Wind of change on spousal maintenance (alimony)

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Michael Gouriet
PARTNER | UK

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Various reported cases in the English Family Courts over the last year indicate that the pejoratively termed 'meal ticket for life' may be on the wane.

By way of short recap, the Court has a statutory duty in every case to consider whether or not a clean break can be achieved on the division (which can be unequal) of property and capital assets between spouses on divorce. Where that is not viable, the Court will look to meet needs through ongoing spousal maintenance orders (known elsewhere as 'alimony'). As regards duration, the Court can award spousal maintenance on a 'joint lives' basis requiring the payments to be made (pending any future variation or further terminating order) until one of the parties dies or the recipient remarries. Alternatively, the Court may limit the maintenance to a period of years, for example through to the payer's retirement or until the children reach an age where the recipient can transition to financial independence. The Court also has the power to impose a statutory bar on the extension of that term, or leave the term open to extension if circumstances justify. Historically, the courts have taken a cautious approach in tending to award 'joint lives' spousal maintenance orders, putting the onus on the payer to vary in the future. However, the tide now appears to have shifted towards term limited maintenance orders.

The most recent headline grabbing case was *Wright v Wright* (2015) which attracted focus due to being strap-lined by the press as 'go get a job' – although this editorial licence somewhat masks the less abrupt reality of the decision. Pursuant to a court order made on a divorce in 2008, the husband (an equine surgeon whose earnings were approximately £150,000 net per annum) was required to pay spousal maintenance of £33,200 per annum (in addition to child maintenance and school fees for their two children aged 16 and 10). The wife who was 51 had in the past worked as a legal secretary and an administrator. At the original hearing, the District Judge had observed that once a child is in year 2 at school (ie, aged seven) most mothers can consider part time work consistent with their obligation to the children. The Judge awarded maintenance on a joint lives basis but commented that within two years of the order the wife should be able to make some financial contribution towards her own household expenditure.

In the vanguard of the more restricted judicial approach to spousal maintenance has been Mr Justice Mostyn.

In the case of *NS v SS* (2014) where the total liquid and illiquid assets had been divided equally giving each spouse approximately £1.65m (including pension share), the significant feature was the inclusion by Mr Justice Mostyn of a list of relevant threads on the question of spousal maintenance that he drew together from prior case law.

Without reproducing the full list in this article, important elements included:

a. '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. The duration of the marriage and presence of children are pivotal factors.' That latter point is illustrated in the case of *Murphy v Murphy* [2014] where the husband had unsuccessfully applied for an automatic step down in maintenance three years after the divorce and the imposition of a term order to coincide with the end of the children's secondary education. As the couple had twins aged three years old, the Judge in that case decided it was 'too speculative' to impose a step down or a term in the circumstances of that case. A different approach, however, was taken in the case of *Chiva v Chiva* [2014] where the Court of Appeal endorsed a two year term maintenance order made by the trial court for a professionally qualified spouse in her mid-30s (she was an actuary) who had a three year old daughter.

b. A spousal maintenance award 'should only be made by reference to needs, save in a most exceptional case where the sharing or compensation principle applies'.

c. '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 recipient 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.'

d. 'Where the choice between an extendable term and a joint lives maintenance order is finely balanced, the statutory steer should militate in favour of the term'; but 'where the choice is finely balanced between an extendable and a non-extendable term, the decision should normally go in favour of the economically weaker party'.

e. 'The marital standard of living is relevant to the quantum of the spousal maintenance award but that is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.'

In that case, where the wife had applied for a 27 year extendable term maintenance order, Mostyn J awarded the wife spousal maintenance of

£30,000 per annum indexed linked (to be paid from the husband's base salary of £300,000 (£170,000 net) for a term of 11 years (but without a prohibition on extension) plus 20% of the husband's net bonus (capped at £26,500 per year) for a seven year non-extendable term.

The Judge also commented that on an application to extend a term maintenance order, an examination should be made of whether the implicit premise underlying the original Order of the ability of the recipient to achieve financial independence by that time had been impossible to achieve and if so, why.

It is also noteworthy that when awarding a term maintenance order in an earlier case in 2014 (SA v PA), the same Judge stated 'I want to make it clear that it is my firm view that the failure of the wife to save the shortfall from those payments will not be a good reason to extend the term, unless the money is being spent on some reasonable but presently unforeseeable need'.

The *SA v PA* case is an example of the Court looking to achieve a clean break over a much shorter period in a high income case through a combination of factors such as awarding the recipient spouse a higher level of maintenance than their assessed income needs in the expectation that the surplus will be saved and used as a partial income generating fund once the term has ended. Consistent with the approach in other cases (including notably the maintenance variation proceedings in *McFarlane* [2009]), Mostyn J included in his deferred clean break calculations, not only commencement of pension drawdown in the years ahead but also further investment income becoming available to the recipient spouse through equity release by downsizing her home once the children reached a certain age or the parties reach retirement age. On the latter, the Court appears to accept retirement as being significantly lower than statutory pension age for those working in professional firms.

Besides taking a reasoned approach to the deferred clean break, the case of *SA v PA* is also of interest for its dismissive approach to the concept of compensation. Mostyn J concluded that the theory was 'extremely problematic and challenging both conceptually and legally'. He expressed the firm view that the Court would require 'near certainty that the spouse seeking compensation gave up a very high earning career and with an appreciable track record'; and that in the rare and exceptional cases where compensation is founded, it should be reflected by fixing a spouse's income needs toward the top end of the discretionary bracket and premiums ought to be avoided.

Whilst each case turns on its own specific facts and is subject to the broad discretion of the Judge before whom it is heard, these run of reported cases should be welcomed by high earners in particular who have (with some justification) perceived the erstwhile 'meal ticket for life' approach of the English Courts to be overly lenient on the issue of spousal maintenance.

Authors

Michael Gouriet

PARTNER | LONDON

Divorce and family

+44 20 7597 6125

michael.gouriet@withersworldwide.com