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## Family Law [2019] Fam Law 1259 Case Update: O'Dwyer v O'Dwyer {2019} EWHC 1838 (Fam)

### *Waggott* rules OKFactsDecision on appealCommentary

An appeal before Francis J from a first instance financial remedy decision of His Honour Judge O'Dwyer which follows the approach required following *Waggott v Waggott* [2018] 2 FLR 406, that a spouse's future income capacity or potential post-divorce is off limits to the sharing principle unless need or compensation require otherwise and provides a welcome working example of the extent of capital amortisation necessary in the exercise of assessing the weaker financial spouse's income to meet needs.

The first instance order provided W with a s 28 maintenance term to H's 66th birthday of £150k pa, payable monthly. Pending the outcome of the appeal, there was a stay of payment in the form of a direction that payment of the ordered ppo was to be made into a solicitor's holding account.

The parties were married in 1988 and had four adult children. They separated in 2016 (in all, a 30 year relationship). W had moved back to the USA as an American citizen. At the first hearing, H's McDonalds' franchise, operated for many years, had an agreed value of £2.409m net of CGT. The total net asset pot, including this business net value, was £5.865m. It was agreed this was a paradigm sharing case and each was to receive half of the capital being £2.932m each.

The appeal was solely made with respect to the income order. The core issue was the franchise provided H with incomes of circa £1m pa which Judge O'Dwyer said was a much-valued asset for the income streams it produced and stated:

'I identify that they are matrimonial property. I identify that their value is not only the capital value at this point but also the income that they will produce over the coming years.'

Judge O'Dwyer had, therefore, on a clean break basis provided W with a 5-year term s 28 order of £150k ppo pa (out of H's estimated c £400k net pa).

Whether that future income stream should have been regarded as matrimonial property lay at the heart of the appeal in the light of *Waggott v Waggott*, where the sharing of an income stream was held as unprincipled unless to meet needs or, possibly in rare instances, compensation.

Indeed, in *Waggott's* case Moylan LJ had said (para [128]):

'... in my view *Miller* and the subsequent decisions referred to above, in particular *Jones* and *Scatliffe*, do not support the extension of the sharing principle to an earning capacity. The sharing principle applies to marital assets, being "the property of the parties generated during the marriage otherwise than by external donation" (*Charman*). An earning capacity is not property and... it results in the generation of property after the marriage.'

And at para [131]:



'... in my view it is clear from *Miller* and *Charman* alone that, as a matter of principle, the court applies the need principle when determining whether the sharing award is sufficient to meet that party's future needs.'

Accordingly, Francis J accepted that this was now settled law and any award for periodical payments: "must be based on properly analysed arithmetic reflecting need, albeit that the judge is still left with a significant margin of discretion as to how generously the concept of need should be interpreted."

Francis J rejected a number of arguments made for W and in so doing stated as follows:

1.
  - That the length of marriage did not affect the *Waggott* principle.
2.
  - That the fact that the source of the income stream may come from a business built up over the course of the marriage could not be a reasoned basis for sharing the income to be made from it, especially as here W had received her half share of the business value. In some cases it would be appropriate, initially, to share the business value identified and also to provide for a deferred lump sum should there be a future business sale achieving more – but a clean break should be attained if possible and this was just such a case.
3.
  - That there was a disconnect between Judge O'Dwyer saying that the business income stream was matrimonial property and that this led to 'a true determination of the reasonable needs of the wife'. Francis J considered that it was only if the judge had found W's remaining capital, after dealing with her reasonable housing and any other capital needs, was insufficient to provide her with income to meet her expenditure needs that the judge should consider periodical payments, at which point there would be a general discretion as to the assessment of need and the issue of amortisation of such capital as W retained.
4.
  - That the issue of compensation was not open for consideration in this appeal since, although W's counsel sought to argue that W would be suffering a relationship-generated disadvantage by not sharing in H's future income stream and *Waggott's* case had not involved a compensation case, compensation had not been raised before the first instance judge and it was not now relevant to the appeal.
5.
  - That albeit W's counsel argued that in *Waggott* the wife had received a share of the husband's bonuses in recognition that they related to the matrimonial enterprise, again, the issue of compensation did not arise on this appeal. Francis J further added that by reference to the caselaw on bonuses -where such a bonus is earned in a marriage – then it will be treated as matrimonial property but if earned after, then sharing a bonus would only be possible by reference to needs and compensation and in regard to the latter there were almost no successful compensation claims in the reported cases.
6.
  - That the proximity of H, by reason of his age of 61, to the eventual business sale, as was argued for the W, making his pending income more readily identifiable was not a relevant factor. Francis J re-iterated that *Waggott's* guidance could not have been clearer that the future income stream was not generally shareable.
7.
  - Judge O'Dwyer was wrong to identify the income stream of the business as matrimonial property for this purpose.

Hence Francis J concluded that the fact that while it may seem unfair to W in this case that she must as a result of the appeal start immediately to live off her capital (whether or not amortised) whereas H would not whilst enjoying the business income stream, it was the inevitable consequence of the fact that an earning capacity is not subject to the sharing principle.



Whilst Judge O'Dwyer also sought to justify his award of £150k pa ppo on the basis of W's needs as generously interpreted and had a wide discretion to do so, Francis J considered the judge had alighted upon the figure in a broad and not specific way, which he was not entitled to do without reference to any arithmetic and in particular (a) the recipient's needs; (b) the income that the recipient's capital will generate; and (c) whether or not the recipient's capital should be amortised; and, if so (d) from what date the recipient's capital should be amortised. Discretion must not give way to disorder or chaos and litigants are entitled to know how judges ascertained particular figures so as to assist in reaching settlements generally.

Hence, Francis J went on to find that whilst Judge O'Dwyer had possibly been overgenerous that W needed c £1.2m, including £1.128m for another home, after criticising both parties for their unrealistic future property indications, such assessment lay within the judge's discretion having heard the oral evidence. Then, deducting the cost of a car, Francis J found there would be £1.732m left to W and not £1.776m as incorrectly calculated by Judge O'Dwyer. His Lordship also found Judge O'Dwyer had not adequately addressed to what extent W would spend or save any investment income which the remaining capital would generate and the judge had wholly failed to address amortisation.

In addressing these areas, Francis J, following *Waggott's* lead, applied, whilst acknowledging a discretion to do otherwise, a return basis of 3.75% which after tax (in the United States) would equate to circa £52k pa net for W. If all the surfeit capital from day one of the first instance hearing was then amortised, W's annual income return rose up to £100k pa net.

Amortisation and the proportion of any capital to be amortised was entirely case specific. Francis J considered, where H's future income was very substantial after a long marriage and there had been equal contributions, it was fair that W should not have to amortise her capital receipt whilst H's earnings were at these levels. Such an approach was *Waggott*-compliant and therefore he concluded her income would be £52k pa net.

Francis J found Judge O'Dwyer had not properly analysed W's changing and rounded-off budget presentation in his judgment, despite extensive cross examination over the same. Such analysis was a judicial function which had to be alive to forensic manoeuvrings by experienced family lawyers. Francis J with an eye to avoiding further delay in the case and overall fairness decided not to refer the lack of analysis in the judgment back to Judge O'Dwyer, but proceeded to assess W's needs based on cost of living in Texas and the figure in her Form E of £120k pa, which he assumed had been calculated with careful thought. Hence, (£120k less £52k, as above =) £68k pa was W's income need and not the £150k pa ppo ordered by Judge O'Dwyer. The appeal was allowed to this extent.

Pre *Waggott* HHJ O'Dwyer could have been forgiven for recognizing the apparent unfairness to a wife in leaving the marriage after many years duration with half the capital value but with no real prospect of matching anywhere near the future income return enjoyed by the husband's continued employment which had been enhanced by her marital contributions. Moylan LJ in *Waggott* painstakingly addressed this issue in reaching the overall pragmatic decision that a spouse's earning capacity/potential could not be seen as a divisible marital asset absent need or compensation considerations.

In this case applying that principle, the balance struck on appeal appears fair since W was to receive £68k pa ppo (for 5 years) on top of her own investment income return (£52k pa) from her surfeit capital post the purchase of a home to meet her assessed needs until H was likely to realise by sale the business capital value. In the meantime, H would have less the W's maintenance (£400k pa less £68k =) c£332k pa net in expected remaining net income, but, without engaging a mortgage, less liquid capital to secure a home value close to that of the W's choice (£1.128m).

In refusing to amortise any of the investable capital retained by W in these 5 years, Francis J obviously assessed that each, potentially, would have broadly equal capital access once the business sold and H's greater income retention in the meantime reflected his continued unmatched employment effort therein and the usual commercial business risk factors.



This example of the workings out of the *Waggott* principles is welcome against a background where, not infrequently in local courts to date, erroneous submissions have been made about a wife's obligation to use her retained/recovered capital to support herself and to justify an immediate clean break despite the fact that her investment return cannot match the H's retained income receipt.

It is also an example of a wife receiving some maintenance to match her assessed needs, despite having also received her full half share of the combined capital value held. An alternative interpretation would be that the court was taking account of H's actual and reasonably foreseeable greater future income resources when reaching the fair outcome balance.

Finally, it is a curious feature of the case that Judge O'Dwyer had failed, despite a request to do so, to perfect his judgment or order before the appeal and Francis J, having therefore to make assumptions from the provisional judgment draft, suggested should this re-occur it would justify referral to the President's office. His Lordship also warned that both counsel and solicitors had a duty to inform the Court Office immediately if a time estimate was incorrect and failure to do would have costs consequences.

Ashley Murray

Barrister, Liverpool November 2019