Barristers' Chambers

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Issue 51
The Principles relating to Spousal Maintenance Provision: SS v NS [2014] EWHC 4183 (Fam)

Introduction:

1. It must have been with a sinking heart that the Wife's counsel in this case heard Mostyn J start off his judgment with the comment that in writing her section 25 narrative statement, the Wife had had her pen 'dipped in vitriol'. The judgment, however, was ultimately not ungenerous in provision to the Wife and in reaching its conclusion, His Lordship considered many aspects of the current right to spousal maintenance provision, including the level of such payment and the percentage therein of any bonus payable (a la **H v W [2013] EWHC 4105 (Fam)**) and canvassed whether there should now be a statutory limit, as in other jurisdictions, to the length of spousal maintenance once there has been a divorce. The judgment usefully draws together the guiding principles of the present law on spousal maintenance provision which have been set out in schedule form for the reader's convenience below.

Facts:

W 39 and H 40 cohabited from 2002 and married in 2007. By then they had three children, aged 11, 9; and 7. All were being privately educated. The matrimonial home was in London. The separation was in 2013. H had since started living with another woman in her rented accommodation. She already had one child with another man and was expecting a child with H. H was a banker and he had recently had cancer and had taken a less demanding position as a result in the banking industry. W had worked until 2003 and thereafter devoted herself to caring for the children. Most recently she had taken part time work at a gym and hoped to develop her experience in this area to eventually gain a more independent income.

The parties matrimonial assets consisted of liquid net value c £1.8m inclusive of the FMH and another £1.47m in less liquid asset value, including c £0.7m in pension value. A total of almost £3.3m. There were unvested bank shares amounting when payable after tax to another c £548k.

As to these latter unvested shares Mostyn J disagreed [see para 12] with Thorpe LJ in **Lawrence v Gallagher [2012] EWCA Civ 394** where the same as deferred shares were removed from the capital analysis and treated as the Husband's future income stream only. Mostyn J considered that if the only condition for their receipt was that the husband remained

in work then the fact that they were deferred should not prevent their present inclusion into the parties' current capital value albeit with a **Wells [2002] EWCA Civ 476, CA** type discount approach or in the distribution, if need required, leaving these more risky assets to the husband. However in the present case, subject to needs, there was no reason why all the value of the assets identified in the case should not be divided equally. That would provide each with c £1.645m in value

To achieve that split, because of needs, Mostyn J assessed that W should have, principally for housing, c £1.2m from the liquid asset pot of £1.8m. In addition, of the £0.7m pension she should have an equal pension share topped up with another £107k from the illiquid assets – bringing her overall to the 1.645m split. That meant H was left with more of the illiquid asset value, albeit he had similar housing needs as W. Mostyn J considered that he had the capacity to raise a sufficient mortgage, which in the shorter term could also be reduced as he received the deferred share values.

The amount and duration of the ongoing maintenance level for W was in dispute. H wanted a decreasing level of maintenance, inclusive of a capped share of any bonus payment he received, for W, which was to be cut off (s 28) after 11 years. W wanted 27 years extendable term maintenance at a much higher level and a larger capped share of any bonus received. Mostyn J found both proposals unreasonable [para 24].

His Lordship commented that the requirement for a spouse to pay a former spouse maintenance after a marriage had ended was a curious aftermath of the common law requirement for a husband to support a wife in matrimony at a time when divorce had not been possible save by Act of Parliament before 1857 when reforms had introduced the present system of divorce by the court. He observed that, even in the instance of divorce by Act of Parliament, the husband would not be expected thereafter to provide other than a modest provision for the former wife.

In this context, he reminded the parties that, as in **B v S [2012] EWHC 265 (Fam) at paras 75 – 79,** that, save in exceptional circumstances, spousal maintenance is only payable to meet needs. His Lordship compared other jurisdictions where the obligation to pay spousal maintenance is limited to short periods (Scotland etc) and how since 1984 in this jurisdiction the statutory steer had been to consider a term on such maintenance unless there would be 'undue hardship' to the payee. After reviewing the case law upon the basis for the present law permitting maintenance provision with or without a defined term, Mostyn J observed that whilst this was the present law, he saw no justification for maintenance to be payable to a former spouse where the need which was being met had no causal connection with the marital relationship

Having considered the Law Commissions observations (**Matrimonial Property, Needs and Agreements (Law Com No 343) 26 February**) and the relevant case law concerning the

level and length of spousal maintenance provision and desirability of imposing a term thereon and the approach upon any application to extend the same, Mostyn J addressed the maintenance approach to be adopted in the instant case. He first of all dealt with the needs of the (3x) children which he accepted included the need to secure the continued provision of their private education and out of H's base income (without any bonus) of c £170k pa net he provided for their combined annual school fees of £64k and then awarded each £7.5k pa maintenance on top – so reducing the H's net available base income to c £82k pa. From this, he regarded that a £30k pa ppo provision for W (ie 36.4% of the residue) was fair and after projecting in tabulated form their potential future income resource receipts, he gauged that any share of H's bankers net of tax bonus should be limited to 20% pa capped at £26.5k maximum pa [paras 58 to 66].

In regard to the appropriate term Mostyn J imposed a s 28 term of 7 years on any bonus share and an 11 years extendable term on the core maintenance provision, which was when the youngest child would be 18 and a time when he anticipated H retiring from banking (51) – so allowing W to return to apply to extend, if she had not fared as predicted.

Principles:

Of particular interest to the reader will be the following principles which Mostyn J derived from the authorities concerning the approach to maintenance provision [para 46]. These are set out on the next page for ease of reference.

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16.01.15.

1.	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. In the present case, the duration of the marriage and the presence of children are pivotal factors
2.	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
3.	Where the needs in question are not causally connected to the marriage, the award should generally be aimed at alleviating significant hardship
4.	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
5.	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
6.	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
7.	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
8.	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
9.	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
10.	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
11.	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