

In Practice

Avoidance of Discrimination in Maintenance Pending Suit Cases

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Despite the social and cultural shift over the last four decades towards the treatment of women in our society and the emphasis in recent cases on equality and fairness in the treatment of spouses on divorce, there is evidence of discrimination against applicants (predominantly women) for maintenance pending suit. As Lord Nicholls of Birkenhead said in *White v White* [2002] 2 FLR 981, at 989C-D:

–There is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so.ø

These words are etched on the minds of ancillary relief practitioners. The principle lesson of *White* is that there should be no discrimination between the breadwinner and the homemaker in terms of their financial entitlement in ancillary relief on divorce. The principle was developed further in *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186. when Lord Nicholls observed at para [16] that:

–a third strand is sharing. The parties commit themselves to sharing their lives. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary.ø

However, is this principle of avoidance of discrimination being applied only to the end result of the final ancillary relief award?

Surely such a fundamental principle should be applied at all stages of the process of resolving the financial dispute, and in particular when considering an application for maintenance pending suit hearing? In *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71 (*G v G*), Charles J observed at para [71]:

–I accept the submissions made on behalf of the wife that:

- (a) Just as is the case when making a final award. In awarding maintenance pending suit the overriding consideration for the court is to arrive at a fair result.ø

Is there a continuing need for maintenance pending suit to demand the justification of need/calculation of legal budget? Is such an approach contrary to this principle? The expression "maintenance pending suit" is defined within s 22 of the Matrimonial Causes Act 1973:

On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable.

CASE STUDY: A CLIENT'S PERCEPTION ON THE METHOD OF ADJUDICATION

- Jane and Patrick have been married for 28 years. They have no children.
- On marriage Jane sold her property and realised £220,000. She sold her endowments and realised £58,000.
- She moved into Patrick's property which is where the parties have lived throughout the marriage.
- In year three of the marriage Patrick wanted to buy a new factory and adjoining strip of land for development as a car park. Jane's £278,000 was used. The factory and the land were placed in Patrick's sole name and today and today have a combined value of £1,000,000.
- Jane has not worked throughout the marriage. Patrick earns £150,000 net per annum.
- The assets total £3,000,000 and are all vested in Patrick's sole name.
- Jane applies for maintenance pending suit to cover living expenses (she has moved out of the home) and legal fees.

In support of her application Jane has filed:

- (1) A detailed statement of evidence setting out her interim/essential needs.
- (2) A detailed costs projection from her solicitors setting out the projected legal budget ó amount for counsel, disbursements and solicitors own costs and VAT.

Are the parties treated in the same way in the determination of the Application? Is the determination of the application fair? Following a raft of cases including A v A (Maintenance Pending Suit: Provision for Legal Fees [2001] 1 FLR 377; G v G and Moses-Taiga

v Taiga [2005] EWCA Civ 1013, [2006] 1 FLR 1074, it is plain that definition of maintenance pending suit is properly interpreted to include a payment to meet the applicant's costs of the proceedings.

[T]he progressive construction that the judges have adopted in the Family Division is both pragmatic and sensible. The modern reality is that the highly specialist solicitors and counsel necessary for the conduct of big money cases will no longer do publicly funded work. So, if the applicant has no assets, can give no security for borrowings, cannot guarantee an outcome that would enable her to enter into an arrangement such as that which was upheld in *Sears Tooth (a Firm) v Payne Hicks Beach (A Firm) and others* [1997] 2 FLR 116 then there is no source of funding of the litigation other than the approach to the court for a maintenance pending suit that will include a substantial element to fund the cost of the litigation. Obviously, in all these cases the dominant safeguard against injustice is the discretion of the trial judge and it will only be in cases that are demonstrated to be exceptional that the court will consider exercising the jurisdiction. But, I am in no doubt that in such exceptional cases, s22 of the Matrimonial Causes Act 1973 can in modern times be construed to extend that far (per Thorpe LJ in *Moses-Taiga*, para [25])

Therefore there seems little doubt that any award in the above example would include an element for costs. Therefore, Jane's application is likely to result in a legal fees element.

OUTCOME OF JANE'S APPLICATION

Jane's application is determined by the court and it awards her £5,000 per calendar month, £2,000 of which is to be allocated to legal fees for which Jane's lawyers have to produce a detailed account each quarter on how those funds are being utilised. What is the client's perception of the outcome? It is likely to include the following:

- (1) There has been no analysis of what Patrick and his legal team intend to spend on presentation of the case on his behalf: no analysis of his solicitors' hourly rate, year of qualification, location of their office (inner Birmingham City Centre/outside etc).
- (2) Jane has had to show her hand. Patrick knows who she has elected as her counsel and the level of experience of her legal team.
- (3) The wealth the parties have accumulated stems from direct financial contribution she has made. Yet she has to seek permission from the court on how she spends her own money.
- (4) Her level of spending has laid bare how much her rented

accommodation is, is it in an appropriate part of town, how much petrol is she using, etc.

- (5) The court, through the process of adjudicating Jane's application, is imposing a limit on what it is reasonable to spend on herself and her legal team. No such restrictions are placed on Patrick. Of his £150,000 net after the maintenance commitment he has £90,000 available at his disposal and, save in the case where a freezing order is used, he has the capital assets available to borrow against or utilise.

When considering qualification of maintenance pending suit in *G v G*, Charles J scrutinized the wife's financial position at paras [124]-[131]:

[T]he wife also produced what she described as a comprehensive schedule illustrating a monthly budget which she had prepared for the purposes of this application for interim provision. The total of the items so listed was £11,023. In my judgment there is force in many of the points made by the husband on the budget particularly in respect of the payment relating to holidays, household maintenance, payments on utilities, food and drink and personal expenditure by the wife.

He required the wife to curb her expenditure or to meet additional costs from her own income. The judgment, however, is silent about the husband's budgetary requirements and expectations. In *TL v ML and others (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, Nicholas Mostyn QC, sitting as a deputy High Court Judge, referred to *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45 and *G v G* and concluded at paras [123] and [124]:

[F]rom these cases I derive the following principles:

- (i) The sole criterion to be applied in determining the application is "reasonableness" which, to my mind, is synonymous with "fairness".
- (ii) A very important factor in determining fairness is the marital standard of living.
- (iii) In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing. That budget should be examined critically in every case to exclude forensic exaggeration.

Is discrimination really avoided if you "critically scrutinise" one party's

budget but not the other? Is it fair to impose spending limits on one party knowing full well that the same limit is not and will not be imposed on the other party? Is the potential unfairness of this approach compounded by the new costs rules?

The family proceedings Rules (Amendment) Rules 2006 (SI 2006/352) introduced a new r2.71 to the Family Proceedings Rules 1991 (SI 1991/1247). For petitions issued after 3 April 2006 the court would not make an order requiring one party to pay the costs of the other party, save for certain exceptions. Therefore, once the legal budget is set through the vehicle of maintenance pending suit, is it not difficult for Jane to subsequently achieve a costs award should her budget prove to be inadequate? Say there is an unexpected turn of events and a third party intervenes in the proceedings with an application about beneficial ownership of the commercial unit. From his £90,000 Patrick may be able to absorb this cost within his income. Jane has to borrow or run up credit with her solicitors. Yes she could probably apply back to the court to increase the level of maintenance pending suit, but that will involve further cost and possibly delay. It is clear that the courts have some way to go in giving full and practical effect to the fundamental principle of avoiding discrimination in ancillary relief cases, and especially when considering applications for maintenance pending suit.