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He Doesn't Love Me Anymore But Will He Maintain Me?

By Farhana Shahzady & Flora Grossman

As matrimonial finance practitioners this is one of the most tricky but often asked questions faced in practice. We also suspect that this is an issue which is buffeted, rightly or wrongly, by contemporary ideas of autonomy, self-sufficiency, independent finances and the desire to start afresh. The statutory test has certainly not changed since the Matrimonial Causes Act 1973 but there can be little doubt that issues concerning maintenance are as murky as ever – and advising can be problematic.

The statutory test for spousal maintenance is found at section 25 A (2) of the Matrimonial Causes Act, namely: are periodical payments appropriate and if so, only for such term as in the opinion of the court will be sufficient to enable the payee to adjust without undue hardship to the termination of such payments. Section 25 A (1), makes it clear the court is under a duty to consider a clean break in every case.

Two key cases have determined how to approach 'adjusting without undue hardship', namely : *Flavell –v- Flavell [1997] 1 FLR 358* and *C –v- C (financial relief: short marriage)[1997] 2 FLR 26*. The latter case is particularly useful for practitioners, particularly at paragraphs 45-46, where the proper approach to maintenance is set out by Ward LJ in a very helpful and detailed analysis. It is exhorted that facts supported by evidence must be sought to substantiate financial self-sufficiency and that *'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*". The key question is, can the payee adjust, not should she adjust. The importance of certainty is given further weight by the high threshold of "exceptional justification" which must be satisfied to justify the extension of a term as laid down in Fleming v Fleming [2003] EWCA 1841. The principle that the burden of bringing the matter back to court in uncertain cases should lie with the payer was approved by Baroness Hale in Miller, McFarlane [2006] 1 FLR 1186 and helped to ameliorate the situation for wives who might otherwise be stuck with unrealistically short maintenance orders who have no prospect of being able to increase the term due to the tough threshold.

As a sign of the times, we have encountered two recent first instance decisions where wives, in their early 50s – with nothing exceptional to report in terms of capital, pension or job prospects – have suffered the blow of a deferred clean break in five years with the added humiliation of a s.28 (1A) bar which gave no recognition to the length of the marriage (20 years plus) or the standard of living enjoyed during the marital partnership. This is clearly contra Flavell above where Ward LJ articulated it was not usually appropriate to provide for termination of periodical payments in the case of a woman in her mid 50s. But even the PRFD/Central Family Court which was hitherto considered one of the remaining bastions of joint lives periodical payments appears to be succumbing to the altar of the clean break even when the facts suggest otherwise. *D v D* orders, which do not extend beyond retirement, seem more fashionable now, especially when there has been a substantial pension split.

Turning to quantum, this is no less troublesome for practitioners. Whilst the overriding objective when it comes to both capital and periodical payments is fairness, when it comes to spousal periodical payments, the equal sharing principal of *White v White* does not apply. In *Miller, MacFarlane,* three clear distributive principles were enunciated:

i) Needs (generously interpreted);
ii) Compensation;
iii) Sharing.

"Need" clearly trumps all and as outlined by Baroness Hale in Miller; McFarlane "*..in the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close to the standard of living which they enjoyed during the marriage*". In terms of compensation for relationship-generated disadvan-

tage, whilst this is contemplated from time to time in practice, it is rarely invoked or even quantified: *"…compensation will rarely be amenable to consideration as a separate element in the sense of a premium susceptible of calculation with any precision… compensation is best dealt with by a generous assessment of her continuing needs unrestricted by purely budgetary considerations"*: VB-v-JP [2008] 1 FLR 742. Sharing has fared no better when it comes to maintenance. The advice to clients is that when the marital partnership has come to an end, sharing of future resources or income has no place save for meeting needs. A payee cannot expect that the payer's surplus income will be shared, often to a wife's annoyance! We have all heard the client's familiar retort : *"But I cooked his meals and ironed his shirts…where is my fair share for the years of looking after him and putting my career on hold....."*

The Law Commission's long awaited report this year in which it was hoped there would be some clarity with regard to defining 'needs' has made no recommendations which means that the 'budgetary exercise' remains vexed for practitioners although the court has long encouraged, as in *M –v- M [2004] 2 FLR 236*, the importance of realistic budgets. In the recent case of H-v-W [2013] EWHC 4105 (Fam) two budgets have been commended for some cases where the payer has a significant discretionary element of income : one budget for ordinary/basic expenditure and another for additional, discretionary items which may vary from year to year. The case of *H –v– W* may in fact give heart to some payees who are otherwise hostage to payers whose income is comprised of both a basic component and a generous discretionary element (bonus/ deferred shares etc). This has long been problematic since the bonus is discretionary, unreliable and arguably classified as surplus/additional income immune to future sharing. To deal with the problem in the past, a general 'run-off' approach has been used, as in the case of *H –v– H [2007] EWHC 459* where Charles J felt that when the marital partnership has come to an end, there should thereafter be some share of any additional earnings by the payer to reflect contributions made by the payee during the marriage. This would however be limited in duration since "sharing" post-separation would not be entertained long into the future. Therefore, in cases where bonus was required to meet the reasonable needs of the payee, bonuses were split for a period . In the case of B –v– B [2010] EWHC 193 the bonus was paid for three years : 50% of bonuses up to and including the year of separation, followed by 25% in the second year and 12.5% in the third year. Thereafter, there would be no future share of bonus.

The case of H –v– W, largely remedies this short run-off approach and allows for a percentage share of ongoing bonus but only strictly where "needs" justifies this and not on the basis of abstract "sharing" of bonuses . The approach endorsed in H–v–W is for the court to calculate a total figure for maintenance to cover the payee's ordinary or basic expenditure. In addition, the court should assess the payee's additional discretionary items which would be variable from year to year. Having carried out this exercise the court would make a monthly order to be paid from salary and the balance would be expressed as a percentage of the net bonus up to a maximum sum each year. The judge however emphasised the importance of a cap in order to 'avoid the unintentional unfairness which may arise as a consequence of a wholly unanticipated substantial bonus paid to the '[payer]'. The point of course being that the payee could expect maintenance so far as she strictly needed it but could not expect the sharing principle to apply to bonus in an unfettered way.

It is certainly not always easy telling the wife, as did Potter P in VB–v–JP [2008] 1 FLR 742 that a "wife has no right or expectation of continuing economic parity ("sharing") unless and to the extent that consideration of her needs, or compensation for relationship generated disadvantage so require…." but the clarity is refreshing and helpful. As for answering the question of "how much maintenance and for how long?" that is altogether more mercurial, a little like "love" itself!

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Farhana *qualified in 2002 and specialises in family law at Bindmans LLP where she is a Partner and joint head of department. As well as dealing with the full range of matrimonial, co-habitation and separation issues, Farhana's expertise is in contested financial disputes at court. Farhana is accustomed to dealing with the full spectrum of court applications in relation to matrimonial finance including freezing injunctions, maintenance pending suit, setting aside and variation applications. Her clients value her strategic and results driven approach which often leads to early settlement. As well as being an expert litigator, Farhana is also committed, whenever possible, to negotiating financial settlements without recourse to court proceedings.*

Farhana also has considerable expertise in the full spectrum of children disputes to include representing both mothers and fathers in issues over child arrangements to include s.8 orders such as prohibited steps and specific issue as well as dealing with disputes over where the child should live (previously known as "residence") and how much time the child should spend with the non-resident parent ("contact"). Being both perceptive and sensitive to the client's needs, one of Farhana's key strengths is the ability to provide clarity and direction. She is committed to empowering her clients so that they are able to understand and take control of the process with a view to moving forward constructively. Farhana is also a trained collaborative lawyer who recognises the importance of problem solving rather than point scoring in sensitive family matters.

Flora *is a divorce and matrimonial finance specialist who also regularly advises on a wide range of financial issues including cohabitation disputes; proceedings under Schedule 1 of the Children Act; maintenance disputes; freezing orders and joinder of interveners. Flora deals with a range of mid to high net worth clients and has experience of complex trust and company issues. Flora has been a Resolution Accredited specialist (high net worth) for over 10 years and is described by her colleagues and clients as a "committed and common sense lawyer" with an "acute ability to identify the key issues at an early stage" which helps to optimise results for clients whether by negotiation or litigation.*

As well as dealing with financial disputes, Flora regularly advises on pre-nuptials; separation and cohabitation agreements and considers one of her key strengths the ability to find agreement or common ground between parties and to narrow issues in dispute whenever possible.

Flora is extremely experienced with both round table meetings and advocacy at court which is no doubt a result of the many years she has also been involved in assisting and advising parents or Guardians in children disputes both in the private law and public law arena. Flora has been a Children Panel member for over 12 years and has enormous experience in residence and contact disputes along with more complex children matters involving abuse and domestic violence.