A system of Russian roulette?

Sital Fontenelle and Elizabeth Burch consider the different approaches to spousal maintenance and whether a formula for maintenance would provide clarity

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'*Duxbury* is clearly still the starting point – and currently the favoured approach by judges, however there is increasing interest in exploring alternative methods.'

How much and for how long is a standard question regarding spousal maintenance in financial proceedings, but family lawyers up and down the country will provide differing advice on what is often a key issue for the parties. Often it is not just a question of the sum of money the ongoing maintenance represents, but a point of principle and frustration for the payer, especially if there is a new family to consider.

Joint lives versus a term order

As we are aware, in every case where an award of periodical payments is made, the court must consider the clean break provisions within the Matrimonial Causes Act 1973 (MCA 1973), specifically whether the award should be term limited, and if so whether that term should be extendable or not (per the section 28(1A), MCA 1973 bar). However, it is only in the last four to five years that London seems to be catching up with the rest of the country in moving away from joint lives to term orders, except in the most exceptional circumstances. In *SS v NS* [2014], Mostyn J reminded practitioners that if the choice between an extendable term and a joint lives order is finely balanced, the statutory steer should be to the former. He emphasised the clean break provisions within MCA 1973, which require the court to apply a term order unless the payee would be unable to adjust without undue hardship to payments being terminated, and that a degree of hardship during the transition to independence is acceptable.

It is not unknown for the payer to threaten to throw in the towel if they are ordered by the court to pay part of their hard-earned income to their former spouse on a joint lives basis. Of course, on the other side of the coin is the homemaker who feels aggrieved and resentful, perhaps having given up a lucrative, fulfilling career in order to allow the career of the other spouse to flourish.

This brings us onto *Waggott v Waggott* [2018], a Court of Appeal decision which has divided opinion on joint lives orders and the sharing of post-separation income. Practitioners will be familiar with the facts, which involved the parties divorcing after 21 years of marriage. Despite the husband and the wife starting off at the same level in the accountancy field, and the wife clearly sacrificing her career path for the family, her claim for a share in the fruits of the post-separation earnings was rejected by the Court of Appeal.

The Court of Appeal replaced a joint lives order with a term order of three years with a section 28(1A), MCA 1973 bar, on the basis that:

- the wife's relationship-generated needs could be met from her surplus capital; and
- the sharing principle did not apply to earning capacity, despite the wife's claim that she had helped build the husband's earning capacity over the 21 years of her ongoing contribution in taking care of the children, an approach that many thought to be discriminatory.

In *C v C* [2018], Roberts J ordered a clean break in line with *Waggott*. The parties in that case were both investment bankers, with the wife

at one point earning more than the husband. During the marriage, given the level of the husband's remuneration package, the parties had built up assets of over £25m. Part of the husband's bonus was made up of deferred equity participation (stock units), for which he realised the funds when they vested. However, as is usual in the banking industry, these awards were susceptible to a claw-back over a fixed period in the event that performance targets were not met. The court provided the wife with just over 50% of the assets on a clean break basis and allowed the husband to retain his post-separation accrual. The outcome was that the wife would have her housing and income needs met, however, unlike the husband, whose income needs would be met from his significant remuneration, the wife had to rely on her capital.

The current system increases the stress for the parties and makes it harder for people to reach an agreement as litigants and judges scuffle to find a way towards a solution.

Certainly, joint lives orders are alive and kicking for the right case. In the long-running *Quan v Bray* [2018], which was determined after *Waggott*, Mostyn J made an order for joint lives maintenance for the wife. The husband's evidence on his earning capacity was not accepted by the court and Mostyn J concluded that the husband had been 'dishonest, manipulative, arrogant, menacing and contemptuous of the court's authority'. Having considered the wife's needs and her modest earning capacity, maintenance on a joint lives basis, index linked, was ordered.

Mostyn J did, however, highlight (at para 48) that the clean break provisions have been 'strangely neglected since they were enacted, but recent decisions have emphasised their key importance', adding that:

> A limited term should be imposed unless the court is satisfied that the claimant would not be able to adjust to a cut-off without undue hardship. Normally that decision is easily reached because the claimant will have a capital base to fall back on in her later years. Generally speaking, there would have to be shown good reasons why a term maintenance order should not be made. And, generally speaking, where a term maintenance order is to be made there would have to be shown good reasons why it should not be non-extendable.

Capitalisation: out with the old?

How do we approach the calculation of a capitalised sum once an award of periodical payments has been made? The standard approach is to use a *Duxbury* calculation (per *Duxbury v Duxbury* [1990]), which assumes an element of growth and some risk. However, in a decade that has seen negligible interest rates, there is a very real risk of a significant shortfall resulting in a failure to meet a spouse's needs. In *Tattersall v Tattersall* [2018], Moylan LJ said (para 42):

> Although I would expect judges typically to use *Duxbury*, a judge can decide to use a method of calculation other than *Duxbury*. To do so is not, in my view, an error of law.

Various alternatives to *Duxbury* have been explored. In *HC (by her litigation friend) v FW* [2017], a case where the wife suffered various disabilities, the use of the Ogden tables was proposed, which are the actuarial tables used in personal injury claims. They take a far more cautious approach than the *Duxbury* tables, contemplating virtually no growth on an investment of virtually no risk.

In *WG v HG* [2018], the *Fournier* basis (per *Fournier v Fournier* [1998]) was put forward for the husband (which involves selecting a term during which the maintenance would be payable and then capitalising that term into a lump sum). This was rejected by Francis J in favour of *Duxbury* on the basis that it would be unfair to the wife who had disabilities and no earning capacity, and hence income needs which needed to be met. Francis J acknowledged the shortfalls in the *Duxbury* method, saying (at para 85):

> *Duxbury* is no more than a tool; it is not in any way a rule that has to be followed. It has been subjected to considerable criticism not least in the return that it assumes will be made. However, it is still the tool used by judges and family lawyers alike in these cases and nobody has sought to argue in this case that there is a better way of assessing the way to capitalise lifetime maintenance.

So, is there a better way? *Duxbury* is clearly still the starting point – and currently the favoured approach by judges, however there is increasing interest in exploring alternative methods and practitioners should be encouraged to bring independent financial advisers onboard early in cases to provide a more accurate method of calculating the capitalised lump sum.

Where are we going?

For many years there have been calls for greater clarity and certainty to the approach to determining spousal maintenance. The Law Commission called for a formula for spousal maintenance to be introduced in its report on matrimonial property, needs and agreements in 2014 (Law Com No 343).

In July 2017, Baroness Deech's Divorce (Financial Provision) Bill (the Bill) proposed a five-year limit on a term of spousal maintenance (extendable in the case of hardship) and had its first reading in the House of Lords. At the time of writing it is at the second reading stage in the House of Commons. As the Bill has progressed it has attracted much commentary. In a speech at Bristol University in March 2017 Lord Wilson spoke of the unrealistic expectation to 'tell a wife, left on her own perhaps at age 60 after a long marriage, that, following payments for say three years, she must fend for herself' (see

www.legalease.co.uk/wilson-bristol, p11), a comment that was met with disdain from Baroness Deech who said in response that 'it is also quite wrong that a senior judge should express resentment of Parliamentary scrutiny of the law' ([2017] Fam Law 785).

Mostyn J agreed with Lord Wilson in his speech at Exeter University in October 2018 (download from www.legalease.co.uk/mostyn-exeter), saying (at para 26):

> I will only say that I support Lord Wilson. But my support will endure only for as long as judges closely follow the messages from the higher courts about giving meaningful effect to the steer in the [clean break provisions introduced to MCA 1973 in 1984]. The road to independence is one on which every successful claimant of periodical payments should be set.

The Bill provided the context for a lively debate hosted by the Kingsley Napley family team, with a panel of speakers that included esteemed High Court judges and QCs, on whether, when it comes to determining spousal maintenance, we should have a system that is defined or one which allows for discretion.

Definition versus discretion

The inspiration for more definition comes from similar systems in place in other jurisdictions, including Canada, which provides a formula with a maintenance cap, established following research and careful drafting, and one which Baroness Deech has drawn upon in her speeches to the House of Lords in support of her Bill.

From a practical perspective, it can be argued that the current law which provides for periodical payments to be ordered for such a time so as to allow the payee to 'adjust without undue hardship' is too discretionary, the result being that different judges around the country often come to very different conclusions in the pursuit of 'fairness'. This creates a Russian roulette for clients seeking a quick resolution, who instead find themselves trapped in an expensive system of uncertainty and instability, which even their legal advisers can struggle to navigate.

Discretion is particularly troublesome with the reduction in the availability of legal aid, as for the vast majority of cases where income is tight (and income budgets do not hit hundreds of thousands) the parties are left unrepresented with no straightforward set of principles to assist them.

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However, the discretionary system avoids a 'one size fits all' model, which leaves all but the mathematical average case at a disadvantage. Can an algorithm or formula really replace a system that allows for each case to be considered on its own facts and merits?

Even the Canadian model does not provide for absolute definition and has an element of discretion weaved in. So, how would we get the formula right first time? The system for calculating child maintenance was until recently set up to ignore non-income-generating assets, thus allowing asset-rich parents to lower their income and dodge their child maintenance obligations. An injustice in that formula took six years to correct. But even the most vehement supporters of the discretionary system seem to agree that it would be helpful for some guidance to be given to judges, legal professionals and litigants as to the application of the current law to provide greater certainty. However, this does not mean that we need an (inevitably complicated) formula, which could create even more challenge for the legal profession, let alone the unrepresented litigant. Will greater definition make it easier to settle cases? Statistics suggest that even with judicial discretion-led law the percentage of cases settling outside of court is still high.

Conclusion

The suggestion that the law in England and Wales should adopt a maintenance cap, in all but in exceptional circumstances, puts the family's primary caregiver (usually the woman) at a significant disadvantage. Bringing the law into line with Scotland and most of Western Europe would also ignore the disparity between countries when it comes to the cost of child care and other related costs that make the transition to independence harder.

Polls taken at the beginning and end of the Kingsley Napley debate showed that the majority of the room was unwilling to take human decision-making out of the equation for calculating spousal maintenance and favoured discretion. However, a swing of 17 points in the poll taken at the end of the debate in favour of more definition evidenced an awareness that there is very much room for greater clarity in the current law, not just for litigants but legal advisers and judges alike. ■

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C v C
[2018] EWHC 3186 (Fam)
Duxbury v Duxbury
[1990] 2 All ER 77
Fournier v Fournier
[1998] 2 FLR 990
HC (by her litigation friend) v FW
[2017] EWHC 3162 (Fam)
Quan v Bray & ors
[2018] EWHC 3558 (Fam)
SS v NS
[2014] EWHC 4183 (Fam)
Tattersall v Tattersall
[2018] EWCA Civ 1978
WG v HG
[2018] EWFC 84
Waggott v Waggott
[2018] EWCA Civ 727