

The wide and narrow approach to Global Orders and capitalisation of spousal maintenance

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INTRODUCTION

This lecture had its genesis in a few recent cases and my growing perception during the progress of them that these two issues are still generally not fully understood.

In the case of global orders it seemed to me that in certain circles they were regarded as unimpeachable and perfectly acceptable in pretty much any circumstances.

As to capitalisation, my view became that too many lawyers took the view that only income issues mattered.

GENERAL

Recitals vital

Parties encouraged to reach own agreements

History and context should be fully set out

GLOBAL ORDERS

History: CSA 1991 (5th April 1993)

Powers of court to make child maintenance orders removed in most cases and that function given to new agency, then the CSA, later the CMEC and now the CMS.

The CSA 1991 does not apply where there is a foreign element.

Parties are still free to enter into orders by consent (**s 8(5) CSA 1991**), albeit subject to the 12 month rule.

In cases in which the payer has an income of more than £156,000 gross pa, the court has power to order top up child maintenance, but only ONCE an agency assessment is in force.

What is a global order? (aka Connell or Segal orders): an order expressed as a spousal maintenance order which clearly incorporates an element of child maintenance within a global figure, expressly to be reduced pound for pound by any agency assessment.

Current precedent in the Mostyn standard order:

“Global order

The [applicant]/[respondent] shall pay to the [respondent]/[applicant] maintenance pending suit until the date of decree absolute and afterwards periodical payments for the benefit of herself and the children of the family. Payments shall be at the rate of £[insert] per annum less any payments made by the [applicant]/[respondent] to the CSA pursuant to a CSA calculation. Payments shall start on [insert date], and shall end on the first to occur of:

- a. the death of either the applicant or the respondent;*
- b. the [respondent's]/[applicant's] remarriage; or*
- c. a further order.*

OR

- a. The [applicant]/[respondent] shall pay to the [respondent]/[applicant] maintenance pending suit until the date of decree absolute and afterwards periodical payments. Payments shall be at the rate of £[insert] per annum less any payments made by the [applicant]/[respondent] to the CSA pursuant to a CSA calculation and the payments made by the [applicant]/[respondent] in accordance with paragraph (b). Payments shall start on [insert date], and shall end on the first to occur of: (i) the death of either the applicant or the respondent; (ii) the [respondent's]/[applicant's] remarriage; or (iii) a further order.*
- b. The [applicant]/[respondent] shall pay to the [respondent]/[applicant] maintenance pending suit until the date of decree absolute and afterwards periodical payments for the benefit the child[ren] of the family. Payments shall be at the rate of £[insert] per annum per child, payable [weekly]/[monthly] [in advance]/[in arrears] by standing order. Payments shall start on [insert date – same date as in (a)], and shall end on: (i) each child respectively attaining the age of 18 years or ceasing their full-time [secondary] / [tertiary] education [to first degree level] [including/excluding a gap year], whichever shall be the later; or (ii) a further order. The court may (prior to the expiry of the term or subsequently) order a longer period of payment.*

1. **Global order**

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- d. the death of either the applicant or the respondent;
- e. the [respondent's]/[applicant's] remarriage; or
- f. a further order.

OR

- c. The [applicant]/[respondent] shall pay to the [respondent]/[applicant] maintenance pending suit until the date of decree absolute and afterwards periodical payments. Payments shall be at the rate of £[insert] per annum less any payments made by the [applicant]/[respondent] to the CSA pursuant to a CSA calculation and the payments made by the [applicant]/[respondent] in accordance with paragraph (b). Payments shall start on [insert date], and shall end on the first to occur of: (i) the death of either the applicant or the respondent; (ii) the [respondent's]/[applicant's] remarriage; or (iii) a further order.
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The narrow view

Criticisms: see article attached written by Byron James of 14 Gray's Inn Square Chambers for Family Law Week (28.08.12).

Resolution have removed Global orders from their precedents. Mr James' article is referred to in their place.

Case law:

Dorney-Kingdom v Dorney-Kingdom [2000]

Problems

What is what? Not calling a spade a spade

What happens if wife remarries? What happens when children leave home or come to live with payer?

If children are young, term of spousal maintenance can be over extended by back door.

Undertakings not to apply to the CSM are unenforceable.

Properly global orders should be short term only

The wider view

OR NEEDS?

Which end of the telescope?

There is a wholly contrary view: a family as a whole needs a certain amount of income to maintain a suitable lifestyle/home.

Therefore the amount of a CMS assessment is pretty much irrelevant. The court is NOT assessing child maintenance. It is fixing a wholly explicable and justifiable minimum figure required by W.

There is no case law, but plenty of judges have taken this approach.

So WHEN should global orders be used?

More than 3 children

Husband with good lifestyle, but no "income" – eg a partner in an incorporated solicitors' practice drawing down on his new director's loan account/husband being bought out of a business

Problem exacerbated by removal of departure regulations within CMS regime and the 12 month rule applicable to orders pursuant to s 8(5) CSA 1991.

CAPITALISATION OF MAINTENANCE

Probably a receding problem as fewer joint lives orders.

The cold wind/PSO's etc.

History

First **s 25A MCA 1973** – introduced only in 1984

Then **S v S** – Ringo Starr.

Then to fill in the lacuna further legislative change:

S 31(7A-F) MCA 1973 (11.11.99/01.12.00)

“(7A) Subsection (7B) below applies where, after the dissolution of a marriage, the court—

(a) discharges a periodical payments order or secured periodical payments order made in favour of a party to the marriage; or

(b) varies such an order so that payments under the order are required to be made or secured only for such further period as is determined by the court.

(7B) The court has power, in addition to any power it has apart from this subsection, to make supplemental provision consisting of any of—

(a) an order for the payment of a lump sum in favour of a party to the marriage;

(b) one or more property adjustment orders in favour of a party to the marriage;

F147 [(ba) one or more pension sharing orders;]

[F148(bb) a pension compensation sharing order;]

(c) a direction that the party in whose favour the original order discharged or varied was made is not entitled to make any further application for—

(i) a periodical payments or secured periodical payments order, or

(ii) an extension of the period to which the original order is limited by any variation made by the court.

(7C) An order for the payment of a lump sum made under subsection (7B) above may—

(a) provide for the payment of that sum by instalments of such amount as may be specified in the order; and

(b) require the payment of the instalments to be secured to the satisfaction of the court.

(7D) **[F149** Section 23(6)] above **[F150** applies] where the court makes an order for the payment of a lump sum under subsection (7B) above as **[F151** it applies where the court] makes such an order under **[F152** section 23] above.

(7E) If under subsection (7B) above the court makes more than one property adjustment order in favour of the same party to the marriage, each of those orders must fall within a different paragraph of section 21(2) above.

(7F) Sections 24A and 30 above apply where the court makes a property adjustment order under subsection (7B) above as they apply where it makes such an order under **[F153** section 24] above.]”

First reported case Cornick (No 3) in 2001

Caused something of a furore

Didn't take C of A long to react:

Pearce 2003

Pearce is often thought to be it.

However, it suggests a very narrow interpretation of the statute.

Test: Para 46 Lauder

First stage is a reassessment of what pp's should be paid in current INCOME circumstances.

Then and only then turn to capitalisation- usually Duxbury or similar

Therefore if potential payer's income is very low, so too will the capitalisation figure – if any figure at all.

The key question: Is there a capital element?

There has been further case law since 2003:

Miller/McFarlane 2006 – seemed to resurrect Cornick (No 3)

Then Lauder 2007

Needs (again) – we keep coming back to needs

Vaughan (2010)

If meeting needs requires an invasion of H's CAPITAL sobeit.

Which approach will prevail?

Wholly dependent on circumstances

Were there capital assets that were illiquid at time of original order?

What about the parties' circumstances at the time of the original order?

What part should the concept of "non matrimonial property" play?

Ongoing case where joint lives pp's order made but W's pensions claims rightly dismissed given the allocation of nearly all the then capital to her. H's pensions have now increased substantially? What part should that play in a capitalisation case?

The art of the recital once more...

CONCLUSION

As to both ... beware needs.

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