



Will future earnings ever be shared after divorce?

Almost all clients want their finances to be resolved without ongoing financial connections so they can each go their separate ways without continuing financial ties i.e., they want to have a '*clean break*'.

However, in most cases when marital assets are shared but the financially weaker spouse also needs additional financial assistance to meet their monthly financial expenses, spousal maintenance is payable from earnings, capital, other sources of income or a combination of these. The quantum, period and whether the term of maintenance is extendable is however case specific and based on judicial precedent.

Consequently, in most cases it is needs and not sharing which determines whether there can be a clean break. But what if the matter involves more significant sums and there are sufficient marital assets at the time of divorce or dissolution to meet all the parties' financial needs, including their income needs.

When considering a clean break, amortization tables are commonly used to establish what capital sum the weaker financial party requires to meet their needs. A question sometimes arises as to whether it is fair that the weaker financial party only receives a capital sum in settlement of all financial claims which is designed for them to live off and to be depleted by the date the financially weaker spouse dies. whilst the stronger financial party can continue to earn well and not need to use their capital for their living expenses. This is sometime referred to as relationship generated disadvantage.

Relationship generated disadvantage

The financially weaker spouse may say that the future earnings of the other spouse should be considered a '*marital asset*' (thereby being shared equally) because of the sacrifices made to their own careers e.g., to raise children or support their spouses/civil partners' in their successful



careers.

So, should the weaker financial party be able to 'share' in the stronger financial party's future earnings to take account of their financial disadvantage generated by their relationship?

The Courts have considered this issue in recent years. In a particular case heard by the Court of Appeal case of *Waggott v Waggott* [2018] EWCA Civ 727 [1] where the wife sought to share the husband's post separation income. The Court was asked to decide whether:

- If a future earning capacity is capable of being a matrimonial asset and therefore capable of being shared between the parties.

It was confirmed "no"

- To what extent is it right that the weaker financial party should have to use their capital lump sum to meet their ongoing income needs when the other party will be able to meet their needs from their substantial earned income? earned income?

The Court concluded that these points are related but will be case specific

- To what extent is the compensation principle invoked when one party has sustained a financial disadvantage during the marriage and the other an advantage?

The Compensation principle is used when a party is seeking an element of compensation for their lost career opportunities and earnings owing to the supportive and/or caregiving role they were encouraged or required to adopt during the relationship.

Lord Justice Moylan in *Waggot* did not accept the compensation principle is workable as doing so would involve the impossible task of working out whether the weaker financial party's aborted career would have resulted in the couple having higher resources than they did.

Whilst this case, like many others seemed to suggest claims for 'compensation' should not be pursued, in a subsequent case in October 2020 *RC v JC* [2020] EWHC 466 [2], Mr. Justice Moor



concluded that in exceptional situations significant relationship generated disadvantage 'could' lead to a compensation claim against future earnings.

Curiously, like the 15-year-old case which elevated compensation claims arising from relationship generated disadvantage Miller v Miller & McFarlane v McFarlane [2006] UKHL 24 [3] this case involved lawyers' careers. It has also come in for considerable debate as to how anyone can ever be sure what trajectory their career path might have taken if they had not married.

The parties had met when the wife was a trainee solicitor, and the husband was an associate at the same law firm.

Upon divorce the husband was an equity partner at the firm. The Court found that but for the relationship generated disadvantage the wife would also have been an equity partner at the same firm.

The judge ordered that she was therefore entitled to share the husband's future earnings. The Judge did however make it clear that cases of this type were exceptional, and such orders would only be made where:

- There is strong evidence to support the existence of relationship-generated disadvantage resulting from the weaker financial party giving up an established career for the benefit of the family
- There are sufficient assets to do more than meet the parties' needs
- The fruits of the stronger financial party's career are not so great that the weaker financial party's award will put them in a better financial position than they would have been had their career continued

Can earnings received between separation and divorce or dissolution be shared?

There can be other scenarios which require analysis of whether earnings received post separation



but before divorce or dissolution can constitute marital assets for division. For example, where a party receives significant earnings during this period which are placed in savings, a payment from the sale of shares in a company or a bonus or deferred share options which have matured; should those monies fall into the marital pot for division? Here, factors like the period of separation and when those entitlements or contracts for sale accrued even if they only matured or were paid later will be relevant.

Deferred bonuses and share options are common arrangements for professionals in the banking sector, where the bonus or share options are awarded based on performance in a particular year, but only mature and can be realised often three years later. Commonly, whilst their eventual payment is usually conditional on continuance to work with the same employer. If those assets accrue during the marriage, for the run-off period between accrual and maturity they are often deemed marital assets for sharing (equally or on a tapered basis over time).

The way forward

Whilst the view of most lawyers is that future earnings cannot be shared and relationship generated disadvantage and compensation arguments are all but over, this recent case suggests there remains potential in some very limited cases to argue for both.

Overall, however the Courts still favour a timely clean break wherever possible and for most judges the concept of sharing future income defeats this overriding objective. Despite the Court of Appeal case, the comparatively weaker financial party might still achieve a potentially greater than 50% share of the marital assets upon divorce or dissolution whilst avoiding arguments about relationship generated disadvantage. Careful preparation and analysis of annual expense budgets remain key factors in this regard.

Whichever party needs legal advice, it is always best to seek it at an early stage of any relationship breakdown.

If you want to know more about how finances are divided upon divorce or dissolution in England, please contact Lucy Greenwood below.

Lucy Greenwood

lucy.greenwood@iflg.uk.com

The International Family Law Group LLP

www.iflg.uk.com



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Citations

- [1] *Waggott v Waggott* [2018] EWCA Civ 727
- [2] *RC v JC* [2020] EWHC 466
- [3] *Miller v Miller & McFarlane v McFarlane* [2006] UKHL 24