Term time is over!

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School holidays (particularly the Summer ones) are a reminder to any primary carer that children will continue to impact on your earning capacity (or certainly your income) long past the time when they reach school age. The costs involved in looking after children when they are not at school, are not to be underestimated. When making a decision about maintenance payable on divorce, it is not just the amount payable that the court consider, but also how long it should be payable (whether for joint lives, or a specific term) and whether there should be a bar on extending that term. An application to vary the maintenance can be made at any point whilst there is still an obligation to pay — however, once the term has finished, there is a clean break, and there can be no further application for maintenance. As well as looking at the parties' respective income at the time of the hearing, the court must also consider their earning capacity, including any increase in that capacity, which it would be reasonable to expect a party to take steps to acquire. Mrs Murphy must have been relieved when Holman J took such a practical and thoughtful approach to establishing her earning capacity. (Murphy v Murphy [2014] EWHC 2263) Mr Murphy wanted the judge to attribute his wife with an earning capacity that was similar to the amount she had earned before their twins were born in 2011. She had earned £30,000 a year and he thought it reasonable for the court to determine that her earning capacity would be £25,000 a year once the twins were 6 ½, and established at school. He, therefore, wanted the amount of maintenance she received to automatically reduce in September 2017, and for it to end when the children finished secondary school, At the FDR Mrs Murphy had thought that she would be able to re-train as a teacher, and could improve her earning capacity that way. However, by the time of the final hearing (when the parties had agreed capital division but could not agree on whether maintenance for the wife should be for joint lives or a term order), she realised that teachers' hours are far longer than the children attending school, and that it would not be a feasible career choice for her. It is all too easy to assume that once children are in school, those that had previously given up careers to care for them can just go back to work and carry on as before. However, as Holman J made clear 'children change everything'. Furthermore, he was concerned that the family decision to move out of central London would have an impact on Mrs Murphy's earning capacity — she would have to arrange and pay for child care for the time it takes her to commute to work and home again. Holman J said of Mr Murphy's barrister 'He was only able to answer in very vague generalisations, that she must be able to obtain full-time employment somewhere and maybe in Twickenham.' This was not enough of an assurance for the judge. Holman J made clear that the wife's position in September 2017 was highly speculative. For the judge to make an order that the maintenance automatically reduce, he must form an opinion that by the end of the term the wife would be able to adjust without undue hardship. He was not able to do that. It is unusual for the court to make term orders, particularly where there are small dependent children involved. It is commonly accepted amongst practitioners that this is particularly the case in the Central London courts, as opposed to the courts in the provinces where term orders are more likely to be obtained. This is illustrative of the large degree of discretion afforded to the courts when dealing with the issue of maintenance. It is, however, always open to the payer to make an application to vary the maintenance, and so if circumstances change it may be appropriate for the court to order that the maintenance come to an end. In this case Holman J made clear that the court must make a decision as to where the onus should lie — is it for the Wife to show before the expiry of the term why the term should be extended, or should it be on the husband to apply to vary if the circumstances change. In this case, Holman J found that the onus should be on the husband. This is reminder of what Lord Nicholls said in Miller McFarlane, when the House of Lords found that an order for joint lives was more appropriate than a term order: it should not be for the wife to 'shoulder the heavy burden accompanying such an application', the husband should have to vary a joint lives order. Murphy v Murphy was distinguished from L v L (Financial Remedies: Deferred Clean Break) [2011] EWHC 2207 (Fam), which was on appeal before Mrs Justice Eleanor King. In L v L, the two children involved were older (9 and 12), the mother had not given up work when they were young, she had a fashion business, and she had capital provision to fall back on. In that case all the circumstances of the case were considered, and the judge decided that term maintenance was appropriate. Comparing these two cases, and their outcomes, provides an excellent insight into the enormous advantage of a discretionary system where all the individual circumstances of the case are considered. Whilst a discretionary system may be unpredictable, and complicated, it has the advantage of providing solutions that are fair to the individuals involved. Co-authored by Jemma Thomas and Thomas Kurland.

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