

Default position?

Helen Cort examines the evolution of nominal periodical payments orders in favour of the primary carer and the potential impact of the Court of Appeal decision in Matthews v Matthews



Helen Cort is a solicitor at Paris Smith LLP

How often, as family law practitioners, do we accept that there should be a periodical payments order in favour of the primary carer where there are minor children? While this may often be the appropriate outcome, there may be a danger that practitioners simply accept this rather than carefully analysing the specific merits of each case, particularly in terms of income and the effect the children have had on the applicant's earning capacity. Nominal orders in such cases became a convention, but what was the basis for it?

General principles

Under s23(1)(a) Matrimonial Causes Act 1973 (MCA 1973), the court can make:

... an order that either party to the marriage shall make to the other such periodical payments, for such term, as may be specified in the order.

When making such an order the court is under an obligation to (s25A(2) MCA 1973):

Consider whether it would be appropriate to require those payments to be made or secured only for such term as 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 his or her financial dependence on the other party.

The options available to the court on receiving such an application are:

- no order and a clean break as to income;

- a nominal order permitting the income claim to be kept alive;
- a joint lives order expressed to be until the death of either party, the remarriage or cohabitation for more than a stated period of the receiving party, or further order;
- a term order until a defined event, such as the children completing education; and
- a term order with a s28(1A) MCA 1973 bar preventing a party from applying for an extension of the order under s31 MCA 1973.

The court has a duty to consider a clean break, ie that the financial obligations of each party towards the other terminate as soon as is just and reasonable after the grant of the decree (s25A(1) MCA 1973). While there is no presumption of a clean break the appropriateness of one should be considered (see *SRJ v DWJ (Financial Provision)* [1999]).

Courts' approach

It is often argued that a nominal periodical payments order is required to act as a safety net to allow for a future variation should the circumstances of either party change. A nominal order may be appropriate, for example, where the payer's financial position may improve with a promotion at work or the payee's financial position may deteriorate due to illness or redundancy. Where say the primary carer is made redundant a nominal order is intended to enable them to ask the payer for further financial assistance. A nominal order mitigates the economic, social

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and emotional effect that a change in financial circumstances may have on dependant children and enables the primary carer to continue their childcare role.

So, how did nominal periodical payment orders where there are minor children evolve? A leading case in this area is *C v C (Financial Relief – Short Marriage)* [1997]. Interestingly this is a case where an order for substantive, as opposed to nominal, periodical payments, was ordered. Over a period of 12 months, the parties married, had a child and separated. The Court of Appeal described the case as 'highly unusual' and indeed 'unique'. Irrespective of this the court still chose to dismiss the husband's appeal of the first instance decision that had provided the wife with a significant lump sum, child maintenance, but more relevantly, a high level of periodical payments on a joint lives basis. Ward LJ stated that although the marriage was very short, it had profound and continuing consequences for the wife's earning capacity in the short to medium term by virtue of her continuing commitment to their child.

The Court of Appeal summarised the proper approach to assessing whether a clean break order should be made, which depends on all the circumstances of the case, including the welfare of any minor child and the s25 MCA 1973 checklist factors. A short marriage will not of itself require a term order: if a term order is appropriate, there must be evidence to support that conclusion, as opposed to hope or crystal-ball gazing. If there is doubt about when self-sufficiency will be attained it is wrong to require the payee to apply to extend the term. If there is certainty about the appropriate length of the term, the proper course is to impose no term but leave the payer to seek variation or discharge.

The eight-stage approach outlined by the court was:

- The first task is for the court to consider a clean break pursuant to s25A(1) MCA 1973.
- If there is to be no clean break, and a periodical payments order is to be made, the court should decide the amount to be ordered. The duration of the marriage is a factor relevant to the determination of quantum.

- If a periodical payments order is made, whether for a nominal 5p pa or a substantive sum, the court must then consider whether it would be appropriate to impose a term.
- The statutory test is: is it appropriate to order periodical payments only for such term as would be sufficient to enable the payee to adjust without undue financial hardship to the termination of financial dependence on the paying party?
- What is appropriate depends on all the circumstances of the case, including the welfare of any minor child and the s25 checklist, one of which is the duration of the marriage. It is, however, not appropriate simply to say, 'This is a short marriage, therefore a term must be imposed'.
- Financial dependence is evident from the very making of a periodical payments order, although the question is whether, in the light of all the circumstances of the case, the payee can adjust without undue financial hardship to the termination and, if so, when. In considering such questions, the court should take into account not only the duration of the marriage, but the need to care for the minor children and the effect this has had and will continue to have on the earning capacity of the payee. It is highly material to consider any difficulties the payee may have in entering or re-entering the labour market.

- The court cannot form its opinion that a term is appropriate without evidence to support its conclusion. There must be a reasonable expectation that the payee can and will become self-sufficient. Crystal-ball gazing is not enough.
- The court must also form an opinion not only that the payee will adjust, but also that she or he will have adjusted within the term that is fixed. The court may be in a position of such certainty that it can impose a section 28(1A) bar.

In *S v B (Ancillary Relief – Costs)* [2004] a nominal maintenance order for

a term of ten years was made following a three-year marriage where the parties had a three year old child. The wife was also awarded significant capital. The husband appealed arguing, among other points, that the wife's application for periodical payments should have been dismissed. Wilson J took the view that although the periodical payments order was questionable the trial judge had properly exercised his decision and had not been plainly wrong. Accordingly the order would stand. His following comments are only obiter but clearly set out the intention behind the making of a nominal maintenance order:

... the nominal order is not appealable: for, although not my preference, it is not plainly wrong. I must accept that a fair number of my colleagues, be they High Court Judges, Circuit Judges or District Judges – would reasonably have exercised their discretion in favour of keeping alive, at least until the child was a teenager, the wife's right to seek to inflate a periodical payments order to a substantive level. They would regard it as a reasonable precaution against unforeseen developments, taken primarily for the sake of the child. I stress, however, that the circumstances in which it would be apt to vary the order are indeed unlikely to arise: if, for example, the wife fell seriously ill and if, by then, the husband was again a substantial earner, then, yes, there might be a needs-based variation of the order, providing always that the court bore in mind the amount of capital of which, after so short a marriage, the wife had by order relieved the husband.

If we accept that a nominal periodical payments order is a 'reasonable precaution against unforeseen developments, taken primarily for the sale of the child', does it follow that where there is a shared care arrangement a nominal periodical payments order should be made in favour of each parent? The difficulty is how can this then be consistent with the clean break principle that neither party has any continuing financial claim on the other? The courts strive to achieve a clean break where possible because it enables the severing of financial ties thereby allowing the parties to move on with their lives. The modern approach to a clean break was succinctly put

by Lord Scarman in *Minton v Minton* [1979] when he said:

An object of the modern law is to encourage each [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.

Should we not therefore be looking to see what other options are available? Income protection insurance is an obvious option where for example

a greater earning capacity than the husband.

The wife appealed. The Court of Appeal found that the judge had clearly taken account of the fact that the wife was not in a position to get full-time work in the banking sector. The precarious nature of her work and her poor credit score were at the forefront of the evidence and it was inconceivable that the experienced judge could have overlooked it. It was inherent in his finding as to the wife's

with regard to all the circumstances. However, the circumstances of the case were unusual. The parties divorced in 1978 and the financial order was made in 1981, before the clean break provisions were introduced into the MCA 1973 in 1984. Had the financial order been made post-1984 it is likely a clean break would have been ordered, and the case would never have made it to the law reports. That would have been no comfort to Mr North.

Conclusion

The decision in *Matthews* highlights the wide discretion the courts have in applying the s25 factors, and that each case has to be decided on its individual facts. As circumstances vary considerably from case to case, it can be difficult to decipher clear and consistent principles. However, an analysis of the case law in this area does provide a useful reminder to practitioners:

- Not to simply accept where there is a minor child or children that there should always be a nominal periodical payments order in favour of the primary carer. There can be no such convention.
- What is appropriate depends on all the circumstances of the case, including the welfare of any minor children and the s25 checklist. In particular there should be a careful examination of each party's income and earning capacity.
- To investigate what suitable alternatives there may be to cover the risk in the particular case.
- Successful applications for an upwards variation of a nominal periodical payments order are rare, but have happened. ■

C v C (Financial Relief – Short Marriage)
[1997] 2 FLR 26
Matthews v Matthews
[2013] EWCA Civ 1211
Minton v Minton
[1979] AC 593
North v North
[2007] EWCA Civ 760
S v B (Ancillary Relief – Costs)
[2004] EWHC 2089 (Fam)
SRJ v DWJ (Financial Provision)
[1998] EWCA Civ 1634

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the primary carer is working with a reasonable salary and the risk in question is the loss of earnings. This will, however, not be appropriate in every case, for example where the potential payer cannot currently pay, but is reasonably likely to be able to in the future.

Matthews v Matthews [2013]

Matthews came before the Court of Appeal in October 2013. It held that there was no basis to find that the judge's decision at first instance to order a clean break and refuse to make a nominal periodical payments order in favour of the wife (who was the carer of young children) was wrong in principle. To understand the Court of Appeal's rationale in this case we need to analyse the specific facts.

Facts

This was a short marriage of eight months with a couple of years of pre-marital cohabitation. The couple had two children aged six and three. The husband was a self-employed plumber and the wife had worked for a bank before being made redundant. The wife had been unemployed for approximately six of the previous 12 months, and had worked as a contractor in the insurance sector for the remainder. The wife applied for a nominal periodical payments order, at least until their children reached 18. The judge refused to make such an order, and made an order for a clean break, having found that the wife had

earning capacity that he had taken into account all the evidence.

This case is a useful reminder that when considering whether a nominal maintenance order is appropriate, rather than adopt a default position, practitioners should always return to the s25 factors, and in particular the primary carer's income, earning capacity, needs, obligations and responsibilities and their on-going contribution to the welfare of the family.

Variation of nominal maintenance orders

While the nominal maintenance order is often used as a precautionary measure, many practitioners place little value on it in many cases. Such orders are often more of an irritant to the potential payer, rather than a useful tool, and can often stand in the way of settlement. However, this is not always the case and there remains real risk of an application for upward variation.

North v North [2007] was a case where a nominal order came back to bite the husband many years later when the wife's application to vary and capitalise a nominal periodical payments order was successful.

According to *North*, on an upwards variation application, it is not necessarily a prerequisite for an applicant to show that they have used their best endeavours to help themselves without success, although the fact of a failure in that regard is highly likely to bear heavily in the exercise of the broad discretion, which must be exercised