SPOUSAL MAINTENANCE

PRINCIPLES OR CHAOS? THE NEED FOR REFORM AND THE DEECH BILL

INTRODUCTION

1. This paper analyses the current trends in the consideration of spousal maintenance and asks whether the current approach is underpinned by any coherent principles or whether we are in a discretionary wilderness. It then considers how the proposals contained in Baroness Deech's Bill addressed those issues and the professions response.

THE STATUTORY FRAMEWORK

2. The current statutory framework governing financial provision on divorce is contained in the Matrimonial Causes Act 1973 (MCA). It was enacted on the 23rd May 1973. It was a different era when 92% of men were in the work place compared to just 53% of women. Today the figures are 72% for men and 67% for women. [1]

3. At over 40 years old many consider the MCA to be of pensionable age or at least in need of a complete over haul. There are those who consider that given the changed dynamics of economic and family life there needs to be enshrined in statute the expectation of financial independence on divorce.

4. The 1984 reforms which were contained in the Matrimonial Proceedings and Property Act 1984 were supposed to focus decisions on encouraging self -sufficiency and achieving finality. These reforms introduced the formal duty to consider a clean break and gave the judges the power to dismiss once and for all a periodical payments claim without the consent of the claimant. (For an example of how one of the old pre 1984 nominal periodical payments orders can come back and haunt the Respondent see *North v North.* [2])

5. The Law Commission report[3] which preceded the reforms contained the following passages (emphasis added):

> "There was, however, a wide-spread feeling amongst those who commented on the Discussion Paper that **greater weight should be given to the importance of each party doing everything possible to become self-sufficient..we believe the statutory provisions should contain a positive assertion of this principle.**

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[1] Source ONS report on Women in the Labour Market 25.9.13. Statistics from 1971 and 2013.
[2] [2007] EWCA 112 (Fam)
[3] No. 112/1981 *The Financial Consequences of Divorce*

> "We think that it would be desirable to require the courts specifically to consider whether an order for a limited term would not be appropriate in all the circumstances of the case, **given the increased weight which we believe should be attached to the desirability of the parties becoming self-sufficient.**"

6. Following the Law Commission report, the government introduced a Bill, which became the Matrimonial Proceedings and Property Act 1984. This wrought amendments to the 1973 Act, the most important (in this area) was the introduction of s25A.

7. This provides as follows:

> "(1) Where on or after the grant of a decree of divorce…the court decides to exercise its powers under section 23 (1)(a),(b) or (c) or 24A… in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards each other will be terminated as soon after the grant of the decree as the court thinks just and reasonable"
>
> And
>
> "(2) Where the court decides in such a case to make a periodical payments or secured periodical payments order in favour of a party to the marriage, the court shall in particular consider whether it would be appropriate to require those payments to be made or secured 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."

JUDICIAL INTERPRETATION

8. So what has happened to the clean break??

9. The reality is that for many years the judiciary failed to breathe life into the 1984 reforms. It should have been a brave new world where, in each case, the court analysed how long would be required to achieve financial independence and whether a shorter period could be imposed without giving rise to undue hardship.

10. Cases should be decided on the assumption that women (as they are usually the recipients) will work.

11. The high water mark for joint lives maintenance was as recently as 1997 in the Court of Appeal decision of *C v C* [4]. In that case a joint lives maintenance order was directed at a husband after a 9 month marriage. His appeal was rejected and Ward LJ offered guidelines as to the working of the statute:

> "Financial dependence being evident from the making of an order for periodical payments, the question is whether, in the light of all the circumstances of the case, the payee can adjust – and adjust without undue hardship – to the termination of financial dependence and if so when. The question is can she adjust, not should she adjust. In answering that question the court will pay attention not only to the duration of the marriage but to the effect the marriage and its breakdown and the need to care for any minor children has had and will continue to have on the earning capacity of the payee and the extent to which she is no longer in the position she would have been in but for the marriage, its consequences and its breakdown. It is highly material to consider any difficulties the payee may have in entering or re-entering the labour market, resuming a fractured career and making up lost ground.
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> The court cannot form its opinion that a term is appropriate without evidence to support its conclusion. Facts supported by evidence must, therefore, justify a reasonable expectation that the payee can and will become self-sufficient. Gazing into the crystal ball does not give rise to such a reasonable expectation. Hope, with or without pious exhortations to end dependency, is not enough…"

12. Even Baroness Hale in *McFarlane* [5] said (of Mrs McFarlane) as follows:

> "[155] She does, of course, have to consider what she will do in the future. The children will eventually take up less of her time and energy. She could either return to work as a solicitor or retrain for some other satisfying and gainful activity. She cannot therefore rely upon the present provision for the rest of her life. [6] But the Court of Appeal was wrong to set a limit to it on the basis that she would save the whole surplus above her requirements with a view to providing for herself once the time limit was up. They were wrong to place the burden upon her of justifying

[4] [1997] 2 FLR

[5] [2006] UKHL 24

[6] Why then do the HL restore the joint lives order?

continuing payments, especially now that they have set a high threshold for doing so: *Fleming v Fleming* [2003] EWCA Civ 1841. On any view she will continue to be entitled to some continuing compensation, even if the needs generated by the relationship diminish or eventually vanish (although that cannot be guaranteed, despite her best endeavours, given the length of time she has been out of the labour market and the difficulties of repairing her pension position). The burden should be on the husband to justify a reduction. At that stage, the court will again have to consider whether a clean break is practicable, as it could be if the husband has generated enough capital to make it realistic."

13. In more recent decisions it would appear that the winds of change are beginning to blow. The glimmering of the new dawn began with Eleanor king J (as she then was) in *L v L (Financial Remedies: Deferred Clean Break)*[7]*.* W was aged 44 and H 50. The marriage had lasted 10 years. The care of the two children aged 12 and 9 was shared. W was a fashion designer and H was a GP offering private medical services. The assets were £3.4m including the parties' homes (the wife had a farm). In financial remedy proceedings the judge awarded W, inter alia, global periodical payments of £47,000 on a joint lives basis. H appealed. Eleanor king J substituted an order for spousal periodical payments at £30,000pa for two years five months with a s28(1A) bar. This case cried out for a term order. W's farm would shortly be mortgage free, she was moderately young and had worked throughout a moderate length marriage. Although her fashion business had dropped off due to the proceedings she was internationally recognised. The shared care arrangements gave her opportunities to attend to the business and the farm. She had capital reserves within the farm.

14. However subsequently in *Murphy v Murphy*[8] we see the paternalistic hand of Holman J refusing to impose a step down or a term despite the fact that W's case was that she wanted to return to work. Prior to the birth of the parties' 3 year old twins she had worked in retail earning £30,00pa. He considered that the fact of having children and their obvious dependence on their mother for care had a fundamental impact on W not only until the end of secondary education but indeed for the rest of her life. He emphasised that each case was highly fact specific and that the court had a wide discretion. He considered that *L v L* was a decision on its own particular facts.

[7] [2012] 1 FLR 898.
[8] [2014] EWHC 2263

15. In *Matthews v Matthews* [2013] EWCA Civ 1874, the Court of Appeal upheld a clean break and refusal of nominal maintenance for W with two children aged 6 and 3:

- W had previously earned £43,000 pa working in a bank, but was made redundant. It was unlikely that she could return to banking given her adverse credit rating.
- W assessed as having an earning capacity of £40,000.
- There was approximately £98,000 equity in properties. W was £6,000 in debt; H had £30,000 funds.
- H had no contact whatsoever with the children; W had full care.
- CA held that it was entirely within the discretion of the first instance court not to award nominal pps; per Tomlinson LJ, such a decision will usually be unappealable as it is exercise of discretion.
- W had earned £23,000 in the six months prior to the hearing from contract work, and it was assumed that she could work in the insurance sector.
- H had a much lower earning capacity than W (£23,000).
- On the capital division, H had to discharge W's debt.

In *Chiva v Chiva* [2014] EWCA Civ 1558 the Court of Appeal upheld a two-year term where there was a 4-year old child (although no section 28(1A) bar).

- The Court expected W, a qualified actuary, to go from working 7 days per month to full time once the child was at full time nursery or school.
- It was a 4.5 yr marriage, with both parties in their thirties.
- £321,159 of capital only to be split.
- W already had rental income from two flats, and earned £32,000 pcm from working 7 days per month.
- On the £700pcm maintenance payments that were ordered, she would only have to work an additional three days per month to cover the shortfall when the maintenance terminated.
- W had earned more than H immediately prior to the birth of their child.
- Maintenance at £700 pcm gave both parties identical shortfalls on their budgets.

In *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 Mostyn J refused a wife's claim for a 27-year term (no bar) for £60,000 per annum, index-linked, plus 30% of H's bonus. Instead, he awarded

periodical payments of £30,000 pa (RPI linked) and imposed an 11-year term. In addition, he awarded 20% of the husband's bonus on top, capped at £26,500 for a shorter, non-extendable 7-year term. In arriving at his conclusions, he undertook a review and summary of the current state of the law on periodical payments:

- [28] – the statutory obligation is only to avoid undue hardship; this implies that a degree of hardship might be expected in the transition to independence.
- [31] – if the need of the recipient is not generated by choices in the marriage, then it can only apply to the extent of alleviating significant hardship.
- [35] – there should not be too much reliance placed on marital standard of living in determining needs. Especially as time passes post-separation it becomes less relevant, and reliance upon it hampers the move to independence.

– Mostyn J summarises the principles under the current law

i. 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.

ii. 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.

iii. Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

iv. 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. A degree of (not undue) hardship in making the transition to independence is acceptable.

v. 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.

vi. 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.

vii. 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 to 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.

viii. 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.

ix. There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to 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.

x. 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.

xi. 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.

16. There is a welcome emphasis here on prospective earning capacity and the burden is on the wife to come back to court and apply if matters do not turn out as forecast as opposed to the approach in C v. C.

17. We then have Pitchford LJ in *Wright v Wright* [9]*.* This was the refusal of permission to appeal but the Daily M ail readers will be forgiven for thinking that spousal maintenance is terminated once your youngest child is seven. The actual headline on 24th February 2015 read as follows:

[9] [2015]EWCA Civ 201

Divorce ruling 'is a game-changer': Lawyers believe judge's order for multimillionaire's ex-wife to 'get a job' means divorced women will now have to support themselves

- **Tracey Wright told to get a job 11 years after her divorce from millionaire**
- **Mother-of-two had £75,000-a-year maintenance claim rejected in court**
- **Appeal judge's ruling could have significant impact on future divorces**
- **Experts said that most ex-wives with children over seven may have to work**
- **'Spousal maintenance is no longer a meal ticket for life', senior lawyer said**

18. The facts of that case can be summarised as follows:
    - H was aged 59 and W was 51. There were two children aged 16 and 10.
    - The original proceedings took place in 2008 when DJ Cushing made a joint lives' maintenance order in favour of W. At the time, the youngest child was aged 3 and the DJ did not make a finding as to when W could be (or ever would be) self-sufficient.
    - However, the DJ had clearly signalled that W could be expected to contribute financially within a couple of years of the original order.
    - It was she, DJ Cushing, in 2008 who said: "There is a general expectation in these courts that once a child is in year 2 [i.e.6-7 years old], most mothers can consider part-time work consistent with their obligation to their children.".
    - At the variation hearing, HHJ Roberts imposed a 6-year diminishing maintenance regime, with a complete cessation within 6 years.
    - The effect of the Judge's decision was to relieve H of his obligation to maintain W during his (postponed) retirement
    - On the other hand the Judge was critical of W's failure to make any effort to find work and her inflated income needs

- Pitchford LJ refused W permission to appeal against the order. She could not establish, on the facts, a real prospect of success.

LOOKING FORWARD (AND GLANCING BACK)

19. This is all fine as far as it goes but the problem is a discretionary jurisdiction has wide scope for different outcomes. There has been enormous social change since the 1984 reforms, more so since the original 1973 Act. Despite this we are still witnessing cases where the following judgement still resonates:

> "A man should not be allowed to treat marriage as a 'mere temporary arrangement, conterminous with his inclinations, and void of all lasting tie or burden'…. According to your ability you must still support the woman you have first chosen and then discarded".

20. These were the words of Sir J Wilde in *Sidney v Sidney (**1865**).*

21. The Law Commission produced a report on the 26th February 2014 following its Matrimonial Property, Needs and Agreements project. It did not set out any proposals for change but offered "clarification" on the current guiding principles, namely:
    - [1.18] while most people do move on from divorce there are regional disparities in how the law is applied, specifically in relation to joint lives orders;
    - [3.109] the objective of financial awards should enable the parties to make the transition to independence;
    - [3.109] the term of an order should allow time for a party to develop his or her ability to meet their own needs. It specifically should not be a barrier to imposing a term that at the end of the term, the spouse could meet their own needs but would not do so at the standard of living enjoyed in the marriage
    - [3.110] terms should normally be expected to be between 2-10 years
    - [3.110] if a term is to be longer than 10 years it should normally be a joint lives order as the future at that distance is unpredictable
    - [3.111] if there are minor children the term should run until care of the children no longer prevents parent with primary care from meeting their needs. This can be youngest child reaching secondary school, as long as that leaves enough time for the recipient to establish/exercise an earning capacity

22. The Commission recommended there be clear guidance from the Family Justice Council on the meaning of financial needs in order to address the problem of the uncertainty and unpredictability of maintenance outcomes.

23. This however avoids tackling the root problem that radical reform is required in our approach to maintenance.

24. This was addressed squarely by Baroness Deech in her Divorce (Financial Provision) Bill. It included a 5 year maintenance cut off save in circumstances of serious financial hardship.

25. The key provision on periodical payments following the Committee stage was as follows:

    1. In exercising any decision to make a periodical payments order, the court must consider:
        (a) Economic advantage derived by one party from the contributions of the other;
        (b) Fair sharing of the burden of caring for any child under 16 after divorce;
        (c) That a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such periodical payments as is reasonable to enable that party to adjust to the loss of that support on divorce over a period of **not more than five years from the date of the decree of divorce,**[10] such period not to be exceeded unless the court is satisfied that there is no other means of making provision for a party to the marriage and that that party would otherwise be likely to suffer serious financial hardship as a result.

26. What this fails to deal with however is how, if at all, to reflect the duration of the marriage.

27. When considering "economic advantage", the court must take into account:

    (a) Advantage or disadvantage occurring *before* or *during* the marriage;
    (b) Contributions before or during the marriage including non-financial and indirect contributions;
    (c) The extent to which any economic advantage or disadvantage incurred by either party is balanced by any economic advantage incurred by the other party;
    (d) The extent to which any imbalance of advantage and disadvantage has been, or would be, corrected, including correction by the making of an order in relation to the sharing of the value of the matrimonial property.

[10] It had been three years in her original proposals

28. When making periodical payments orders, the court must also take into account;
    (a) The age, health and earning capacity of that party;
    (b) The duration and extent of the dependence of that party prior to divorce;
    (c) Any intention of that party to undertake a course of education or training;
    (d) Any support available to that party from a third party;
    (e) The needs and resources of the parties; and
    (f) All the other circumstances of the case.

29. So what was her reasoning? In an interview with the Financial Times in 2014 she said that the current maintenance rules send out a "bad message" to young women;
    "Although there's lots of talk about how women should be half the Supreme Court and they should have half the seats of FTSE boards, we have a whole area of law which says once you are married you need never go out to work, that you are automatically entitled to everything you might need even if the marriage breaks down and it's your fault".

30. Legal commentators were not universally behind the proposals. In feedback in Family Law Week it was suggested that the prime aim of maintenance should be rehabilitative and should only be permanent for older women or those incapacitated who were not cared for by the state. Various blog posts have criticised her for attempting to create certainty at the expense of fairness and that the current discretionary system works well.

CONCLUSION

31. However the exercise of judicial discretion is unpredictable and what our clients are looking for is a principled approach such that the outcome of litigation is not a gamble.

32. As Baroness Shackleton supporting the proposals said in the Second Reading debate;

    > "In the field of law in which I practise, however, the legislation on which they depend is due for review and is no longer fit for purpose because its interpretation relies too heavily on the discretion of the individual enforcing it, thereby making it more difficult to predict and therefore advise on outcome of a particular case. This creates uncertainty; and uncertainty creates litigation".

33. Our legislation on maintenance is out of kilter with that in many developed nations. Scotland, Sweden and New Zealand have legislation which has provided that save in highly exceptional

circumstances the obligation to maintain should not be imposed save for a very short period. In Scotland it is three years. In Finland it is rare for a spouse to be obliged to pay maintenance to the other spouse, as a rule they support themselves. In the Netherlands there is no automatic right to maintenance. If the marriage is less than 5 years and there are no children the term of the maintenance is limited to the length of the marriage.

34. Reform is needed not only in pursuit of certainty but also to consign to history the paternalistic approach exemplified in the *Sidney* case and still running through our jurisprudence. Women should be encouraged to work to recognise the drive for gender equality and the need not to reward women who do not work more than those who do.

ANN HUSSEY QC[11]

21st September 2015

[11] With grateful thanks to Rebecca Carew Pole for the paper she presented at the 2015 Hare Court seminar