

THE HIGH COURT

[2015 No. 344SS]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961, AS AMENDED

BETWEEN:

MS B

APPLICANT

-AND -

MR B

RESPONDENT

-AND -

MINISTER FOR SOCIAL PROTECTION

NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Background

1. Ms B is a separated mother of three young children. One of her children suffers from Asperger Syndrome but is able to attend so-called 'mainstream' school. Another of the children appears to have severe autism; he is a full-time dependent and will always require care. Ms B is a fulltime home-maker.

2. In January 2014, Mr B left the family home to pursue another relationship. On 7th April, 2014, he and Ms B came before the District Court seeking respectively access and spousal maintenance. For present purposes, the court can confine its attentions to the question of maintenance.

3. Ms B applied for maintenance of €950 per week, comprising €500 spousal maintenance and €150 maintenance for each dependent child. By the time the matter came to hearing, Ms B was in receipt of a number of weekly payments from the Department of Social Protection, viz:

- €
- (1) Carer's Allowance 268.20
 - (basic rate + child dependent allowance x 2)
 - (2) Domiciliary Care Allowance 142.85 (for 1 x child under 16 years)
 - (3) Child Benefit 90.00
 - (for 3 children)
 - (4) Respite Care Grant 25.00
 - (for 1 child)

4. At the hearing before the District Court, it was submitted by counsel for Ms B that the income from payments (1) – (4) (inclusive) should not be taken into consideration when calculating the amount of the maintenance order sought. Counsel for Mr B contended that the opposite should apply. The legal dispute between them focused on the correct interpretation of s.5(4)(a) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended. This provides as follows:

"(4) The Court, in deciding whether to make a maintenance order under this section and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters –

(a) the income, earning capacity (if any), property and other financial resources of –
(i) the spouses and any dependent children of the family, and

(ii) any other dependent children of which either spouse is a parent,

including income or benefits to which either spouse or any such children are entitled by or under statute with the exception of a benefit or allowance in respect of any dependent children granted to either parent of such children..." [Emphasis added].

5. It is the precise import of the emphasised text, and the extent of the exception that it defines, which has been the principal focus of matters before this Court.

II. Findings of Fact and Questions Raised

6. In the District Court, the learned judge reached five findings of fact, on the back of which, and pursuant to s.52 of the Courts (Supplemental Provisions) Act 1961, as amended, she has raised five questions by way of consultative case stated to the court.

7. In the consultative case stated, as stated, the learned District Judge states herself to have reached the following five findings of fact:

1....the basic rate of Carer's Allowance is not a payment 'in respect of children'...

2...the child dependent portion of the Carer's Allowance is an increase in a payment in respect of dependent children.

3...the Domiciliary Care Allowance is a payment in respect of children.

4...the Child Benefit is a payment in respect of children.

5...the Respite Care Grant is paid to the carer as a benefit to the carer allowing the carer to avail of respite from the role of the carer of the dependent child."

8. The court understands the learned District Judge (i) to use the term 'payment' to connote the words "benefit" and "allowance" in the above-emphasised portion of s.5(4)(a) of the Act of 1976; and (ii) in her reference to 'children' at points 1, 3, and 4 to be referring to "dependent children" within the meaning of s.5(4)(a).

9. Arising from the foregoing, the learned District Judge raises the following questions of law:

"(i) Can all, any or any part of the payments received by the Applicant from the Department of Social Protection, namely the Carer's Allowance, the Domiciliary Care Allowance, the Child Benefit or the Respite Care Grant, as a matter of law, fall within the exception provided from by s.5(4) of the 1976 Act?

(ii) If the answer to (i) is yes, in the circumstances of the case, does s.5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, preclude me [the learned District Judge] from taking into consideration all, any or any part of the payments received by the Applicant when determining the amount of any payment in respect of maintenance for the dependent children?

(iii) If the answer to (i) is no, in the circumstances of the case, does s.5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, allow me [the learned District Judge] to take into consideration all, any or any part of the payments received by the Applicant when determining the amount of any payment in respect of maintenance for the dependent children?

(iv) If the answer to (i) is yes, in the circumstances of the case, does s.5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, preclude me [the learned District Judge] from taking into consideration all, any or any part of any of the payments received by the Applicant when determining the amount of any payment in respect of spousal maintenance?

(v) If the answer to (i) is no, in the circumstances of the case, does s.5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, permit me [the learned District Judge] to take into consideration all, any or any part of any of the payments received by the Applicant when determining the amount of any payment in respect of spousal maintenance?"

III. Section 5(4) of the Act of 1976, as amended

(i) Overview

10. To answer the questions posed, it is helpful to consider the evolution of s.5(4) since it was originally enacted in 1976.

(ii) Section 5(4), as originally enacted

11. Section 5(4) of the Act of 1976, as originally enacted, provided as follows:

"The Court, in deciding whether to make a maintenance order and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters –

(a) the income, earning capacity (if any), property and other financial resources of the spouses and of any dependent children of the family, including income or benefits to which either spouse or any such children are entitled by or under statute, and

(b) the financial and other responsibilities of the spouses towards each other and towards any dependent children of the family and the needs of any such dependent children, including the need for care and attention."

12. There is no definition of "benefits" in the Act of 1976, though, as will be seen, a definition of the term "benefit" was later added.

(iii) Section 5(4), as substituted by the Status of Children Act 1987

13. Section 17 of the Act of 1987, *inter alia*, substituted a new s.5(4) for the version that originally appeared in the Act of 1976. This new s.5(4) provided as indicated below. (The square-bracketed text is text that was newly inserted by the Act of 1987. The struck-through text featured in the original s.5(4) and not in the substituted sub-section).

"(4) The Court, in deciding whether to make a maintenance order[under this section] and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters –

(a) the income, earning capacity (if any), property and other financial resources of[–]
[(i)] the spouses and of any dependent children of the family,[and]

[(ii)]any other dependent children of which either spouse is a parent,]

including income or benefits to which either spouse or any such children are entitled by or under statute, and

(b) the financial and other responsibilities of[–]

[(i)] the spouses towards each other and towards any dependent children of the family[, and]

[(ii) each spouse as a parent towards any other dependent children,]

and the needs of any such dependent children, including the need for care and attention.”

(iv) Section 5(4), as amended by the Social Welfare Act 1989 (the “Act of 1989”)

14. Section 13(1)(b) of the Act of 1989 inserted further wording into s.5(4)(a) of the Act of 1976 (as substituted by s.17 of the Act of 1987). The revised wording of s.5(4), following the Act of 1989, is shown below, with the variations introduced by the Act of 1987 still indicated, and the additional wording inserted by the Act of 1989 shown in non-italicised, underlined form:

“(4) The Court, in deciding whether to make a maintenance order[under this section] and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters –

(a) the income, earning capacity (if any), property and other financial resources of[–]

[(i)] the spouses and of any dependent children of the family,[and]

[(ii) any other dependent children of which either spouse is a parent,]

including income or benefits to which either spouse or any such children are entitled by or under statute with the exception of a benefit or allowance or any increase in such benefit or allowance in respect of any dependent children granted to either parent of such children, and

(b) the financial and other responsibilities of[–]

[(i)] the spouses towards each other and towards any dependent children of the family[, and]

[(ii) each spouse as a parent towards any other dependent children,]

and the needs of any such dependent children, including the need for care and attention”.

15. Section 13(1)(a) of the Act of 1989 inserted the following definitions into s.3(1) of the Act of 1976:

“‘allowance’ means deserted wife’s allowance under section 195, supplementary welfare allowance under section 200 or deserted husband’s allowance under Section 198B of the Social Welfare (Consolidation) Act, 1981;

‘benefit’ means deserted wife’s benefit under section 100 of the Social Welfare (Consolidation) Act, 1981;

‘competent authority’ has the meaning assigned to it by section 314 of the Social Welfare (Consolidation) Act, 1981.”

16. The term “allowance” in s.3(1) of the Act of 1976 was amended by s.15 of the Social Welfare Act 1990 to mean “...[a] deserted wife’s allowance under section 195, lone parent’s allowance under section 198B or supplementary welfare allowance under section 200 of the Social Welfare (Consolidation) Act, 1981”.

(v) Judicial Separation and Family Law Reform Act 1989 (the “JS Act of 1989”)

17. Section 38(2)(c) of the Judicial Separation and Family Law Reform Act 1989 (the “JS Act of 1989”) inserted a subsection 5(4)(c) into the Act of 1976, which reads as follows:

“(c) the conduct of each of the spouses, if that conduct is such that in the opinion of the Court it would in all the circumstances be repugnant to justice to disregard it.”

(vi) The Social Welfare (Consolidation) Acts of 1993 and 2005

a. Overview.

18. Section 5(4) of the Act of 1976, as substituted by the Act of 1987, and as later amended by the Act of 1989, the JS Act of 1989, and the Act of 1990 survived the enactment of the Acts of 1993 and 2005. For the sake of clarity and completeness, the court details below how this was achieved. Worth noting, however, is that s.38 of the JS Act of 1989 has never been amended or repealed. Thus the s.5(4)(c) that it inserted into the Act of 1976 remains extant.

b. The Act of 1993.

19. Section 300 of the Act of 1993 repealed a number of Acts (a) as set out in column (2) of the Fifth Schedule to the Act of 1993, and (b) to the extent specified in column (3) of that Schedule. If one turns to the Fifth Schedule, it indicates that, as regards the Act of 1989 “*The whole Act (other than section 13)*” is repealed, and it was, of course, s.13 that effected the amendments to ss.3(1) and 5(4) of the Act of 1976, as described above (other than the amendments effected by s.15 of the Act of 1990 and s.38 of the JS Act of 1989).

c. The Act of 2005.

20. Section 360(1) of the Act of 2005, by reference to Schedule 7 of that Act, repeals the entirety of the Act of 1993. However, this

had no effect over the provisions material to the within consultative case stated: the Act of 1993 had left s.13 of the Act of 1989 untouched; so its repeal had no consequence. The definitions inserted by s.13 of the Act of 1989 into s.3(1) of the Act of 1976, as amended by s.15 of the Act of 1990, and the form of s.5(4) of the Act of 1976, as substituted by s.17 of the Act of 1987, and as amended by s.13(1)(b) of the Act of 1989 remained extant as they had been since 1989, including, separately but notably, s.5(4)(c), as inserted by s.38 of the JS Act of 1989.

IV. What is a "benefit" within the meaning of s.3(1) of the Act of 1976, as amended?

21. It will be recalled that s.13(1)(a) of the Act of 1989 inserted a definition of the term "benefit" into s.3(1) of the Act of 1976. This definition is of significance because s.5(4) of the Act of 1976, as substituted by s.17 of the Act of 1987 and amended by s.13(1)(b) of the Act of 1989 provides, *inter alia*, as follows:

"(4) The Court, in deciding whether to make a maintenance order[under this section] and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters –

*(a) the income, earning capacity (if any), property and other financial resources of[–]
[(i)] the spouses and of any dependent children of the family,[and]*

[(ii)] any other dependent children of which either spouse is a parent,]

*including income or benefits to which either spouse or any such children are entitled by or under statute with the exception of a **benefit** or allowance or any increase in such benefit or allowance in respect of any dependent children granted to either parent of such children, and..."*

22. The reference to "deserted wife's benefit" in s.3(1) of the Act of 1976, as inserted by s.13(1)(a) of the Act of 1989, was to a "deserted wife's benefit" within the meaning of s.100 of the Act of 1981. As it happens, s.100 of the Act of 1981 was repealed (the whole of the Act of 1981, apart from Part VI thereof, which is not relevant to the within consultative case stated, was repealed by the Act of 1993 (s.300 and Fifth Schedule)). However, this repeal had no practical consequence for present purposes, because what comprised a "deserted wife's benefit" was re-enacted on identical terms by s.110 of the Act of 1993. Then, when the Act of 1993 was itself repealed by the Act of 2005, what had been a "deserted wife's benefit" re-emerged as a "one parent family payment" (still payable to, *inter alia*, deserted wives, thanks to the transitional provisions in s.178 of the Act of 2005). In short, the reference to "deserted wife's benefit" in s.3(1) of the Act of 1976 is now a reference to a "one-parent family payment" within the meaning of s.173 of the Act of 2005.

V. What is an "allowance" within the meaning of s.3(1) of the Act of 1976, as amended?

(i) Why is the meaning of the term "allowance" of any significance?

23. It will be recalled that s.13(1)(a) of the Act of 1989 inserted a definition of the term "allowance" into s.3(1) of the Act of 1976. This definition is of significance because s.5(4) of the Act of 1976, as substituted by s.17 of the Act of 1987 and amended by s.13(1)(b) of the Act of 1989 provides, *inter alia*, as follows:

"(4) The Court, in deciding whether to make a maintenance order[under this section] and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters –

*(b) the income, earning capacity (if any), property and other financial resources of[–]
[(i)] the spouses and of any dependent children of the family,[and]*

[(ii)] any other dependent children of which either spouse is a parent,]

*including income or benefits to which either spouse or any such children are entitled by or under statute with the exception of a benefit or **allowance** or any increase in such benefit or allowance in respect of any dependent children granted to either parent of such children, and..."*

24. The definition of "allowance" in s.3(1) of the Act of 1976, as amended by s.15 of the Social Welfare Act 1990, means "[i] deserted wife's allowance under section 195, [ii] lone parent's allowance under section 198B or [iii] supplementary welfare allowance under section 200 of the Social Welfare (Consolidation) Act, 1981".

(ii) Deserted Wife's Allowance

25. The reference to "deserted wife's allowance" in s.3(1) of the Act of 1976, as amended by s.15 of the Social Welfare Act 1990, was to a "deserted wife's allowance" within the meaning of s.195 of the Act of 1981. As it happens, s.195 of the Act of 1981 was repealed (the whole of the Act of 1981, apart from Part VI thereof, which is not relevant to the within consultative case stated, was repealed by the Act of 1993 (s.300 and Fifth Schedule)). However, this repeal had no practical consequence for present purposes, because what comprised a "deserted wife's allowance" was re-enacted on identical terms by s.152 of the Act of 1993. Then, when the Act of 1993 was itself repealed by the Act of 2005, what had been a "deserted wife's allowance" re-emerged as a "one parent family payment" (still payable to, *inter alia*, deserted wives, thanks to the transitional provisions in s.178 of the Act of 2005). In short, the reference to "deserted wife's allowance" in s.3(1) of the Act of 1976 is now a reference to a "one-parent family payment" within the meaning of s.173 of the Act of 2005.

(iii) Lone parent's allowance

26. The s.198B referred to in the definition of "allowance" in s.3(1) of the Act of 1976, as amended by s.15 of the Act of 1990, is a reference to s.198B of the Act of 1981. As it happens, s.198B of the Act of 1981, as amended by s.12 of the Act of 1990, was repealed (the whole of the Act of 1981, apart from Part VI thereof, which is not relevant to the within consultative case stated, was repealed by the Act of 1993 (s.300 and Fifth Schedule)). However, this repeal had no practical consequence for present purposes,

because what comprised a “*lone parent allowance*” was re-enacted on identical terms by s.158 of the Act of 1993. Section 17 of the Social Welfare Act 1996 then replaced the provisions of the Act of 1993 relating to “*lone parent allowance*” and an again re-named “*one-parent family payment*” emerged. When the Act of 1993 was itself repealed by the Act of 2005, this “*one-parent family payment*” was continued by way of s.173 of the Act of 2005. In short, the reference to “*lone parent’s allowance*” in s.3(1) of the Act of 1976 is now a reference to a “*one-parent family payment*” within the meaning of s.173 of the Act of 2005.

(iii) Supplementary welfare allowance

27. The reference to “*supplementary welfare allowance*” in s.3(1) of the Act of 1976, as amended by s.15 of the Act of 1990, was to “*supplementary welfare allowance*” within the meaning of s.200 of the Act of 1981. As it happens, s.200 of the Act of 1981 was repealed (the whole of the Act of 1981, apart from Part VI thereof, which is not relevant to the within consultative case stated, was repealed by the Act of 1993 (s.300 and Fifth Schedule)). However, this repeal had no practical consequence for present purposes, because what comprised a “*supplementary welfare allowance*” was re-enacted by s.171 of the Act of 1993, and then re-enacted yet again by s.189 of the Act of 2005. In short, the reference to “*supplementary welfare allowance*” in s.3(1) of the Act of 1976 is now a reference to “*supplementary welfare allowance*” within the meaning of s.189 of the Act of 2005.

(v) Summary

28. The definition of “*allowance*” in s.3(1) of the Act of 1976, as amended by s.15 of the Social Welfare Act 1990, means “[i] *deserted wife’s allowance under section 195*, [ii] *lone parent’s allowance under section 198B or* [iii] *supplementary welfare allowance under section 200 of the Social Welfare (Consolidation) Act, 1981*”. For the reasons indicated above: (1) items [i] and [ii] must each now be read as referring to a “*one-parent family payment*” within the meaning of s.173 of the Act of 2005; and (2) item [iii] must now be read as referring to a “*supplementary welfare allowance*” within the meaning of s.189 of the Act of 2005.

VI. Liability to Maintain Family

29. Section 12 of the Act of 1989 inserted a new Part X into the Act of 1981 headed “*Liability to Maintain Family*”. This new Part X empowered the State to recover from the persons liable to maintain a child such amount as the State was paying out by way of deserted husband’s allowance, deserted wife’s allowance or deserted wife’s benefit.

30. As it happens, Part X of the Act of 1981 was repealed (the whole of the Act of 1981, apart from Part VI thereof, which is not relevant to the within consultative case stated, was repealed by the Act of 1993 (s.300 and Fifth Schedule)). However, this repeal had no practical consequence for present purposes, because what comprised Part X was re-enacted by way of s.284 et seq. of the Act of 1993. When the Act of 1993 was itself repealed by the Act of 2005, what comprised Part X was re-enacted by way of s.344 et seq. of the Act of 2005. Section 344(1) of the Act of 2005 defines the term “*allowance*” to mean a “*one-parent family payment, supplementary welfare allowance or a relevant payment by virtue of s.178(1)(a)*”, the last-mentioned provision, it will be recalled, being the transitional payments provision of the Act of 2005 which extends, to a deserted wife’s allowance and a deserted wife’s benefit (which, as indicated previously above, have each now been transmuted by statute into the one-parent family payment).

31. So when s.5(4) of the Act of 1976, as substituted by s.17 of the Act of 1987 and amended by s.13(1)(b) of the Act of 1989 refers, *inter alia*, to excepting from the court’s consideration “*a benefit or allowance or any increase in such benefit or allowance in respect of any dependent children granted to either parent of such children*” (when the court is assessing income, earning capacity (if any), property and other financial resources pursuant to s.5(4)), it is excepting from the calculation of income, etc. those payments that the State may recover. And if one steps back for a moment, one can see reason why the Oireachtas may perhaps have proceeded so. Section 5(4) does not count as income those welfare payments that the State may recoup at some future time and which may not ultimately prove to be income. But s.5(4) does count as income those welfare payments that the State cannot seek to recoup and so which are genuine income at the time when the court makes its assessment of income, etc. under s.5(4). It would perhaps ease matters for the partner who holds together what remains of a family unit when the other partner leaves if no welfare payments received were to count as income, for that would almost certainly see maintenance set at a higher level. And the partner left holding together what remains of the family unit will doubtless be all-too-conscious that welfare payments can be reduced or withdrawn and/or that the partner who left may prove recalcitrant, for whatever reason, as regards the payment of maintenance (though there is no suggestion of such recalcitrance here). However, the Oireachtas, as it is perfectly entitled to do, has proceeded as it has in s.5(4), and clearly and unequivocally so.

VII. Interpretation of Sections 3(1) and 5(4) of the Act of 1976, as amended

32. The primary rule of statutory interpretation is that words are to be given their literal and plain meaning. This is so trite a rule of interpretation that it scarcely needs to be supported by case-law but if supporting precedent is sought, it is to be found, *inter alia*, in the judgment of Blayney J. in the Supreme Court case of *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, 151. When one goes through the detail of the various statutory provisions considered above, the plain meaning of what has been done by way of statute is clear. Section 5(4) of the Act of 1976, as substituted by s.17 of the Act of 1987 and amended by s.13(1)(b) of the Act of 1989 provides as follows:

“(4) The Court, in deciding whether to make a maintenance order[under this section] and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters –

(a) the income, earning capacity (if any), property and other financial resources of[–]

[(i)] the spouses and of any dependent children of the family,[and]

[(ii) any other dependent children of which either spouse is a parent,]

including income or benefits to which either spouse or any such children are entitled by or under statute with the exception of a benefit or allowance or any increase in such benefit or allowance in respect of any dependent children granted to either parent of such children, and

*(b) the financial and other responsibilities of[-]
[(i)] the spouses towards each other and towards any dependent children of the family[, and]
[(ii) each spouse as a parent towards any other dependent children,]
and the needs of any such dependent children, including the need for care and attention."*

33. To the above must be added the subsection 5(4)(c), as inserted by the never-amended and never-repealed s.38(2)(c) of the JS Act of 1989, viz:

"(c) the conduct of each of the spouses, if that conduct is such that in the opinion of the Court it would in all the circumstances be repugnant to justice to disregard it."

34. What is an excepted benefit or allowance for the purposes of s.5(4)(a)? The literal meaning of section 5(4) is plain and unambiguous and yields an interpretation that is entirely logical and sensible. When one goes through the statutory provisions in the manner that the court has done above, one finds that the excepted benefit and allowances extend to, and solely to, a one-parent family payment and a supplementary welfare allowance.

VIII. The Court's Answers to the Questions Posed

35. The court replicates the questions posed by the learned District Judge below and indicates its answers to same. The rationale for those answers has been detailed above.

36. **"(i) Can all, any or any part of the payments received by the Applicant from the Department of Social Protection, namely the Carer's Allowance, the Domiciliary Care Allowance, the Child Benefit or the Respite Care Grant, as a matter of law, fall within the exception provided for by s.5(4) of the 1976 Act?"**

37. The court understands the reference to s.5(4) in the question posed to be a reference to s.5(4)(a) of the Act of 1976 and, in particular, to the portion of the text of same that reads *"with the exception of a benefit or allowance or any increase in such benefit or allowance in respect of any dependent children granted to either parent of such children"*.

38. The court's answer to the question posed is 'no'. The *"benefit or allowance"* referred to in the just-quoted text extends to, and solely to, a one-parent family payment and a supplementary welfare allowance.

39. **"(ii) If the answer to (i) is yes, in the circumstances of the case, does s.5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, preclude me [the learned District Judge] from taking into consideration all, any or any part of the payments received by the Applicant when determining the amount of any payment in respect of maintenance for the dependent children?"**

40. The court's answer to (i) is not 'yes'.

41. **"(iii) If the answer to (i) is no, in the circumstances of the case, does s.5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, allow me [the learned District Judge] to take into consideration all, any or any part of the payments received by the Applicant when determining the amount of any payment in respect of maintenance for the dependent children?"** [Emphasis added].

42. The court's answer to (iii) is (A) 'no', in terms of the learned District Judge being 'allowed' to proceed as indicated, and (B) 'yes' in terms of the payments to be taken into account.

43. It may assist the learned District Judge for the court to elaborate on the answer just given. As regards (A), under s.5(4), the District Court, *"in deciding whether to make a maintenance order[under that section] and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to [the matters identified at s5(4) (a)-(c)]..."*. Thus the learned District Judge must, inter alia, have regard to the included income referred to in s.5(4)(a) of the Act of 1976 and not to the excluded income referred to therein. As regards (B), as the court indicated in its answer to the first question posed by the learned District Judge, the included *"income, earning capacity (if any), property and other financial resources"* referred to in s.5(4)(a) includes, in this case, the Carer's Allowance, Domiciliary Care Allowance, Child Benefit and Respite Care Grant payable to Ms Berry, but would *exclude* any (if any, and there appears to be none paid to Ms Berry at this time) one-parent family payment or supplementary welfare allowance.

44. **"(iv) If the answer to (i) is yes, in the circumstances of the case, does s.5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, preclude me [the learned District Judge] from taking into consideration all, any or any part of any of the payments received by the Applicant when determining the amount of any payment in respect of spousal maintenance?"**

45. The court's answer to (i) is not 'yes'.

46. **"(v) If the answer to (i) is no, in the circumstances of the case, does s.5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976, as amended, permit me [the learned District Judge] to take into consideration all, any or any part of any of the payments received by the Applicant when determining the amount of any payment in respect of spousal maintenance?"**

47. The court would respectfully refer the learned District Judge to its answer regarding Question (iii).

48. Finally, it may assist the learned District Judge for the court to note that, insofar as the application of s.5(4)(b) and (c) of the Act of 1976, are concerned, it appears to the court that, as a matter of logic, any maintenance order to be made by the District Court must be made within the context and limitations of the income, earning capacity (if any), property and other financial resources as identified pursuant to s.5(4)(a).