect the marriage and its breakdown and the need to care for any minor children has had and will continue to have on the earning capacity of the payee and the extent to which she is no longer in the position she would have been in but for the marriage, its consequences and its breakdown. It is highly material to consider any difficulties the payee may have in entering or re-entering the labour market, resuming a fractured career and making up any lost ground.

(7) The Court cannot form its opinion in the terms appropriate without evidence to support its conclusion. Facts supported by evidence must, therefore, justify a reasonable expectation that the payee can and will become self-sufficient. Gazing into the crystal ball does not give rise to such a reasonable expectation. Hope, without or without pious exhortations to end dependency, is not enough.

(8) It is necessary for the Court to form an opinion not only that the payee will adjust, but also that the payee will have adjusted within the term that is fixed. The Court may be in a position of such certainty that it can impose a deferred clean break by prohibiting an extension of the term pursuant to s.28(1A). If, however, there is doubt about when self-sufficiency will be attained, it is wrong to require the payee to apply to extend the term. If there is uncertainty about the appropriate length of the term, the proper course is to impose no term but leave the payer to seek the variation ...”

39. In Flavell – Flavell [1997] 1 FLR 353, Ward LJ returned to this theme and said at 358:

“The words of the section do not impose more than an aspiration that the parties should achieve self-sufficiency. The power of the court to terminate dependency can, however, be exercised only in the event that adjustments can be made without undue hardship. There is, in my judgment, often a tendency for these orders to be made more in hope than in serious expectation. Especially in judging the case of ladies in their middle years. The judicial looking into a crystal ball very rarely finds enough of substance to justify a finding that adjustments can be made without undue hardship. All too often these orders are made without evidence to support them.”

40. Advocate Couch submitted that the observations of Mostyn J in SS –v- NS quoted above are inconsistent with C –v- C and Flavell, both of which decisions were binding upon Mostyn J. Indeed, as a counterpoint to the dictum of Mostyn J, Advocate Couch referred to an observation of Holman J in Murphy –v- Murphy [2014] EWHC 2263 where the issue was whether the periodical payments payable to the wife should be subject to a term or for joint lives. Having quoted section 25A(2) Holman J said at [32]:

“It is extremely important to observe that that sub-section requires the court, as a first step, to form an “opinion”. Second, the critical word in the sub-section is not “should” but “would”. In other words, the court has to be able to form an opinion that by the end of the selected term the payee will be able to adjust without undue hardship to the termination.”

The judge went on to hold that the future was too uncertain in that case and he was therefore not willing to make a term order.

41. Advocate Couch submitted that, on the facts of this case, it would be wholly unfair to stop the maintenance in some 11 or 12 years and the Lieutenant Bailiff was correct to order payment during joint lives with the review dates which he specified.

Discussion

42. We deal first with Advocate Couch’s point that, if Advocate Fooks felt that the reasoning of the Lieutenant Bailiff on the duration of the maintenance order was inadequate, she should have raised this with the Lieutenant Bailiff when the draft judgment was circulated for comment. She referred in support to the English case of Re B (Appeal: Lack of Reasons) [2003] 2 FLR 1035 where the Court of Appeal confirmed that an advocate ought to draw a judge’s attention to any material omission in the judgment so the judge could then amend his judgment if he thought fit. That is encapsulated in Practice Direction 30A of the Family Procedure Rules in England and Wales which provides at para 4.6:

“Where a party’s advocate considers that there is a material omission from a judgment of the lower court ... the advocate should before the drawing of the order give the lower court which made the decision the opportunity of considering whether there is an omission and should not immediately use the omission as grounds for an application to appeal.”

43. Advocate Fooks pointed out that this was not replicated in Guernsey and that in fact Practice Direction 1 of 2012, dealing with the handing down of judgments, is to the opposite effect because at paragraph 4, having stated that one of the purposes of circulating a draft is to enable advocates to submit suggestions about typing errors, factual errors, wrong references and other minor corrections, it goes on to say *“This facility is confined to the correction of textual mistakes and is not to be used as the occasion for attempting to persuade the judge to change the decision on matters of substance.”*
44. We do not think that it would have been inconsistent with that paragraph for Advocate Fooks courteously to raise with the judge her concern that he had not given reasons for his decision to prefer a joint lives maintenance order and to invite him to elaborate on his reasons as he thought fit. That would not be inviting him to change his decision. However, we can understand why she might have felt unable to do that in the light of the Practice Direction and we do not consider that her failure to raise the point with the Lieutenant Bailiff precludes her from taking the point on appeal. Nevertheless, in case it is of assistance in future, we are of the view that a courteous request to give or elaborate reasons for a conclusion in a judgment is not inconsistent with Practice Direction 1 of 2012. It is not asking the judge to change the decision. It is then up to the judge as to whether or not he wishes to give further reasons following such a request.
45. In the light of our conclusion on this particular question, we do not need to decide whether, or in what circumstances, a party who takes a tactical decision not to point out to a judge the absence of reasons for a particular exercise of a discretion should then be precluded from challenging the exercise of the discretion on appeal on the basis that the exercise of the discretion is unexplained. More immediately, we do accept Advocate Couch’s submission that the reasons for the Lieutenant Bailiff’s decision to make the spousal maintenance order he did appear sufficiently from his judgment. This we explain further below.
46. Next, we remind ourselves of the approach which this Court should adopt when hearing an appeal from a discretionary decision such as the level or duration of maintenance payments. That approach is conveniently summarised in the speech of Lord Hoffmann in Piglowska –v- Piglowski [1999] 3 All ER 632 at 643 where he said:

“In G –v- G [1985] 2 All ER 225 at 228, [1985] 1 WLR 647 at 651 - 652 this House, in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith LJ in Bellenden (Formerly Satterthwaite) –v- Satterthwaite [1948] 1 All ER 343 at 345, which concerned an order for maintenance for a divorced wife:

“It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.”

This passage has been cited and approved many times ...”

47. It follows that we may only interfere with the Lieutenant Bailiff’s decision if satisfied that his decision to order the spousal maintenance for a period of joint lives rather than for a term exceeds the generous ambit within which reasonable disagreement is possible.

(i) Duration of maintenance orders – the principles

48. As to the position in England and Wales, whilst we accept, as stated by Francis J in *ABX –v- SBX* [2018] EWFC 81 at [95] that there can be said to be a ‘trend’ in favour of term orders, on the basis of the material before us we consider that the position is not as one-sided in favour of term orders as Advocate Fooks submits.
49. Thus, in the report of the Law Commission ‘Matrimonial Property, Needs and Agreements’ published in February 2014, it was said at paras 2.50 and 2.51 that the Family Registry in London tended to make joint lives orders whereas other major court centres did not. Whilst, in its recommendations the Law Commission supported the objectives of section 25A in seeking to promote independence where possible, it cautioned that this would not always be possible. Thus at para 3.49 it said:

“We were warned – and we are well aware – that there are cases where clean breaks are unachievable. The majority response from the Judges of the Family Division told us that “admirable principle has to yield in so many cases to practical reality. The combination of age, length of marriage, and duration out of the work place renders, in very many cases, an ambition of independence impossible.””

50. The report summarised the Law Commission’s views on this point at 3.67 in the following terms:

“3.67 Accordingly, we conclude that the objective of financial orders made to meet needs should be to enable a transition to independence, to the extent that that is possible in light of the choices made within the marriage, the length of the marriage, the marital standard of living, the parties’ expectation of a home, and the continued shared responsibilities (importantly child care) in the future. We acknowledge the fact that in a significant number of cases independence is not possible, usually because of age but sometimes for other reasons arising from choices made during the marriage.”

51. The Law Commission recommended that the Family Justice Council should provide guidance on this topic. The Council subsequently did so and we have been referred to the April 2018 edition of the ‘Guidance on Financial Needs on Divorce’. The Guidance refers to a number of the cases already mentioned but we found helpful the bullet point summary of the Guidance at page 31 in the following terms:

“Duration and the transition to independence.

- *Most case outcomes tend eventually not towards life-long support but towards independence, but this is not appropriate in all cases.*
- *If needs are to be met through a periodical payments order then the court must consider (whether making an initial order or a variation order) whether to make a joint lives order, an extendable term order or a non-extendable term order.*
- *In deciding on the duration of any order the Court will need to consider the statutory steer towards the termination of obligations at the earliest point which is just and reasonable, but termination should only occur if the payee can adjust to it without undue hardship.*
- *Termination of the obligation should not be achieved at the expense of a fair result.*
- *Termination of the obligation should be justified by reference to an evidential foundation, not crystal ball gazing or pious exhortation.* [emphasis added]

52. The Guidance then goes on to consider the matter in more detail. It quotes specifically from Miller/McFarlane, Flavell, C –v- C, G –v- G and SS –v- NS. Having done so, it summarises the position at para 58 in the following terms:-

“58. When read with the overarching guidance provided in the leading cases in the House of Lords (Miller; McFarlane) and in the Court of Appeal (Flavell and C –v- C), the Family Justice Council endorses and commends adopting this type of rigorous and disciplined approach, consistent with the overall objective identified above in paragraph 15 and the ‘gentle transition’ towards independence.

59. But we emphasise that each case must be considered on its merits, upon proper exercise of the Court’s individual discretion, at each stage at which the continuation of periodical payments falls to be considered....”

53. Advocate Fooks submitted that C –v- C and Flavell were no longer good law and were inconsistent with Miller. She submitted that para 58 was in effect a wholehearted approval of the comments of Mostyn J in SS –v- NS, which were quoted in the immediately preceding paragraph 57. We do not agree. It is clear from paragraph 58 that the Family Justice Council, whilst commending the approach of Mostyn J as an example of a ‘*rigorous and disciplined approach*’ was expressly stating that what he said had to be read in conjunction with the overarching guidance in McFarlane, Flavell and C –v- C.
54. In this connection, the decision in McFarlane itself is of interest. In that case, as in the present case, there was a high-earning husband but the capital assets were insufficient to provide for an immediate clean break. Maintenance for the wife was therefore appropriate. The Court of Appeal had overturned the decision of the first instance judge for a joint lives maintenance order and had imposed a term of five years on the maintenance. The House of Lords said this was wrong and re-instated the joint lives order. We refer below to the observations of Lord Nicholls and Lady Hale in this regard.
55. Putting these matters together, the conclusion which we draw from the cases and texts is that, notwithstanding the statutory steer in section 25A, the courts in England and Wales will still make joint lives orders where they are unable to form the opinion that the payee will be able to adjust to a termination at the expiry of a term order without undue hardship. In particular, as stated by the Family Justice Council, a term order should be justified by reference to an evidential foundation, not crystal ball gazing or pious exhortation.
56. We have dealt with the position in England and Wales at some length because that is the way the case was argued before us. But we must decide the matter in accordance with the law of Guernsey. Section 25A has no application in Guernsey. Article 47(1) of the Matrimonial Causes (Guernsey) Law 1939 (as amended) states merely that the court should order such periodical payments as it ‘*may deem reasonable*’.
57. It was common ground before the Lieutenant Bailiff and before this Court that, when considering questions of financial provision, the courts of Guernsey will nevertheless pay close attention to the principles adopted by the English courts (because the underlying social conditions and objectives are likely to be the same) and that includes the desirability of a clean break if that is achievable. This point was indeed noted in terms by the Lieutenant Bailiff when, at paragraph 26 of his judgment, he set out the applicable principles by which he directed himself.
58. This approach would seem to be consistent with that approved by this Court in C –v- C (12th December 2006) where, having noted that, although the checklist contained in section 25 of the Matrimonial Causes Act 1973 of England and Wales had not been enacted in Guernsey, the courts in this jurisdiction had regularly applied the factors set out in the checklist, the Court went on to say at para 20:

“20. Bearing in mind that they reflect modern attitudes it is right that the factors set out in Section 25 of the 1973 Act (the so-called “checklist”) should inform the courts of this jurisdiction in the exercise of their powers under Article 47(1) of the Law and that the English authorities as to the application of that section, particularly those emanating from the House of Lords, should be carefully considered here. After all, the social conditions in Guernsey are similar to those pertaining in the United Kingdom and the financial problems posed by divorce are much the same. But at the end of the day it has to be borne in mind that it is the legislation prevailing here and not that of England and Wales which is being administered and that the legislation in the respective jurisdictions is not identical.”

59. The Court went on at paragraph 21 to sound a note of caution in the following terms:

“21... And care must be taken not to assume that the English legislation is to be applied here lock, stock and barrel. For example, Mr Duckworth referred in his submissions to Section 25A of the 1973 Act which applies when a court in England or Wales is considering whether to enforce a clean break. While it may or may not be appropriate to seek to apply the principles implicit in that provision, insofar as this may be possible in Guernsey, never having been enacted here it cannot be deemed to impose duties on the courts of this jurisdiction.”

60. We agree with this approach. Given that section 25A has not been enacted in Guernsey, it would be wrong for the courts in this jurisdiction to regard themselves as duty bound to apply its exact wording, including in particular the reference to ‘undue hardship’ as set out in section 25A(2).

61. In making this observation, we are not to be taken as casting any doubt upon the approach adopted by the courts in Guernsey of seeking to achieve a clean break as a route to independent finances and self-sufficiency wherever possible. On the contrary, we endorse that approach as being appropriate for the present day.

62. However, as the speeches in Miller/McFarlane and the emphasised fourth bullet point from the Guidance of the Family Justice Council quoted at para 51 above make clear, the ultimate objective is one of fairness. That was also the view of this Court in E -v- E (2007-08) GLR 133 where at paragraph 41 the Court said:-

“The duty of the court, when determining how the capital assets of the parties to a marriage are to be divided, is to achieve fairness.”

Whilst that observation was made in the context of capital assets, the principle is of equal application in relation to maintenance orders and their duration.

63. It follows that, whilst the Court should seek to achieve a clean break where this is possible, it should only do so where it is satisfied that this will achieve a fair and reasonable result as between husband and wife. A clean break may of course be immediate (by allocation of sufficient capital assets) but may also be deferred (by reference to a term order for maintenance). If the court is considering the latter, it must consider what the position is likely to be at the expiry of any term order and determine whether that would be a fair result as between husband and wife having regard to all the circumstances, including the desirability of seeking independence and self-sufficiency on the part of the receiving party.

64. Advocate Fooks placed weight upon the fact that in Jersey, where there is also no statutory equivalent to section 25A, the Royal Court had, in the case of Q -v- R [2018] JRC 041 per Clyde-Smith, Commissioner in effect adopted the provisions of section 25A(2) as reflective of Jersey law. The court in that case was considering an application by the husband to vary a joint lives order so as to replace it with a term order and in passing the court said this:

“43. The requirement for the English court to consider whether there should be a clean break on an application to vary spousal maintenance has statutory force under section 31(7)(a) of the Matrimonial Causes Act 1973, which has no equivalent in this jurisdiction, but even so, we accept the principle that the Court should in every case consider whether financial independence can be achieved without undue financial hardship. Both the parties in this case expressed a desire for financial independence, given the acrimony their dependence has caused since the divorce and the legal costs that have been incurred.

...

77... The obligation on the ex-husband to pay spousal maintenance for the whole of his life runs counter to the policy of the Court to strive to achieve a clean break if this can be done without causing undue financial hardship, allowing the parties to lead independent lives.”

65. On the facts, the court concluded that it had no basis upon which to find that the wife could at the expiry of the suggested term become financially independent and therefore dismissed the application to replace the joint lives order by a term order. It did indicate that the parties might wish to try and achieve a clean break by agreeing upon a lump sum payment from the husband by way of capitalisation of the maintenance, but made no order to that effect as it had insufficient information to do so.
66. We note the decision of the Royal Court of Jersey. However, the fact remains that section 25A(2) has not been enacted in Guernsey. Whilst it would undoubtedly be open to this Court to hold that the Guernsey courts should, as a matter of policy, replicate the approach mandated by the exact wording of section 25A(2), we do not think it would be right to do so. If a term order would at its expiry cause the receiving party hardship, albeit not undue hardship, we think that it should be for the court in this jurisdiction to decide in all the circumstances whether or not it would be fair and just to make a term order as opposed to a joint lives order, rather than being more or less obliged, per Mostyn J, to make a term order in such circumstances.
67. We think that the occasions upon which the approach which we prefer and the approach required by section 25A(2) would lead to a different result are likely to be very few. The Guernsey courts will be seeking a clean break wherever possible and will be seeking to promote independence and self-sufficiency. However, given that section 25A(2) has not been enacted in Guernsey, we think that the court should ultimately retain the flexibility to make such order as it considers just and fair without being forced into the straitjacket of the exact wording of section 25A(2).

(ii) Application to the facts

68. In our judgment, notwithstanding the desirability of achieving a clean break (deferred in this case) if possible, it cannot be said that the Lieutenant Bailiff’s decision was plainly wrong. On the contrary, it seems to us eminently reasonable.
69. The husband is suggesting an order which expires in June 2030 when the daughter will be 22, the wife will be 57 and the husband 56. A term expiring by reference to the completion of the daughter’s tertiary education would probably not be significantly different in length.
70. The wife’s annual income between now and then will be £90,000 maintenance plus £20,000 earnings plus rental income from the First Property (if she retains it) which the Lieutenant Bailiff estimated at £15,600 net, plus such income as she may earn from her capital of £185,135 and £58,500 (being the brother’s debt) and other sums. On this basis, her income would fall, on termination of the maintenance at the age of 57, to £35,600 plus such income as she will have from the capital sums referred to above and her pensions (once payable). This would be a drastic reduction from the income level which she will have been receiving and would not begin to cover her living expenses, which the judge assessed at £110,000 per annum. Even if she

manages to make some savings from her income over the next 11 years and even if she reduces her living expenses by a reasonable amount (as Advocate Fooks submitted she should, because she is not entitled to continue to live at the standard of living enjoyed in the latter part of the marriage), it is impossible to say with confidence that she will have enough to meet her reasonable living expenses if her income is reduced by £90,000 at that stage.

71. There was of course also considerable uncertainty before the Lieutenant Bailiff as to what the position would be in 2030 and during the period between the date of the order and 2030. It all depended upon whether the daughter, accompanied by the wife, went to live in the UK or remained in Guernsey. The position described in the previous paragraph assumes that the wife and daughter stayed in Guernsey and that accordingly there was an income from the First Property. If she were to move to the UK, the Lieutenant Bailiff held it was likely that the First Property would be sold in order to fund the purchase of a house in the UK where the wife and daughter would live. She would in those circumstances not have any income from the First Property until 2030, at which time presumably any property purchased in the UK with the proceeds of sale of the First Property could be let or sold. All in all, it was extremely difficult to know what the position would be in 2030.
72. Conversely, for the next 11 years, the husband can expect to earn close to £1m a year. He should be able to accumulate substantial capital during this period, which would provide him with an income as and when he retires. It is true that, as Advocate Fooks submitted, the wife might be able to sell the First Property (or any replacement property) at that stage and she could gradually eat into her capital assets. Nevertheless, when one asks oneself whether a decision at this stage to terminate the wife's maintenance in 11 years' time would be a fair and reasonable outcome given that the husband will have this extremely large income until he retires, the answer in our view is that it would, on the contrary, be unfair and unreasonable. It would not therefore be right to make a term order.
73. Advocate Couch emphasised that a joint lives order does not assume that the maintenance will in fact continue for such a period and it is not a 'meal ticket for life'. It is open to the paying party to apply to bring the maintenance to an end at any time, quite apart from any specific review dates built in to the order. In our judgment that is a point which must be borne very much in mind.
74. Ultimately, it seems to us that the only real difference between the parties in this case is a question of onus. In the case of a joint lives order, the onus will be on the husband to show that any of the events stipulated by the Lieutenant Bailiff or indeed any other event requires a termination or variation of the maintenance. In the case of a term order, the onus will be on the wife to persuade the Court that the maintenance should be extended at the expiry of the term.
75. In Miller/McFarlane, the House of Lords addressed this issue. In order to put it in context, we would quote the following passages from the judgment of Lady Hale:

“154. There is obviously a relationship between capital sharing and future income provision. If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision. In McFarlane, there has been an equal division of property, but this largely consisted of homes which can be characterised as family assets. This was not enough to provide for needs or compensate for disadvantage. The main family asset is the husband's very substantial earning power, generated over a lengthy marriage in which the couple deliberately chose that the wife should devote herself to home and family and the husband to work and career. The wife is undoubtedly entitled to generous income provision for herself and for the sake of their children, including sums which will enable her to provide for her own old age and ensure the husband's life. She is also entitled to a share in the very large surplus, on the principles both of sharing the fruits of the matrimonial

partnership and of compensation for the comparable position which she might have been in had she not compromised her own career for the sake of them all....

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 re-train 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 ... 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.” [emphasis added]

76. The speech of Lord Nicholls was to the same effect:

“97... 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....”

77. Both Lady Hale and Lord Nicholls referred to the fact that, under English law, there is a high threshold for a receiving spouse to justify the extension of a term order pursuant to Fleming –v- Fleming [2003] EWCA Civ 1841. It is of course possible that the courts in Guernsey would not impose such a high threshold or that the decision in Fleming will be revisited in England and Wales, but that is all very uncertain. In our judgment, it would be unfair to place the onus on the wife to seek an extension. Far fairer that the onus should be on the husband to seek termination or variation of the order. By the time of any such review, he may well have accumulated sufficient capital from his earnings to enable the court to consider a clean break by way of a capital payment if appropriate.

78. In summary, we consider that the award of a joint lives maintenance order in this case was well within the discretionary area of judgment given to the Lieutenant Bailiff and was fair and reasonable.

79. We return finally to the attack on the Lieutenant Bailiff’s judgment made on behalf of the husband concerning the suggested absence of reasons for the Lieutenant Bailiff’s decision and concerning his suggested failure to consider the wife’s inability to adjust to complete financial independence by 2030 without undue hardship.

80. It has to be borne in mind that before the Lieutenant Bailiff, as summarised at paragraph 4 above, the husband was contending for tapering payments expiring in 2030, whereas the wife was contending for a joint lives order without any tapering. It was never part of the husband’s case that the wife should receive in the longer term, beyond 2021 and up to 2030, much more than £40,000 per annum; rather the amounts were to become ever smaller before ceasing altogether, reflecting what the husband submitted was the wife’s rapidly increasing independence and move to full independence.

81. In particular, it was not the husband’s case that spousal maintenance should continue at a level commensurate with the wife’s needs, less only the income she could earn, for a fixed term until

2030. Specifically, the approach argued for by the husband on this appeal was not the husband's contention before the Lieutenant Bailiff, namely that the wife should properly receive substantial spousal maintenance through to 2030 but was thereupon to be expected to have adjusted to complete financial independence from the husband so that it was appropriate that she should in principle receive nothing more.

82. In our judgment, the Lieutenant Bailiff rejected the husband's submission before him because he had concluded that the wife could not be reasonably expected to become increasingly independent of her high-earning husband, contrary to the husband's argument. As we have pointed out, at paragraph 68 of his judgment the Lieutenant Bailiff asked himself how the wife's financial needs for £110,000 per annum were to be met. In subsequent paragraphs of the judgement he had examined this issue, before concluding that, with the exception of the contribution of £20,000 per annum from earnings, the wife's needs could not be reasonably expected to be met otherwise than by ordering continuing spousal maintenance for the parties joint lives, but subject to review on the occurrence of various events likely in the future to be relevant to the parties' financial situation.
83. In these circumstances it is obvious that the Lieutenant Bailiff accepted (as he was fully entitled to do) the substance of the reasons put forward on behalf of the wife to justify her stance. For the same reason that an annual £40,000 of spousal maintenance would not be sufficient by 2022 to enable the wife to meet her annual need for approximately £90,000 per annum, and that less than £18,000 per annum by 2030 would be insufficient, it was not to be expected with any degree of confidence that the wife would have become financially independent without difficulty (or, if one will, without hardship, undue or otherwise) by 2031 if the husband had continued to provide the spousal maintenance until then sufficient to allow her need to be met.
84. We therefore do not consider there to be any force in the husband's argument that the Lieutenant Bailiff's spousal maintenance order was unreasoned or defectively exercised so that on this appeal it is for us to exercise afresh his discretionary power. But, in any event, had we concluded that there were insufficient reasons and that we needed to exercise the discretion afresh, we would have reached the same conclusion as the Lieutenant Bailiff.
85. We also add for the avoidance of any doubt that had we been persuaded that we should hold that the law of Guernsey as it relates to spousal maintenance payments is now indistinguishable from the law of England and Wales because, for policy reasons, the courts in Guernsey should proceed as if a provision such as section 25A(2) of the Matrimonial Causes Act 1973 was part of its law we would, nonetheless, have reached the conclusion that the appeal should be dismissed. In our judgment, it is not possible, on the facts of this case, to form the opinion, now, with any degree of confidence, that the wife would be able to adjust to a reduction in her income by £90,000 in 2030 without undue hardship.
86. For the reasons we have given, we dismiss this appeal.