

Maintenance pending suit 1

When a couple separates, this can cause some cash flow problems for the financially weaker party.

On many occasions the financially stronger party agrees to pay maintenance and child maintenance to support the weaker party.

Sometimes however, the financially stronger party either pays nothing or doesn't pay enough. What is to be done about this?

Well if there has been a divorce petition issued, then there can be an application for maintenance pending suit. In other words the financially weaker party can ask the court to order that the stronger party pays them maintenance until the divorce proceedings are finished.

There is a box which can be ticked on the divorce petition for an application for maintenance pending suit. There is also a box on "form A" which is the form used to apply for financial remedies on divorce.

The court's power to order maintenance pending suit comes from section 22 of The Matrimonial Causes Act 1973 which says:

"On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable."

In the case of *TL v ML* [2005] EWHC 2860 (Fam), Deputy High Court Judge Mostyn QC gave the following explanation in relation to maintenance pending suit. Let's look at the explanation he gave and then think about it a bit more:

- i) The sole criterion to be applied in determining the application is "reasonableness" (s22 Matrimonial Causes Act 1973), which, to my mind, is synonymous with "fairness".
- ii) A very important factor in determining fairness is the marital standard of living (F v F). This is not to say that the exercise is merely to replicate that standard (M v M).
- iii) In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long term expenditure more aptly to be considered on a final hearing (F v F). That budget should be examined critically in every case to exclude forensic exaggeration (F v F).
- iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources (G v G, M v M). In such a situation the court should err in favour of the payee.
- v) Where the paying party has historically been supported through the bounty of an

outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial (M v M).”

In another case Moore v. Moore [2009] EWCA Civ 1427, Mr Justice Coleridge said that such an order:

“...is designed to deal with short-term cash flow problems, which arise during divorce proceedings. Its calculation is sometimes somewhat rough and ready, as financial information is frequently in short supply at the early stage of the proceedings.”

So in other words the idea is to help the financially weaker party to cope in the short term.

The next thing which was mentioned in TL v ML was the standard of living. That is relevant because it will affect how much money a person needs to get by. If the financially weaker party can show that the marital standard of living was very high, it will probably increase the amount of money the court thinks should be paid in maintenance pending suit.

The third point is that there has to be a maintenance pending suit budget from the person who is asking the court to make the order. It is suggested that the following is a fair guide to the preparation of such a budget:

- It should be set out in a table
- There should be separate headings for different categories, e.g. housing expense, utilities, household expenditure, insurances, motoring expenses, expenses specifically relating to children, other (to include some discretionary spending).
- Each item of expenditure should have a monthly cost next to it.
- The figures should be totaled to show the court what the amount actually needed per month is.
- Judges are used to seeing budgets which are completely overstated or “hammed up”. A sensible budget is actually very persuasive. It is foolish to ham up a budget, it will annoy the judge and give the other side something to argue about.

The 4th point from TL v ML is that when the court comes on to consider the income position of the financially stronger party, they do not just have to take that person’s say-so. The court can look at the information which the financially stronger party has provided and can draw assumptions. If what the financially weaker party is saying “looks fishy”, the court can draw robust assumptions about that person’s ability to pay. Courts are well-used to the stronger party turning up to court and saying that business is very bad at the moment and they have just lost a contract from a major client etc.

What the court generally does when it is looking at an application for maintenance suit is consider things in this way:

1. What are the monthly financial needs of the financially weaker party? The court will consider their budget and find e.g. £2,000 per month.

2. How much does the financially weaker party have coming in, e.g. from benefits or employment or child maintenance? E.g. £1,000 per month.

3. Is there a shortfall? In our example: yes £1,000 per month.

4. Does the financially stronger party have the means to pay? Conduct the same exercise re income and outgoings. Perhaps the stronger party has an excess of £1,500 per month.

5. The court goes onto consider how much if anything the stronger party should pay. In our example the court might order the stronger party to pay to the weaker party £1,000 per month.

Important practical points

The party who is thinking about making an application for maintenance pending suit should try and get the other party to agree to pay something, before making the application. There is no point in wasting time and money going to court if the stronger party would pay some money anyway.

Any agreement about how much money the stronger party will pay should be recorded in writing.

If the parties are not very far apart on how much maintenance pending suit should be paid then it may not be worth going to court over.

When the court hears the application, usually no one gives evidence, both sides just present an argument to the judge. That is in accordance with the Family Procedure Rules, rule 22.7:

“22.7 Evidence at hearings other than the final hearing

(1) Subject to paragraph (2), the general rule is that evidence at hearings other than the final hearing is to be by witness statement unless the court, any other rule, a practice direction or any other enactment requires otherwise.”

The rules about costs for this type of application are different. The person who “wins” the argument about maintenance pending suit will usually get an order that the other party should pay their costs of the application.

Hearings about maintenance pending suit are often set down with a time estimate which is not long enough. Often the court lists the case to take 1 hour and hearing the case properly takes a good deal longer.