

# For richer, for poorer

*Graeme Fraser questions the judicial trend of higher income awards on divorce which provide for financial dependency for life*



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**'Maintenance ends on remarriage but not as a result of cohabitation, even where a new relationship develops to the point where children are conceived.'**

Since the House of Lords' decision in *Miller v Miller; McFarlane v McFarlane* [2006], reported cases indicate that financial awards for joint lives spousal maintenance are made more frequently and at higher levels. The principles and issues apply equally to civil partners but to date there have been no reported cases specifically on civil partnership. It should be noted that the statutory provisions of the Matrimonial Causes Act 1973 in relation to periodical payments are mirrored in the provisions of the Civil Partnership Act 2004.

This article examines the erosion of the clean break principle, why the law causes practical difficulties, how this contrasts with other European countries, and the way forward.

## Erosion of the clean-break principle

Periodical payments are a continuing form of ancillary relief, whereas relief of a capital nature can normally be given only once. The standard form of order for periodical payments provides for payments during the joint lives of the spouses and until the payee remarries. Periodical payments therefore continue during the lifetime of the payer and may be varied at any time. Until the passage of the Matrimonial and Family Proceedings Act 1984, it was possible to terminate the right of one party to apply for periodical payments only by consent. As a result of that statute, now incorporated mainly in s25A of the Matrimonial Causes Act (MCA) 1973, a court can

terminate the right to periodical payments without consent, through a clean break.

Under s25A MCA 1973, the court is duty-bound to consider whether it would be appropriate to exercise its powers so that the financial obligations of each party towards the other are terminated as soon after the grant of the decree of divorce as the court considers just and reasonable. In particular, the court will consider whether it would be appropriate for those payments to be made for a term that 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 their financial dependence on the other party.

Since 1984 the courts, the legal profession and the public have acknowledged and accepted that at the end of a marriage there is a need for a clean break wherever possible. Indeed, the Court of Appeal decision in *Myerson v Myerson* [2009] in April 2009 reiterated that public policy promotes the need for finality in divorce. This ensures that families can move on in their business and personal lives, free in the knowledge that the settlement they have reached will not be re-opened or varied.

## Practical difficulties

Reported cases on maintenance generally deal with parties with significant resources. This means that there is little guidance on what should happen where the resources are more modest, particularly for middle income families, where the focus is on needs, which, following *Miller; McFarlane*, are generously interpreted. However, the

payer will understandably be worried about an unfavourable outcome focusing on the payee's budget, which affects the payer's ability to meet their own needs.

A good example of case law precedent which favoured the payee's budget is *S v S* [2008]. In this case, the wife had kept horses at the matrimonial home throughout an 11-year childless marriage. So long as the husband's income was well able to finance an aspect of the wife's life that had been integral to the marriage, an award of maintenance that allowed her to continue her hobby was not unfair. The horses would become an unjustifiable extravagance, however,

a key feature of the latest economic downturn and recession. It can be very difficult to quantify future income, particularly if this is paid in bonuses or, as a consequence of the banking crisis which began in September 2008, perhaps deferred into share options or long-term incentive plans, or transferred into shares instead.

In *H v H* [2007] the wife was awarded one-third of the husband's income in the year of separation, one-sixth of his income the following year and one-twelfth of his income in the third year. This is the main authority on future income since *Miller; Mcfarlane*, but is by no means an ideal one for most cases because it

authority to make new law or change the old.

If there is a significant improvement in the payer's income, then the payee can apply for an increase in maintenance. In recent years, significant increases have been achieved in reported cases.

In *Hvorostovsky v Hvorostovsky* [2009] the Court of Appeal endorsed the judgment in *Cornick (No 3)* [2001] that the payee can share in the increased prosperity of the payer and is not restricted to reasonable requirements or the standard of living during the marriage. In *McFarlane (no 2)* [2009] the wife received an enhanced award of 40% of the husband's net income up to £750,000 (ie, £300,000); 20% up to £1m (ie, £50,000) and 10% over £1 million, to continue until 31 May 2015, at which time the husband would be aged 55 and probably have retired. If by that time the wife had a *Duxbury* income of at least £120,000 pa it would be 'a strong pointer in favour of no extension being ordered'.

The perception that England and Wales is a place where wives are favoured in financial claims on divorce results in a lack of trust which discourages couples from marrying. Overall, marriage rates are in long-term decline. The number of marriages registered in England and Wales in 2007 was 231,450, only three-quarters of the number recorded in 1991, falling to the lowest rates on record.

However, it is a misconception to assume that maintenance awards will be moderated or made any more certain for the modern family relationship, where children are increasingly born out of wedlock. Contrast the £70,000 per annum awarded to the mother in *Re P* [2003] to the maintenance awards made on divorce, more normally recorded at a threshold of up to £25,000 per annum.

### Contrast with Europe

The decision in *Miller; Mcfarlane* was groundbreaking in that it made clear that there is nothing in the statutory provisions to suggest that Parliament intended periodical payments orders to be limited to payments needed for outgoings. Lord Nicholls found that such payments may be made to afford

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if the husband were made redundant or retired. The wife had an income of £82,000 pa (of which £50,000 pa was maintenance) while the husband had a net income of between £95,000 pa and £135,000 pa.

The move towards fairness and equality which began with the yardstick of equality set out in the landmark decision in *White v White* [2000] has made it less likely for capitalising income to take place which would detract from achieving a clean break. This is particularly so in families where there is a low level of realisable capital, but high income.

This is relevant where the main family asset is a business. In *H v H* [2008] the total capital was £4.79m, of which a restaurant business run by the husband was worth £2.5m. It would not be right to make an award that required the husband to sell the business he had run for 33 years, so this was not a clean break case. The settlement involved an award to the wife of periodical payments of £60,000 pa for herself and £20,000 pa per child.

The position becomes more problematic where the income stream is less certain, which has been

involved big money: the award to the wife was £13.7m.

The realities of modern family life following divorce do not sit comfortably with statute. Maintenance ends on remarriage but not as a result of cohabitation, even where a new relationship develops to the point where children are conceived.

In *H v H* [2009] the pregnancy of a spouse did not affect her income award, as it was not clear that she was cohabiting nor that the boyfriend was contributing financially to her living expenses. The husband was ordered to pay spousal maintenance of £125,000 pa and child maintenance of £15,000 pa (out of a net income of £435,000 pa). The case was unsuitable for a clean break as the wife would not be able to adjust to the termination of her financial dependence without undue hardship. Although Singer J was 'sympathetically attracted' to the view of Coleridge J in *K v K* [2006] that there should be reconsideration of the authorities, he reasoned that:

... change in this area must come from Parliament, or from a court with

compensation to the other party. Baroness Hale said that they would enable compensated spouses to share in the fruits of the matrimonial partnership, as well as meeting financial needs.

The move towards higher awards of periodical payments on a joint lives basis is out of line with other members of the European Union. Contrast the position in Sweden. There, the main rule is that each spouse is responsible for their own support. The maintenance allowance is periodic and only ordered if there are special reasons. Maintenance cannot be ordered for more than three years after the commencement of proceedings, unless the person liable to pay maintenance agrees. However, if one of the spouses needs money for maintenance for a transitional period, they are entitled to an allowance from the other spouse according to what is reasonable, having regard to the capacity of that spouse and other circumstances. Only in exceptional cases can a spouse obtain maintenance for a longer period. In Scotland, maintenance is limited to a term of three years, irrespective of circumstances. In Italy, the spouse at fault in the separation may receive maintenance only if they are in need. English law has not, however, moved as far as the criteria adopted in New York, where a portion of a spouse's expected future earnings are treated as if they were property, to be valued and then divided at divorce.

**Possible way forward**

Pre-nuptial cases often involve clients from different countries, which makes it necessary to consider the law of the other country where a party is domiciled, and where the parties will live. Choice of jurisdiction could be crucial to enforceability. The couple may not agree that the agreement should be construed solely or even at all according to English law.

This appears more likely following the Court of Appeal's decision in July 2009 in *Radmacher v Granatino* [2009], which pointed to more predictability in the upholding of agreements where spouses are foreign and there is great wealth. In the future, the judge should give due weight to the marital property regime into which

the parties freely entered. To achieve fairness between the parties to the proceedings, the agreement can be given decisive weight.

This decision marks a bold departure from previous cases, which limited the court's consideration to 'all the circumstances of the case' and 'conduct', as factors under s25 MCA 1973. If future decisions on pre-nuptial agreements on different facts follow the guidance given in

expect to be supported for life. This is a change from the move towards self-sufficiency which underpinned the clean-break principle introduced in 1984. The result of recent case law is that many families find themselves in difficulty when it comes to negotiating a fair financial settlement, as the courts are noticeably more reluctant to order clean breaks. This appears to be at odds with the aspirations of individuals to regulate their own affairs, free from interference

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*Radmacher*, English law could move towards an approach in which personal autonomy is the decisive factor, enabling individuals to regulate their financial affairs on divorce, as opposed to the wide-ranging judicial discretion empowered by state legislation under s25 MCA 1973. Many feel that this discretionary regime has contributed to the great uncertainty and heavy costs of matrimonial litigation in the appellate courts since *White*, which in turn has led to a lack of faith and trust by those intending to marry, but with assets they wish to protect.

The Law Commission has commenced its project to examine the status and enforceability of agreements made between spouses or civil partners (or those contemplating marriage or civil partnership) concerning their property and finances. We await with interest the report and draft bill expected in late 2012, and whether at that time Parliament will have the appetite for reform.

**Conclusion**

The movement by the courts towards equality and fairness in recent years has led to a perception by many that the courts have moved the goalposts too far in favour of payee spouses, so that they can now

by the courts or strict regulation by the state. Future judicial decisions and the Law Commission project will highlight whether English law is on track to move away from the undesirable uncertainty of outcome that prevails at present. ■

*Cornick (no 3)*  
[2001] 2 FLR 1240  
*H v H*  
[2007] EWHC 99  
*H v H*  
[2008] EWHC 935  
*H v H*  
[2009] 2 FLR 795  
*Hvorostovsky v Hvorostovsky*  
[2009] EWCA 791  
*K v K*  
[2006] 2 FLR 468  
*McFarlane (No 2)*  
[2009] EWHC 891  
*Miller v Miller;*  
*McFarlane v McFarlane*  
[2006] UKHL 24  
*Myerson v Myerson (no 2)*  
[2009] EWCA Civ 282  
*Re P (Child: Financial Provision)*  
[2003] 2 FLR 865  
*Radmacher v Granatino*  
[2009] EWCA Civ 649  
*S v S*  
[2008] EWHC 519  
*White v White*  
[2000] 2 FLR 981