

Spousal maintenance and gender inequality

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Rosie Schumm is partner in Forsters family team and is known for taking a creative and pragmatic approach to family law to achieve the best outcome for her clients. She specialises in advising high net worth clients on complex

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Christine Abbotts qualified into the Forsters family team in September 2017 having trained at the firm. She is particularly interested in children cases with an international dimension and has gained considerable experience at Forsters

assisting on the recent reported case of *Goyal v Goyal* involving pension sharing orders in respect of overseas pensions.

In 2017 we can still find many examples of gender inequality within our society. Recent ONS figures show that for a man earning £45 an hour, a woman in an equivalent role will be earning £30. Gender inequality also plays out in family life where there is still a lack of societal acceptance of paternity leave and shared parental leave for men in the UK. In Sweden 90% of men take some shared parental leave, in the UK uptake is only 5% according to CIPD figures. Women

are still more often than not those who will earn less and sacrifice prosperous careers to care for young children.

These examples of gender inequality become even more pronounced when discussing spousal maintenance. It is essential not to ignore the deep-seated inequality women face in the work place and as mothers seeking employment when determining their spousal maintenance award. The judiciary should contextualise maintenance awards within the background of the gender inequalities both women and men encounter. Financial independence upon divorce or soon after is an ideal but independence is different to equality and the earning gap could be met by the bigger breadwinner in appropriate cases.

Family judges have grappled with gender inequality in the context of spousal maintenance for years, sometimes with undesirable results for both husbands and wives. Women are, of course, increasingly the breadwinners within heterosexual marriages and long may this rise continue.

ONS figures released in October 2016 show men reach their highest weekly earnings in the 40 to 49 age group and women in the 30 to 39 age group. Contrasted with the peak divorce age for women of 42.6, from ONS figures released November 2015. Women could therefore face enforced financial independence through divorce at a time when their optimum earning capacity has already passed. These statistics demonstrate inequality for both sexes as men hit their peak earning capacity just as they are most likely to get divorced, possibly leading to a more generous spousal maintenance award against them.

The gender inequality debate around financial provision upon divorce, most

commonly focuses on the wife and mother. Often she has not worked for several years prior to divorce due to caring for the children and is now facing the daunting task of re-entering the work place in order to achieve financial independence. Quantifying expected levels of remuneration involves much crystal ball gazing as to the availability of roles, access to professional networks, commercial interest and potential earning capacity. Therefore, any potential spousal maintenance award rests entirely on the judge's position on these key factors. We have recently seen a judicial move away from joint lives orders, led by Mostyn J in *JL v SL* (No 3) [2015] EWHC 555 (Fam), [2015] 2 FLR 1220, with an emphasis on shorter-term orders and the wife re-entering employment. These orders commonly do not give enough recognition to the challenges the woman faces in seeking employment, often whilst juggling childcare. Family lawyers observe that shorter-term orders are becoming the norm in regional family courts, often with London judges taking a more cautious approach. In spite of this trend, many argue the judiciary is still outdated in its approach and expectations of both genders. This is perhaps due to the makeup of the judiciary itself; in 2016, 48.3% of judicial appointments were over 60.

There is of course a difference between the 33-year-old mother and the 55-year-old homemaker and maintenance orders should reflect this, whilst also being realistic about the wife's employment prospects. ONS figures show that nearly half of all births in 2013 were to mothers aged 30 and above, and one in 25 babies is born to a mother over the age of 40. It is therefore not surprising that women in their early 50s are still caring for their children in some capacity; it is their careers and job prospects which must therefore suffer. According to research from PwC, in conjunction with Women Returners and the 30% Club, 427,000 of UK female workers are currently estimated to be on a career break. Of these, three in five are likely to enter lower skilled, lower paid roles on return to work. There are another 29,000 women returning to

part-time work who would prefer to work longer hours, but cannot due to a lack of flexible roles.

In 2017, a Timewise study found that 9.8% of advertised roles with a salary of over £20,000 were available on a flexible basis and that fell to 6.8% per cent for roles with a salary of over £80,000. Therefore, the job market does little to support women of all ages attempting to get back into work after having children. It is important that judges are conscious of these realities when ordering women back to work with unrealistic expectations of their employability and career prospects.

The law in this area has come a long way since the compensation approach first set out by Baroness Hale in *Miller v Miller: McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186. The notion of compensation for the spouse who has forsaken their career, enabling the other to excel, has largely been marginalised in subsequent cases. In terms of gender inequality, as a concept, compensating women for the 'backseat' their careers had to take during their marriage has had profound implications. It allowed women to trust that their sacrifices referred to by Potter P in *VB v JP* [2008] EWHC 112 (Fam), [2008] 1 FLR 742 as 'relationship-generated disadvantage', would be valued and they would not be left financially weaker upon divorce because they stopped working to take on the role of house-wife and primary carer.

However, as we know, this approach to spousal maintenance has fallen from favour and there is now a recognised move to needs-based, rather than compensation-based spousal maintenance, as held by Mostyn J in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124. Compensation was confined by Mostyn J in *B v S (Financial Remedy: Marital Property Regime)* [2012] 2 FLR 502 and *SA v PA* [2014] EWHC 392 (Fam), [2014] 2 FLR 1028, to a 'very rare and exceptional case', where there are large financial assets. The Court of Appeal in *H v H* [2014] EWCA Civ 1523, [2015] 2 FLR

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447 has subsequently approved this approach. Therefore, women can no longer rely on the compensation principle; they must rather endure the rigours of detailed budget preparation, hours of analysis and extensive proof of needs to claim spousal maintenance successfully.

The principle of compensation, can still survive, Mostyn J found in *SA v PA* but the claimant will need to show they gave up 'a very high earning career which had it not been foregone would have led to earnings at least equivalent to that presently enjoyed by the respondent'. Given the ONS figures on income inequality, it is perhaps unrealistic to place such an income requirement threshold

on the wife, who is already battling endemic income inequality, to not only match but also top the earnings of her husband.

The family courts cannot be expected to ameliorate gender inequality alone. They have to walk a fine line between encouraging financial autonomy with younger couples, accepting the limits placed on mothers with young children and understanding that older women who have given up their careers to care for their families will have a limited earning capacity; they will still need some degree of support. For needs based cases at least, the financial implications of marriage should not end at divorce.