Short-term solution

Camilla Thornton analyses recent decisions on maintenance and whether joint lives maintenance orders are facing extinction

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'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.'

There seems to have been a sea-change in recent years with the courts more reluctant to award joint lives orders in circumstances where historically they would have been granted. This is perhaps as a consequence of the economic difficulties since 2008 or because of the recommendation of the Law Commission in its paper 'Matrimonial Property, Needs and Agreements' (Law Com No 208) that (para 102):

> ... the message that the law should convey is that lifelong dependence is not what is wanted, and that self-sufficiency is expected but only where that is possible.

Section 25A(1) of the Matrimonial Causes Act 1973 (MCA 1973) provides that:

> ... it shall be the duty of the court to consider whether it would be appropriate [to exercise its powers] [so] that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree... as the court considers just and reasonable.

The court has to consider whether the maintenance should be payable and s25A(2), MCA 1973 states that such an order should be:

> ... only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party.

In the Court of Appeal decision of *C v C* [1997] Ward LJ said in relation to the wife that the 'question is, can she adjust, not should she adjust' (ie without undue hardship), and that the court should not gaze 'into the crystal ball' but would need concrete evidence that a party can and will become self-sufficient.

Three reported cases in 2014 considered in particular the issue of joint lives periodical payments:

Chiva v Chiva [2014]

Facts

The parties were in their 30s and had been married for four and a half years. They had a three-year-old daughter for whom the wife was the primary carer. The wife was an actuary and worked part-time seven days a month earning £1,900 (her full-time earning capacity was greater than the husband's), and the husband was a lawyer.

First instance decision

At first instance, HHJ Harris divided the matrimonial assets 50:50 and ordered the husband to pay child maintenance, half of the nursery fees and maintenance to the wife of £700 per month for 24 months, saying that she was satisfied that the wife could adjust to independence within a period of two years:

> I consider that whilst the wife builds up her hours, and... that cannot take place overnight, it may take some time, and should take some time, as the daughter is still very young, that the husband should pay... periodical payments for a period of 24 months.

Appeal

The wife appealed on a number of grounds, which included that the capital award failed to meet her needs, the periodical payments were too low and for too short a period, and that a clean break was wrong on the circumstances of the case.

The leading judgment by McFarlane LJ found against the wife on all counts and dismissed her appeal. On the matter of the term of the maintenance, McFarlane LJ said that:

> At the commencement of the hearing I was concerned that a strict cut-off twenty four months into the future was to a degree arbitrary, and that it would bite at a time when the child was still only four years old, I am now... persuaded that the judge was justified in taking this course and expecting the wife to be in a position to make up the loss of the periodical payments order at the end of that period... the target chosen by the judge seems readily achievable for this intelligent individual who has a valuable and marketable qualification... it remains open to the wife at the end of the two year period to apply under Matrimonial Causes Act 1973, s31 for the order to be varied or extended if she has evidence to justify such an application.

SS v NS [2014]

Facts

The parties married in 2007 having cohabitated since 2002. The wife was age 39 and the husband 40. They had three children aged 7 to 11, all being educated privately. The husband was a successful banker who had been diagnosed with cancer in 2010, although by the hearing he was in remission. He was in another permanent relationship and was expecting a baby with his new partner.

The wife had stopped work in 2003 to care for the family. She had trained as a Pilates teacher and worked part-time earning £5,000 per annum. She hoped to offer private Pilates sessions.

Decision

Mostyn J concluded that within two years, working five days a week for 40 weeks a year 'which I think reasonable', the wife would have a gross income of £32,000 per annum (£23,500 net).

Interestingly, when calculating the wife's capital need, he included the sum of £36,000 to represent her shortfall in earned income during this two-year period. In his judgment and after dividing the capital and pensions Mostyn J analysed the case law and gave guidance on the question of spousal maintenance, saying (at para 26):

> I have tried to explain that an order for spousal periodical payments can only be made in order to meet needs, save in a wholly exceptional case: see *B v S* [2012]... But my analysis only explains the parameters of the discretion; it does not ask or answer the question why on the dissolution of a contract of marriage such a liability can or should arise in the first place.

He said that ss25A(1)-(2), MCA 1973 'suggest that Parliament anticipated that a degree of not undue hardship in making the adjustment is acceptable' (para 28) and create 'a statutory steer as to an eventual clean break' (per *Matthews v Matthews* [2013]). He concluded (para 29):

> ... unless undue hardship would likely be experienced the court ought to be thinking of providing an end date to a periodical payments order.

Mostyn J referred to the explanation of Lady Hale in *Miller v Miller; McFarlane v McFarlane* [2006] that 'the most common rationale is that the relationship has generated needs which it is right that the other party should meet', and that of Lord Hope that:

> ... the career break which results from concentrating on motherhood and the family in the middle years of their lives comes at a price which in most cases is irrecoverable...

with Mostyn J's view being (at para 30):

> Obviously this is a very sound rationale and it is for this reason that the factors of duration of marriage and the birth of children are so important.

and

> For many women the marriage is the defining economic event of their whole lives and the decisions made in it may well reverberate for many years after its ending.

The transition to independence, if possible, may mean that one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living.

He further said: 'it is hard to see how a relationship has generated needs in the case of a short childless marriage, although this is not impossible' and 'I would suggest that in such a case spousal maintenance payments should only be awarded to alleviate significant hardship'.

Mostyn J then went on to consider how much maintenance should be paid and for how long, referring to the Law Commission's recent report and emphasising the sentence at para 3.96:

> ... the transition to independence, if possible, may mean that one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living, unless he or she can afford to do so from his or her own resources...

Mostyn J went on to say (at para 35):

> It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence...

Referring to para 3.67 of the Law Commission report, ie:

> ... we conclude that the objective of financial orders made to meet needs should be to enable a transition to independence, to the extent that that is possible in light of the choices made

> within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and the continued shared responsibilities (importantly, childcare) in the future. We acknowledge the fact that in a significant number of cases independence is not possible, usually because of age but sometimes for other reasons arising from choices made during the marriage...

Mostyn J's view was that 'the Holy Grail should be, where it is just and reasonable, an eventual termination and clean break'.

He then summarised what he considered to be the relevant principles on an application for spousal maintenance (at para 46):

- 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 – here the duration of the marriage and the presence of children are pivotal factors;
- an award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies;
- where the needs in question are not causally connected to the marriage, the award should generally be aimed at alleviating significant hardship;
- 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 payee would be unable to adjust without undue hardship to the ending of payments, and a degree of (not undue) hardship in making the transition to independence is acceptable;
- if the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former;
- the marital standard of living is relevant to the quantum of spousal maintenance but is not decisive; that standard should be carefully weighed against the desired objective of eventual independence;
- the essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant;
- where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis;
- there is no criterion of exceptionality on an application to extend a term order; on such an application an examination should be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why;
- on an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence; and
- if the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

Applying these principles to the facts in *SS v NS*, Mostyn J ordered the husband to pay periodical payments to the wife of £30,000 per annum, index linked by reference to the retail price index (RPI), until September 2025 (or wife's earlier remarriage) with no s28(1A), MCA 1973 bar, plus 20% of his net annual bonus, capped at £26,500 (indexed by reference to the RPI and payment to be deferred where applicable), for the calendar years to 2021 with this element of the award being subject to a s28(1A) bar. In addition he made orders for the benefit of the children.

Murphy v Murphy [2014]

This final case did result in a joint lives order. The wife was 42, had given up her career to care for the parties' three-year-old twins and, although she intended to work, produced evidence to show that her commitments to the children significantly hindered her earning capacity. Holman J said he could not assume she would become financially independent as her age and childcare commitments, combined with her work history, qualifications and financial resources, made her future financial position 'precarious', and concluded that '[t]he economic impact on this wife is likely to endure not only until they [the children] leave school but, indeed, for the rest of her life' and that 'she is very largely dependent on her husband'.

Conclusion

Does the decision in *Chiva* signal the end of nominal maintenance payments for a primary carer while children are minors where a mother has a reasonable earning capacity? And does *SS v NS* mean that the 'meal ticket' for life has finally gone? That will depend upon the circumstances. However, the indication is that a primary carer should take steps to become financially independent within a reasonable period of time. ■

B v S
[2012] EWHC 265 (Fam)
C v C (Financial relief: Short Marriage)
[1997] 2 FLR 26
Chiva v Chiva
[2014] EWCA Civ 1558
Matthews v Matthews
[2013] EWCA Civ 1874
Miller v Miller; McFarlane v McFarlane
[2006] UKHL 24
Murphy v Murphy
[2014] EWHC 2263 (Fam)
SS v NS (Spousal Maintenance)
[2014] EWHC 4183 (Fam)