

Applications at Beginning and End:
Maintenance Pending Suit (MPS)
and
Notice to Show Cause

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Beginning - Maintenance Pending Suit (MPS)

What We'll Cover



What is MPS?

MPS: Interim
spousal
maintenance
during proceedings

Why is it ordered:
Stops financial
hardship pre-final
order

INTERIM: not a final
determination of
needs

“(1) On an application for a divorce, nullity of marriage or judicial separation order, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the making of the application and ending with the date of the determination of the suit, as the court thinks reasonable.

(2)An order under this section may not require a party to a marriage to pay to the other party any amount in respect of legal services for the purposes of the proceedings.

(3)In subsection (2) “legal services” has the same meaning as in section 22ZA.”



The power: Matrimonial Causes Act 1973, Section 22

The Discretionary Legal Test

Reasonableness:

- what is 'reasonable' in all circumstances
- Needs vs ability to pay
- Summary, not a forensic exercise – interim order



Key Case: TL v ML [2005] [2005] EWHC 2680 (Fam)

Held that the sole criterion for determining an application for maintenance pending suit is 'reasonableness' and there should always be before the court a specific budget for the application for maintenance pending suit.

The court's focus is on immediate needs

The court makes a quick, pragmatic assessment

Drafting the Application

Compliance with Part 18 (FPR9.7(1)(a) and (2)):

- Application notice AND D11 needed
- A draft order is part of Part 18

Use Form D11

- Accompanying the Form A clarity aids meeting the reasonableness test

Clear monthly budget

- Clarity aids meeting the reasonableness test

IF pre-Form E (r9.7(3): File and serve a statement in support:

- Explaining why the order is necessary
- giving up-to-date information about that party's finances
- respondent must, at least seven days before the court is to deal with the application, file and serve a statement their means

Highlight: Evidence Requirements



Compliance with all procedural requirements



Concise witness statement to show urgent need for MPS



Income and expenditure schedule limited to immediate needs – Keep Schedules Simple



Be Realistic in Budgets



Recent bank statements (if available)

Respondent's Approach

01

Challenge
inflated
budgets

02

Provide
realistic
counter-
schedule

03

Highlight the
client's
inability to pay
MPS

Costs

- Clean Sheet Case - Costs orders more common than usual
- Conduct matters – could be relevant in ongoing proceedings
- Risk of unreasonable positions being penalised



Best by Test – Bobby Fischer: Case Law

SS v NS [2014]

- Needs-focused approach
- Avoid long-term needs/expenditure
- Court encourages transition to independence

BD v FD [2016]

- Fairness and proportionality
- Interim awards must be realistic

Rattan v Kuwad [2021]

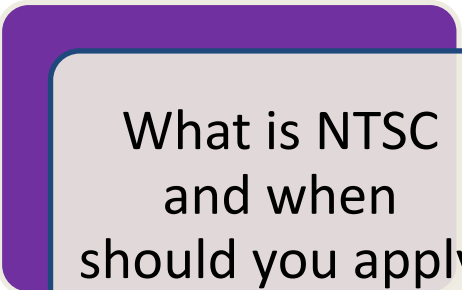
- Importance of proper evidence
- Reiterated the need for interim awards to be fair



End - Notice to Show Cause Applications (NTSC)



We will look at:



What is NTSC
and when
should you apply



Procedure for
applying for
NTSC



NTSC in practice

What is NTSC?

AKA 'Dean Summons' - Dean v Dean [1978] Fam 161

Application to enforce agreement

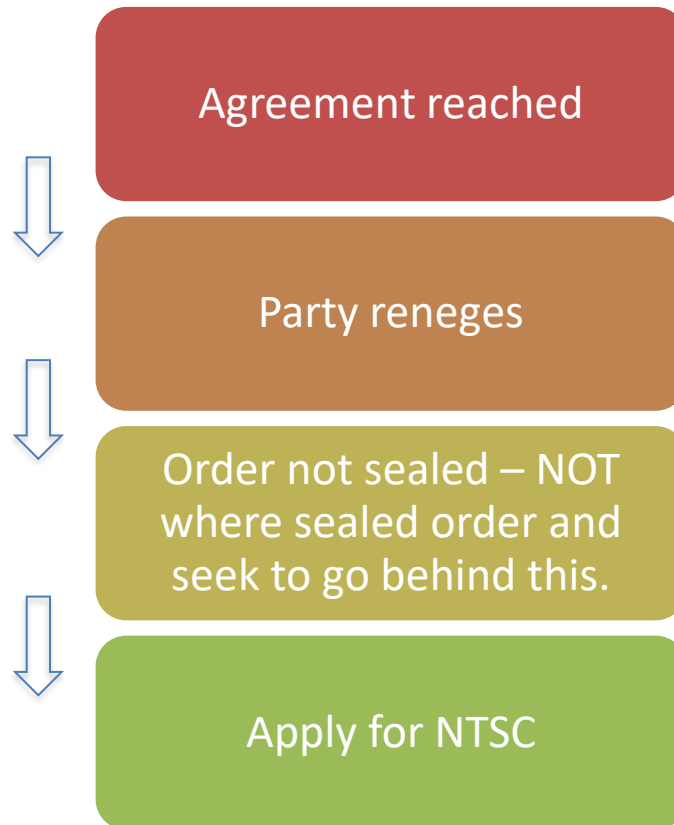


Used before consent order sealed

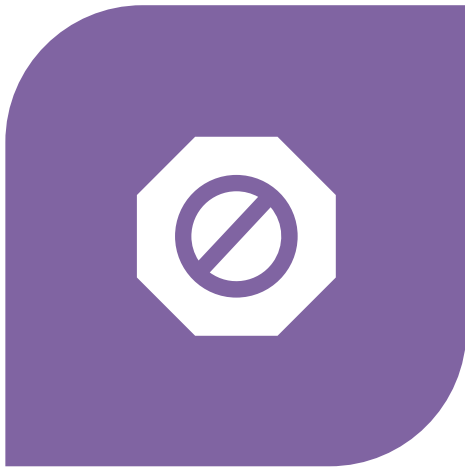


Respondent must justify renegeing on agreement

When It Arises



Applying for NTSC - Procedure



NO FIXED PROCEDURE – FPR DOES NOT REFER
TO IT



GUIDANCE VARIES DEPENDING ON TYPE OF
AGREEMENT REACHED OR ALLEGEDLY
CONCLUDED

Common Denominators in Guidance

- 1) Part 18 and Form D11
- 2) Outline the directions sought and annex a copy of the agreement to the application form.
- 3) IF no live proceedings: issue the D11 at the same time as the Form A and specify that one of the directions sought is an early directions hearing, to avoid standard directions being issued upon Form A processing
- 4) If live proceedings: issue NTSC application ASAP.
- 5) NTSC can be issued in response to receiving a FRP application.
 - 1) NTSC COSTS: starting point is that costs follow the event.
 - 2) Applicants relying upon agreements will to try and limit the the courts enquiries, Respondents may seek deeper enquiry and wider directions to demonstrate the agreement was not binding.



When May NTSC Arise?



LITIGATION AGREEMENTS:
SEEKING TO HAVE AN
AGREEMENT MADE EITHER
PRE-PROCEEDINGS OR
DURING PROCEEDINGS
MADE INTO A CONSENT
ORDER.



XYDHIAS V XYDHIAS: SEEKING
TO DEMONSTRATE THAT AN
AGREEMENT WAS REACHED, IN
ACCORDANCE WITH THE
PRINCIPLES ENUNCIATED IN
XYDHIAS V XYDHIAS AND FOR
ONLY THE OUTSTANDING
MATTERS TO BE DETERMINED
AND THEN MADE INTO AN
ORDER.



'PRE-NUP': SEEKING TO
HAVE A PRE-NUPTIAL
AGREEMENT MADE INTO A
COURT ORDER, USUALLY SO
THAT ORDER CAN BE
ENFORCED.

CASE LAW – Dean v Dean

H and W agreed a compromise. Both were represented and both signed the minutes of a consent order.

W then changed her mind and she was directed to produce an affidavit [now a witness statement] to show cause as to why she should not be bound by the agreement.

The judge determined that the court was not simply there to 'rubber stamp' the agreement and must consider the fairness or otherwise of the compromise.

The court considered the section 25 criteria, but very importantly this included the 'fact of and nature of the agreement voluntarily arrived at'.

Wife was held to be bound by the agreement.

Leading Case – Edgar v Edgar [1980] 1 WLR 1410

Where one party tries to go behind an agreement the principles from this case are as follows:

- a) The court has a duty to consider all the circumstances of a case.
- b) The circumstances surrounding the making of the agreement are very important e.g. undue pressure, changes in circumstances and disclosure.
- c) Formal agreements properly arrived at with competent advice should not be displaced without good and substantial grounds.
- d) The existence of an agreement is a very relevant circumstance under section 25 and in the case of an arms length agreement, based on legal advice between parties of equal bargaining power, is a most important factor to consider under section 25.

Inconsistent Further Decisions led to...

**X v X (Y and Z Intervening) [2009] 3 WLR 437; and
MacLeod v MacLeod [2002] 1 FLR 508**

Steadied the ship with clear and consistent principles:

The agreement does not bind the court and the court must always consider its duty under section 25.

The fact that the parties' have reached an agreement is very significant and a party should not be able to lightly escape the consequences of that agreement.

Whether the agreement is a good or bad bargain is not a sufficient reason to discard a freely entered agreement, the agreement must fail to adequately provide if the court is to refuse to follow it.

The following are grounds for setting at agreement aside:

- The presence of vitiating circumstances, such as, duress, undue influence or fraud etc.

- Insufficient disclosure. [Sharland v Sharland [2015] UKSC 60]

- No reasonable opportunity to obtain legal advice.

- A significant change of circumstances.

- The agreement is manifestly unfair i.e. it does not make reasonable provision.

Is there an Agreement??

Xydhias v Xydhias [1999] 1 FLR 683 – Lord Justice

Thorpe:

‘In my opinion, there are sound policy reasons supporting the conclusion that the judge is entitled to exercise a broad discretion to determine whether the parties have agreed to settle A more legalistic approach, as this case illustrates, only allows the inconsistent or manipulative litigant to repudiate an agreement on the ground that some point of drafting, detail, or implementation had not been clearly resolved’

In some cases the court needs to consider IF there is an agreement AND whether this was



Pre-nups! - Crossley v Crossley [2008] 1 FLR 1467

- The Court may use an accelerated procedure where one party has issued a show cause application to seek to enforce the terms of the pre-nuptial agreement:
 - One party makes a show cause application.
 - Forms E are completed without exhibits.
 - There would be no questionnaires.
 - Either within the Forms E or witness statements filed and served with the Form E the parties explain the background to the agreement, any change in circumstances and their reasons for asserting that the agreement either should or should not be followed.
 - There would then be a show cause hearing which is usually undertaken on submissions only.

The Legal Burden in NTSC



Initial Burden of Proof on Applicant to show there is an agreement



Once proven, shift of Burden of Proof to Respondent to prove why they should be permitted to withdraw



If Respondent fails to show cause, the agreement will be finalised in an order by the court



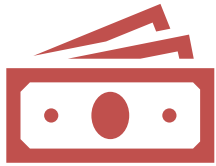
The relevant Burden of Proof is the Civil Burden



CAUTION - COSTS



The general rule in FRP does NOT apply to NTSC.



There is a risk on an unsuccessful application of having to pay the other sides costs...



Equally on a successful application you could get some costs.



Please...
File a Schedule



Questions?

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