

## The death-knell for add back cases: *Rapp v Sarre*?

Jo Edwards, *Partner, Forsters LLP*  
Amanda Sandys, *Solicitor, Forsters LLP*



Jo Edwards is the immediate past Chair of Resolution, an organisation of family practitioners committed to reducing conflict during divorce. Jo is a family solicitor, mediator and collaborative lawyer.



Amanda Sandys is a solicitor and collaborative lawyer in the family team. She specialises in resolving disputes arising from divorce and separation. Her cases often involve significant assets and have an international or trust element.

What does the recent Court of Appeal case *Rapp v Sarre* [2016] EWCA Civ 93, [2016] FLR (forthcoming) tell us about the extent to which bad behaviour should be reflected in financial remedy cases? Although a party's conduct is a factor that must form part of all the circumstances of a case for a judge to weigh up under the provisions of s 25(2)(g) of the Matrimonial Causes Act 1973, invariably clients are dismayed that what they consider subjectively to be heinous behaviour on the part of their estranged spouse is rarely considered sufficiently heinous to impact on the financial outcome of divorce proceedings. In practice, allegations of misconduct fall into two categories – personal misconduct and financial misconduct.

### Personal misconduct: 'gross and obvious'

A party's personal conduct has long been relevant where it is 'both gross and obvious' and thus inequitable to disregard – this approach (long established since the 1973 case of *Wachtel v Wachtel* [1973] Fam 72) has been seen as just and practicable because, as Baroness Hale reiterated in *Miller; McFarlane* [2006] it is not possible for an outsider to pick over the events of a marriage and decide who is the more to blame for what went wrong, save in the most 'obvious and gross' cases. Further, while it may be a bitter pill for clients to swallow, the Family Court would groan even more under the weight of dealing with its caseloads were it to factor matters relating to 'conduct' into financial outcomes any more than it already does. Although some litigants may bemoan the limited circumstances in which their spouse's conduct has a bearing on a financial outcome, in practice it is really only cases in which there is an allegation of personal of financial misconduct that there is a bearing on the financial outcome.

### Financial misconduct: the add back before *MAP v MFP*

Cases of financial misconduct being taken into account are more common and, where there has been reckless or wanton dissipation by one spouse in, say, the lead up to financial proceedings, then it may be appropriate for the court to treat that party as though s/he still had those assets and re-attribute them to him/her for the purposes of assessing resources. Dissipation of assets commonly includes gambling, the purchase of expensive consumer goods and services and irresponsible investments – not to mention monies spent on unwise litigation. Where there were cases in which

conduct was relevant, what impact did the conduct have upon the outcome in the financial proceedings?

Shortly after the coming into force of the Matrimonial Causes Act 1973, *Martin v Martin* [1976] Fam 335 came before the Court of Appeal. H depleted resources by passing marital funds to his mistress for two ultimately unsuccessful business ventures. Cairns LJ found that 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'.

In *Norris v Norris* [2002] EWHC 2996 (Fam), [2003] 1 FLR 1142, W sought to 'add back' to the pot a sum of money which she claimed was due to her because of H's 'overspending'. While Bennett J did not add all the over expenditure back into the pot, he did consider H's spending to be 'reckless' and added back the lion's share of the overspend to the matrimonial pot, £250,000 of £323,000. Bennett J said: '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'.

### 'Wanton element'

By the time of *Vaughan v Vaughan* [2007] EWCA Civ 1085, [2008] 1 FLR 1108, the judge at first instance did not add back into the pot any of the H's £80,000 gambling spend, despite the judge finding the expenditure 'profoundly irresponsible'. However, when the wife appealed, the Court of Appeal, citing *Norris*, found the judge at first instance to be wrong but noted that dissipated sums can be added back or re-attributed only where there is 'clear evidence of dissipation (in which there is a wanton element)' and where it is necessary to add back to meet needs, such as housing needs.

### 'Demonstrably wanton'

The judiciary has identified difficulties with notional re-attribution of assets, as

highlighted by Mostyn J in *BP v KP and NI (Financial Remedy Proceedings: Res Judicata)* [2012] EWHC 2995 (Fam), [2013] 1 FLR 1310, in that carrying out an exercise about 'add back' does not recreate any actual money and does not bring assets back into the pot. Mostyn J suggested that add back should apply 'very cautiously' and only where the dissipation is 'demonstrably wanton'. This was evidence of the courts adopting an even more cautious approach in adding back into the matrimonial pot monies that had been dissipated. Perhaps one of the reasons for the judiciary's reluctance for a party's bad behaviour to have a bearing on the financial proceedings is because it is so hard to determine what expenditure has been 'improperly' made. It is hard to police, and often very time-consuming and difficult to piece together how much has been 'wrongly' spent.

### For better, for worse? Many successful people are flawed

Until *Rapp v Sarre*, the issue of bad behaviour had reared its head most recently in *MAP v MFP (Financial Remedies: Add-Back)* [2015] EWHC 627 (Fam), [2016] 1 FLR 70. The couple, both in their early 60s, had separated after a 40-year marriage. The assets to be divided were £25.1m, largely derived from H's successful property maintenance business. W sought half the assets, and an additional £750,000 in respect of what she claimed was her husband's 'wanton and reckless expenditure' over the preceding two years, in which H's 'personal demons' had been given full flight – including cocaine addiction, depression and prostitutes, and a significant sum spent on unsuccessful treatment. Although Moor J did add back £271,000 to the pot, being tax that W spent as a result of H sacking her and her losing entrepreneur's relief for CGT, in his judgment he did not add back the full sum that W sought, concluding as he did that H had not overspent to reduce his wife's claims. H's expenditure was held not to be 'deliberate or wanton' and therefore Moor J determined that it would be wrong to add it back. It was down to a flawed character on the part of H – irresponsible but not deliberate or wanton:

‘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 H’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.’

This seemed to spell the end of add back cases – for a long time an area the judiciary had approached cautiously – as here the test for the dissipation no longer seemed to be ‘reckless’ but whether the spender had demonstrated an intent to defeat the other’s claims by the expenditure. In *MAP v MFP* it was determined that H was driven to his excessive expenditure by his addictions and to seeking out expensive treatment to try to address his addictive personality. His behaviour was not driven by the goal of defeating his wife’s claims.

Arguably, this is a higher test than the Family Court had set before and to an

extent this case turned on its facts – the judge found that H’s addictions were life-threatening. Would a different judge, on a different day, treat expenditure on drugs where the addictive behaviour was less severe and more ‘recreational’ in a different way? Would a less serious addiction have the requisite element of ‘deliberate’ or ‘wanton’ to justify a claim for addback? Or is the case simply consistent with the principles espoused in *Vaughan*, where only the ‘wanton’ element justified an addback?

### ***Rapp v Sarre* – sex, drugs and litigation misconduct**

Whilst it might be tempting to consider that *MAP v MFP* signalled an end to cases where conduct had a bearing on financial claims (litigants doubtless will ask themselves whether, if a severe cocaine addiction and flawed personality giving rise to a predilection for prostitutes has no bearing on financial outcome, what will?) family lawyers seized upon the 2016 Court of Appeal case of *Rapp v Sarre* – which at first

blush seemed to fly in the face of the decision in *MAP and MPF*. In *Rapp v Sarre*, the court held that that an unequal division of the couple's assets was justified, despite H sharing a great many of the 'bad behaviours' demonstrated by H in *MAP and MPF*. Had the pendulum swung again?

Again, the case featured an addictive personality on the part of H. W worked as a cashier/teller in a bank in Monte Carlo. H moved to London shortly after they starting living together to work as an oil broker. When W joined him shortly thereafter, she never worked again, although there were no children. By 2003, 9 years into the marriage, W knew that H was taking cocaine and drinking excessively and suspected that he was using female escorts. Attempts to address the problems, including H's attendance at rehabilitation clinics proved unsuccessful. The couple separated in 2009. In 2010, H's employer discovered his addictions and engineered his departure; his addictive behaviour continued despite seeking professional help again.

The assets were £13.5m. The judge at first instance considered it fair to depart from an equal division of the assets and awarded W 54.5% to meet her needs. Was H's conduct such that the judge accepted that it had led to the 'reckless frittering away of family money'? Here, the judge did not adopt the sort of approach adopted in *Norris and Vaughan*, notionally re-attributing dissipated sums to the spouse responsible, because he did not think this was possible. However, he accepted that it was appropriate to adjust the distribution of assets from an equal division to take account of this factor. H appealed, arguing that such an unequal division was unfair and that he had been left with risky and less liquid assets. He claimed that the judge had placed undue weight on his addictive personality but his appeal was dismissed by the Court of Appeal.

At first glance, the outcome of *Rapp v Sarre* seems surprising in the light of *MAP v MPF* because it features such similar addictive personalities on the part of Hs involved; it could be interpreted that H in *Rapp* was penalised for his behaviour, in a way that H

in *MAP v MPF* was not. However, *MAP v MPF* is consistent with previous case law in which conduct was not relevant unless found to be 'wanton'. In *MAP v MPF*, the addiction was not found to be wanton – H could not help himself from behaving as he did. Does the differing outcome in *Rapp v Sarre* mean that conduct will once again have a bearing on financial outcomes? Was H penalised for his behaviour and addictive personality, despite what Moor J found in *MAP v MPF*? Not so.

### Needs trump again

In relation to Mr Rapp's addictive personality, and the resulting overspending, the Court of Appeal found that a departure from equality was justified on the basis of the wife's needs alone, given that (as it was found) she could not work following such a long period out of the employment market. H's needs could be met with his unequal share of the available capital if needs be, but the judge considered that H could work and would not have to rely on capital alone to meet his needs.

The Court of Appeal did not have cause, therefore, to consider what it described as the, 'interesting and challenging question recently considered by Moor J in *MAP* of whether behaviour such as H's should be reflected in the court's ancillary relief order, and if so, how. [The judge at first instance] also took into account the distress caused to the wife by H's conduct and considered that "it would be inequitable to disregard the [money] wantonly expended and the distress to the wife of H's addictive behaviour" which, along with the need factor, he considered justified "the modest departure from equality" in his order'. Therefore, such a question must await another day.

The case emphasises that the whole range of the s 25 factors (and, more often than not, needs) determines the outcome of financial proceedings. As one party involved in the case observed, if a differential in needs justifies a departure from equality in a £13.5m case, then the preparation of budgets just got a whole lot more important. One wonders, however, whether,

in terms of his litigation conduct, Mr Rapp's behaviour was thought to be 'wanton' and one which was intended to defeat his wife's claims? Certainly he demonstrated poor conduct in not engaging in the litigation. His disclosure was found to be woeful and he did not instruct solicitors. He did not attend any hearing after the FDR in 2012. He had limited involvement in the final hearing as he wrote to the court in terms which the presiding judge interpreted as an application for an adjournment on health grounds.

### Penalty costs

While divorcing parties must now 'take their spouses as they find them', equally, litigants can hardly be surprised if judges take their behaviour into account too. The 2015 case of *Velupillai v Velupillai* [2015] EWHC 3095 (Fam), [2016] FLR (forthcoming and reported at [2016] Fam Law 19) saw H's litigation misconduct lead to more than 30 hearings, causing the court to have him removed from the building for angry and menacing behaviour and for assaulting the wife and her counsel in the court building. Mostyn J's response was to order H to pay all of the wife's costs on an indemnity basis, make an extended civil restraint order against H and direct that the judgment be published with no anonymity. He also directed that H's abusive emails sent to the court be forwarded to the Commissioner of the Metropolitan Police for him to decide if

any of the threats contained in them amounted to a criminal offence.

It seems that although the judiciary's approach to parties' conduct within a marriage may (rightly) be to continue to look at such cases with caution when considering whether it is appropriate to add back assets into the matrimonial pot (again rightly) no such restraint will be shown by the court in addressing disrespectful behaviour on the part of litigants at court.

### Conclusion

The law in relation to add backs has developed over the past 40 years. It is clear from the authorities that the court may reattribute/add back sums which have been dissipated, moving from assets having been 'frittered away' and 'recklessly depleted' to 'demonstrably wanton' behaviour. Judges are clear that this exercise has to be conducted cautiously and litigants should take note that running add back arguments can be expensive and time-consuming and often, ultimately, fruitless. On the question of add backs, and contrary to first appearances, *Rapp* has not developed the law from the position as it stood in *MAP*. As it currently stands, *MAP* supports the 'flawed individual', no doubt to the disheartenment of many a long suffering spouse. For how long this remains the case, only time will tell.