

Spousal Maintenance: A Discretion - Not A Right

1.1. At common law a spouse has no right to maintenance upon divorce. Section 7(2) of the Divorce Act confers discretion upon a court to make a maintenance order which it finds just, having regard to the following factors:

- (a) The existing or prospective means of each of the parties;
- (b) the respective earning capacities of the parties;
- (c) the financial needs and obligations of the parties;
- (d) the age of each of the parties;
- (e) the duration of the marriage;
- (f) the standard of living of the parties prior to the divorce;
- (g) the conduct of the parties insofar as it may be relevant to the breakdown of the marriage;
- (h) any redistribution order made in terms of s 7(3) of the Divorce Act; and
- (i) any other factor which in the opinion of the court should be taken into account.

1.2. The authors Hahlo & Sinclair in their book *The Reform of the South African Law of Divorce* (1980) stated the following:

‘(T)he idea that marriage ought to provide a woman with a “bread - ticket” for life is on its way out.’

1.3. This passage was quoted with approval in *Grasso v Grasso* where the court stated:

‘Middle-aged women who have for years devoted themselves full-time to the management and care of the children of the marriage, are awarded rehabilitative maintenance for a period sufficient to enable to be trained or re-trained for a job or profession. Permanent maintenance is reserved for the elderly wife who has been married to her husband for a long time and is too old to earn her own living and unlikely to re-marry.’

1.4. The court found in this case that the respondent was not entitled to maintenance as of right, but must persuade the court to exercise its discretion in her favour. In doing so, she has to provide a factual basis for a maintenance award to be made before the quantum and duration thereof are determined by the court.

1.5. In *Grasso* the court, having regard to the duration of the marriage, ie 15 years, and the fact that the plaintiff had not worked for most of the marriage and was not working at the time of the divorce, awarded maintenance to the plaintiff. The court also took into account the conduct of the defendant (husband), which was regarded as 'gross misconduct' and which 'must inevitably play no small part in deciding whether or not he should be ordered to pay maintenance to the plaintiff.

1.6. In *Rousalis v Rousalis*, the court stated:

'A wife of long standing who has assisted her husband materially in building up his separate estate would in my view in justice be entitled to far more by way of maintenance, in terms of this section, than one who did no more for a few years than share his bed and keep his house.'

1.7. In *Kroon v Kroon*, the court found that, having regard to the duration of the marriage, ie 20 years, during which the plaintiff (wife) did not work in the open market but fulfilled the role of housewife and mother, she should be awarded maintenance. However, the court stated that:

'(T)he Courts do not today distribute maintenance with any degree of liberality to women who can and ought to work after divorce.'

1.8. In the matter of *Robert v Robert* (10 March 2003), an unreported judgment, Gyanda J declined to award maintenance to a spouse who was unemployed at the time of divorce on the basis that the marriage lasted only five years, although the plaintiff was no longer a young person to be readily employed. It was a second marriage, and the period during which she enjoyed maintenance in terms of rule 43 had been sufficient to constitute rehabilitative maintenance.

1.9. In *McCarthy v McCarthy* (15 December 2004), an unreported judgment, the issue in dispute was not whether the wife was entitled to maintenance or not, but the amount and period of such maintenance. The parties were married for 25 years and two children were born into the marriage. The wife had not been employed since 1981. She, however, obtained a BA degree after ceasing employment. The court found that there was no fault to be attributed to either of them in causing the marriage relationship to disintegrate. The court ordered rehabilitative maintenance.

1.10. The conduct of the parties is undoubtedly a relevant factor to be considered in determining a claim for maintenance in terms of s 7(2) of the Divorce Act. The marriage was of some duration. The reasons given by the respondent for the

breakdown of the relationship are trivial. The Langebaan incident and the issues that the appellant had with her children cannot be regarded as 'gross misconduct' on the part of the appellant. The difficulties which the appellant and the respondent experienced in accommodating children born of marriages with other parties, within their marriage, coupled with the fact that the parties battled financially, may have placed a strain on their marriage.

1.11. The court in Beaumont, referred to the clean-break principle and stated: '(O)ur Courts will always bear in mind the possibility of using their powers under the new dispensation in such a way as to achieve a complete termination of the financial dependence of the one party on the other, if the circumstances permit. The last-mentioned qualification is, of course, very important; I shall return to it in a moment. The advantages of achieving a clean break between the parties are obvious; I do not think they need be elaborated upon. The manner of achieving such a result is, of course, by making only a redistribution order in terms of ss (3) and no maintenance order in terms of ss (2). What I have said earlier with regard to the Court taking an overall view, from the outset, of the possibility of making an order or orders under either ss (2) or ss (3) or both, does not mean that the Court will not consider specifically the desirability in any case of making only a redistribution order and awarding no maintenance, having regard particularly to the feasibility of following such a course. With regard to the latter and to the qualification I stressed a moment ago (if the circumstances permit), there will no doubt be many cases in which the constraints imposed by the facts (the financial position of the parties, their respective means, obligations and needs, and other relevant factors) will not allow justice to be done between the parties by effecting a final termination of the financial dependence of the one on the other. In the end everything will depend on the facts and the Court's assessment of what would be just.'

1.12. Regarding the uncertainty as to what the future holds and the respondent's prospects of continuing in her employment after reaching 60 years, the court in Beaumont stated:

'Both parties will inevitably suffer hardship because of the parting of their ways. In relation to the areas of uncertainty it is impossible to assess accurately the relative degrees of hardship which each of the parties will suffer, depending upon what assumptions are to be made. Where choices are to be made and decisions to be taken in the dark, as it were, and where the areas of uncertainty are not due to

any remissness on the part of the respondent to place available information before the Court, it would be fair, because of the appellant's misconduct, to allow the scales of justice to be tipped in favour of the respondent and against the appellant, rather than the reverse.'

1.13. Section 7(2) of the Divorce Act states that in exercising its discretion, the court has to take any other factor into consideration in making a maintenance order. This includes the misconduct of the parties.