Finding closure

Alison Green draws practical points for practitioners on variation of periodical payments from the decision in H v H

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'It is desirable to bring the parties' financial dependency to an end – a clean break is important financially and psychologically, not only to prevent further litigation between the parties but also to exercise the court's duty to try to stop any waste of time and money.'

In *H v H* [2014] Coleridge J's judgment provides practitioners with useful guidance on many issues that arise on a variation application under s31 of the Matrimonial Causes Act 1973 (MCA 1973). The pragmatic and no-nonsense approach set out in the judgment is not only interesting but also one that has very real application in big money cases. In this case the court was concerned with the husband's variation application to bring to an end a periodical payments order on the basis of his planned retirement.

The mechanism for variation is set out in s31(7)(A), MCA 1973; in particular, the relevant part to this case is:

> ... in the case of a periodical payments or secured payments order made on or after the grant of a decree of divorce... the court shall consider whether in all the circumstances and after having regard to any such change it would be appropriate to vary the order so that payments under the order are required to be made or secured only for such further period as will in the opinion of the court be sufficient (in the light of any proposed exercise by the court where the marriage has been dissolved of its powers under section (7)(b) below) to enable the party in whose favour the order was made to adjust without undue hardship to the termination of those payments.

In addition s31(7)(b), MCA 1973 gives the court the power to order a further lump sum on a variation application in favour of a party to the marriage to help with the effects of termination of periodical payments and to assist to avoid hardship.

Background

Briefly, the facts of the case were that the parties were married in 1983 when both were trainees of a well-known accountants. Both progressed well in their careers, the wife reaching the position of chief accountant for a department store and the husband working for what is now a major city financial service provider. Over his period of employment, the husband worked on secondment to a bank and took a job in the Far East where the family relocated to for around four years, as a prelude to him achieving partnership in the practice in 1996. In 1990 the wife had taken redundancy, given up work and started a family by agreement. The parties had two children now 23 and 21 years old.

The relationship broke down and the decree absolute was granted in 2005 along with a consent order in relation to financial matters following a financial dispute resolution appointment (FDR). At that time the total assets were £2.43m and consisted of the matrimonial home, the parties' respective savings, the husband's pension and his unfunded annuity. He had an income of £475,000 net and intended to retire at 55. In the proceedings, the wife put forward a budget for her needs of £115,000 pa. By agreement she received the matrimonial home, mortgage-free, and periodical payments of £90,000 pa, and the husband agreed to pay the children's school fees. The wife thus received £1.37m in liquid assets; the husband £1.06m, much of which was his pension and his unfunded annuity.

The wife subsequently applied to vary this order in 2006, possibly motivated by the decision in *Miller v Miller; McFarlane v McFarlane* [2006] that had for the first time allowed for the concept of compensation to be

argued successfully. In 2007 Baron J varied the order following a successful FDR, providing £150,000 pa for the wife and increasing the order for the children.

In May 2006 the husband remarried and had a daughter with his second wife in 2008 and a further daughter in 2012. The birth of the second child followed the diagnosis of the second wife in 2011 with incurable cancer, who at the time of Coleridge J hearing the case was aged 41 and very seriously ill.

Coleridge J did not fully adopt the argument that the wife could release capital from her home to produce income but he very much factored that into his findings.

The husband's application for variation was made against this background as he was aware that, on his wife's death, he would become the sole carer to two very young children and so retirement was to become a necessity. His wife could have two years left to live and so the application made was to enable him to plan for the future.

Coleridge J heard evidence from both husband and wife and was complimentary about both parties despite the ongoing animosity between them. The husband sought termination of the periodical payment order from the date of his retirement. The wife resisted, saying that consideration was inappropriate until the retirement actually happened and that it was unclear what the husband's income would be at that point and whether in fact he would retire. However, during her evidence, on questioning by the judge, the wife agreed that the court should consider the long-term position of the parties and make the necessary orders. That position apparently took counsel for the wife by surprise. The final submission for the wife was that the proper capital payment for the husband to pay in exchange for a final termination of the periodical payments order would be £2.6m by way of addition to the wife's current capital, to be payable on the husband's retirement in 2015 or 'whenever it actually occurs' if later.

Assets

Both parties produced schedules of assets and the judge commented that the financial picture was not complex. There was no dispute as to the wife's financial position, made up of her interest in her home with an agreed value of £1.8m and savings of just over £1m. The wife contended that the husband's position was very much more ample than he maintained, however the judge commented that there was no real difference between the parties on the underlying figures. The difference between the parties depended on the extent to which it was appropriate to add to the husband's position the payments he would receive in the coming years, from receipts from life assurance on the anticipated death of his second wife, the value of the second wife's share in the parties' French property, and, particularly significantly, the ongoing value of the payments he would receive from his employer over the course of the next ten years as part of his terms of retirement. After consideration, Coleridge J concluded that he would approach the case on the basis that the husband's present assets were worth in the region of £5.68m, but that in the not too distant future, and over the course of the next ten years, he would be entitled to receive further and in some respects significant payments (which he detailed in the judgment).

Findings

In reaching his decision, Coleridge J referred to s31(7)(a), MCA 1973 and also made reference to *McFarlane v McFarlane* [2009] as invited by counsel for the wife to draw a direct comparison to that case as to the issue of compensation. However, the judge distinguished the current case as he found the husband's employment was about to cease and thus his earnings and earning capacity would reduce. He made the following findings based on the analysis:

- it was wrong to reopen previous orders in a case where the wife had been properly and fairly treated – there had of course been no appeal;

- it is desirable to bring the parties' financial dependency to an end – a clean break is important financially and psychologically, not only to prevent further litigation between the parties but also to exercise the court's duty to try to stop any waste of time and money if a decision could be reached reasonably and fairly;
- the husband wanted certainty in relation to his financial future;
- much of the wealth had been generated post separation and the wife had benefitted from a high periodical payments order;
- it was not necessary to wait for an event such as the husband's actual retirement before a reassessment took place;
- the husband's current wife's illness and his two young children made it more desirable to achieve a termination;
- there was acrimony between the parties;
- it was possible to terminate now without causing undue hardship; and
- the case retained a compensation element that should not be ignored.

Against this background, Coleridge J went on to find that:

- there was no basis to adopt the existing periodical payments order as the starting point as it was based on the husband's earnings which obviously would change;
- the wife's budget could be £70,000 pa realistically;
- cross-checking that figure revealed the amount the wife had been able to save, which from 2007 to date was in the region of £700,000; thus the wife had been living on figures lower than she had previously stated as being her needs; and
- £10,000 pa should be added to that calculation to be generous to the wife.

Order

As a result of the compensation element in the case, Coleridge J did not fully adopt the argument that the wife could releasecapital from her home to produce income but he very much factored that into his findings. He therefore:

- only attributed £500,000 of equity in her home as being part of an income fund;
- took the whole £1m she had saved as being available to her but not on a fully amortised basis;
- did not factor in a step-down at a later date in relation to home size; and
- ignored the prospect of any future savings that the wife may make before the husband retired.

The judge went on to calculate therefore the shortfall in the wife's income, having taken into account the factors above, and then made a 'simple Duxbury calculation' to make up the gap which was £25,000 pa for her life. The order therefore was that the husband should pay the wife £400,000 on his retirement, by way of a lump sum, to provide a clean break between the parties.

Conclusions

The interesting part of the judgment in *H v H*, which is of course relevant mainly to big money cases where there is significant capital to achieve a clean break, is the strong emphasis the judge placed on bringing the litigation to an end where acrimony remained between the parties and one party in particular had moved on with a new family. It would no doubt be the wish of all parties to secure such a clean break in order to reduce the emotion that an ongoing link can cause. Also of interest is the notion that reassessment of a party's position can be applied for at any time, and that the event around which reassessment revolves does not have to yet have occurred. Clearly, there has to be some certainty as to what is likely to happen and it is to be hoped that purely speculative 'what if' applications would not be entertained. However, in cases such as this where there is an inevitability of events, it has to be the sensible approach to have a plan in place for when changes occur.

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The concept of compensation is something that Coleridge J also gave guidance on, making it clear that while it is a frequently argued factor, consideration of compensation is very much case specific. Compensation had been considered in this case and taken into account when settlement was first reached, but it was something that the court could recognise and also take into account when determining that the wife had more than 'just an entitlement' arising from the marriage entitling her to have just her reasonable needs met on a simple lifetime basis. Coleridge J concluded that he agreed with recent pronouncements about the dangers inherent in attributing special weight to arguments about compensation but that there were a small number of cases where it did not do a party justice to deal with matters just on the basis of need when they had sacrificed the security of generating their own earning capacity. ■

H v H
[2014] EWHC 760 (Fam)
McFarlane v McFarlane
[2009] EWHC 891 (Fam)
Miller v Miller; McFarlane v McFarlane
[2006] UKHL 24