

# A Guide to Spousal Maintenance

This article provides a comprehensive review of spousal maintenance including:

1. When it is likely to be ordered to be paid ;
2. How that order can be varied;
3. When the order ends; and
4. What if the payments are not made.

The provision for a divorced spouse to obtain continuing support from an ex-partner after divorce has been a long standing aspect of many divorces granted in England and Wales. This provision, known as Periodical Payments, means that one party to the divorce is able to receive a regular income from the other, even after the divorce has been finalised.

For instance, take the example of a wife who gave up her employment in order to take full time care of the children of the family or any other commitment which would preclude her from working. Indeed, even if one spouse did not give up their employment entirely, but the split from their spouse meant a significant alteration in the standard of their lifestyle or sudden decline in income, the Courts still have the ability to grant continuing periodical payments to the financially disadvantaged party.

## Types of periodical payments orders a Court can make are:

- An order during the joint lives of the parties, or until the remarriage/civil partnership of the recipient;
- A term order that the maintenance is paid for a specified number of years;
- A nominal periodical payments order i.e. five pence per year. The purpose is not that the sum itself is relevant, but that an order exists which is capable of being varied upwards in the event of a change in circumstances that give rise to a need for a financial claim at later date. A common scenario may be where the parent with care of the children is earning a level of income where a substantive periodical payments order is not required, but the existence of young children makes it inappropriate for there to be a clean break. Some judges are of the view that the

parent with care will require the 'safety net' of a periodical payments order in case they are unable to work in the future or there is a dramatic change in circumstances. Although the Court of Appeal has stated that a leave in could not be considered to be 'an insurer against all hazards';

- A capitalised clean break, The court has a duty to consider whether a clean break is achievable between the parties, i.e. that the financial obligations of each party towards the other will be terminated as soon after the grant of the divorce order or decree of nullity as the court considers just and reasonable. As part of that exercise, the court may consider whether there are sufficient assets to capitalise a maintenance claim. A Duxbury calculation is an actuarial calculation designed to identify the capital sum required to meet a periodical payment requirement at a fixed rate for the remainder of the recipient's life.

The factors taken into account by the Courts in deciding whether or not to grant such an order are found in the Matrimonial Causes Act 1973 and Civil Partnership Act 2004 and include the following:-

- The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- The financial needs, obligations and responsibilities of parties have or is likely to have in the foreseeable future;
- The standard of living enjoyed by the family;
- The age of each party;
- Any physical or mental disability of the parties;
- The contributions which each of the parties has made or is likely in the foreseeable future;
- The conduct of each of the parties (this consideration is rare unless the conduct was particularly serious); and
- In the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

There is no set rule in determining if a periodical payments order should be granted on divorce. Nor any set rules on how much should be awarded and on what basis, if granted at all, indeed the High Court has stated obiter that quantification is 'more an

art than a science'. Although in *SS v NS (Spousal Maintenance)*, Mostyn J set out what he considered to be a comprehensive checklist of the factors to be considered which including the following:

- A 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—the duration of the marriage and the presence of children are pivotal factors.
- An award should only be made by reference to needs, save in exceptional circumstances.
- Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.
- 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.
- The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive.
- 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 payer's available income that should go to the support of the claimant.

In broad terms, periodical payments are calculated by balancing the income/earning capacity of the parties against their needs. The only guide is that an award of periodical payments should, in conjunction with the other orders available, produce fairness. An order for periodical payments may therefore not simply confine a party to their needs. It may be that it allows a party to build up capital and to reduce future dependence on the other and case law has indicated that the Courts view the marriage as a "partnership of equals", applying equal criteria to both the 'homemaker' and 'breadwinner'.

The law is largely governed by Case Law and previous prominent divorce cases such as *McFarlane v McFarlane* have seen spouses awarded above and beyond what many would term as 'reasonable need'. In this particular case the Court awarded the wife maintenance of £250,000 per year not only on the basis of her financial needs, but also by taking into consideration the fact that she gave up her career as a City solicitor to care for the couples' children.

## Can the order be varied?

At any time within the duration of a periodical payments order, a party may apply to Court for its variation (albeit uncommon for the receiving party to do so) as to the amount and the duration.

When considering varying the amount, the court considers the matter afresh, in light of all the circumstances, new and old. Relevant factors have included: financial mismanagement or misconduct by a party; the accumulation of capital by a party through thrift; a party's new cohabitation; and a party's new-found wealth. The Court is not necessarily restricted by the intentions of the substantive order (although the intentions of the court, and any capital distribution, will naturally be of considerable evidential weight); its task is to produce fairness.

An application to vary has been seen most recently in the well-documented case of *Wright v Wright*. Mr. Wright, a millionaire race horse surgeon, was ordered to pay £75,000 per year to his ex-wife following their separation in 2008. This was to cover maintenance and school fees for herself and her 2 young children. Following their divorce, Mrs. Wright stopped working in order to care for her children.

Mr. Wright took the case back to Court to apply to have his bills reduced, upon his impending retirement. His application was granted and when Mrs. Wright appealed against the decision, the High Court ruled in Mr. Wright's favour.

The High Court found that Mrs. Wright had made no effort to seek employment since she had left work and stated that there was a general expectation that once children are in Year 2 at school, mothers should begin part time work in order to make a financial contribution. In short, Mrs. Wright should not hold a general expectation that she would be 'supported for life'.

Whilst the comments made by the judges as to the expectation of a mother to work once their children have reached a certain age has proven quite controversial with critics and observers, what this means in legal terms of course is that the ruling of the High Court will be binding on lower family Courts in England & Wales, who will be bound to use the case as a precedent. Although the vast amount of cases will not involve the high sums of money in the case of *Wright*, the principle of 'maintenance for life' may well become an increasing rarity.

## When does the order end?

A periodical payments order is terminable upon:

- The remarriage of the payee or when the payee enters into a civil partnership (Case law recognises however that cohabitation is not to be equated with marriage (or a subsequent civil partnership) and the implications are therefore different, often fact-specific, and not determined by legislative provisions;
- The death of the payee; or
- The death of the payer.

Apart from these qualifications, there is no specific limit on such orders. However, the circumstances of the case may demand that a term order is made, i.e. the periodical payments are to be made for a defined period of time rather than on an open-ended basis as highlighted in the *Wright v Wright* case.

## What if they don't pay?

Certain types of periodical payments orders may be registered in the Family Court for the purposes of enforcement. Once a periodical payments order has been registered, it is enforceable in all respects as if it had been made in the court in which it has been registered (the court of registration).


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