

Behavioural Problems in England and Wales (and USA)

How spousal misbehaviour affects financial proceedings in divorce

Introduction

This article gives a glimpse into the world of spousal misconduct or misbehaviour and how it might affect the way the English Courts deal with the financial proceedings consequent upon divorce. It also includes a brief comparison with how the US Courts deal with this issue.

The Guiding Principle

Ask any lay person in the street, what we in England used to call "the man on the Clapham omnibus" (equivalent to the "man on the San Francisco trolley bus"), whether the person most blameworthy for the breakdown of a marriage ("the guilty party") should suffer some penalty or prejudice in the financial award or redistribution made by the Court on divorce and he or she would say - you bet! Even though there are frequent references in the Judgments from English divorce Judges on this subject touching upon "what the ordinary right thinking man or woman" would make of a judicial award in a bad conduct case (see e.g. *Clark v Clark* [1999] 2 FLR 498), the plain fact is that if a Clapham omnibus man was getting divorced he might have heart failure when being told the law by his English lawyer.

In England and Wales, there is a statute which governs what the Court must do in dealing with the financial claims of spouses on divorce. This is the Matrimonial Causes Act 1973 section 25 and basically it has been interpreted to mean that the Court must always strive to make a fair settlement between the parties taking into account a list of factors set out in the said statute (all

of which are pretty common sense) plus a sweep up "all other relevant circumstances" provision. One paragraph in the relevant section 25 of the Act deals with conduct. It states "the Court shall in particular have regard to the conduct of each of the parties, if that conduct (and only if - my words) is such that it would in the opinion of the Court be inequitable to disregard it". Please note we are talking here of the opinion of the Court not the ordinary person on the San Francisco Trolley. Also observe that the really important words are "inequitable to disregard" and it is these words which have led to a series of cases over the years interpreting the meaning of these words and what conduct will or will not be taken into account by the English Court.

The law as developed by the cases

Unfortunately for the Clapham trolley man, English divorce Judges have more and more restricted the types of conduct which a Court will look at and take into account in deciding a financial award be that capital, spousal/income support, pension sharing or anything else. The cases make clear that the philosophy behind English law and English Courts' practice is not as a matter of course to investigate who did what to whom, who was really to blame for the breakdown of the marriage and generally to look backwards. Instead, the Court wants always to look forwards as to what is fair for the future with a lot of emphasis on the reasonable needs of the parties in their new lives and new circumstances.

We have therefore reached the position in England and Wales where in the recent leading case of *Miller v Miller; McFarlane v McFarlane* [2006] 3 All ER 1, the House of Lords (now actually at last named the Supreme Court) held that to be taken into account conduct or behaviour must be "gross and obvious", harking back to a seminal judgment of the great Lord Denning in *Wachtel v Wachtel* [1973] 1 All ER 829. The facts of the *Miller* case demonstrate that "gross and obvious" conduct does not include where a husband tells his wife that their marriage is at an end due to his "intimate relationship" with another woman whom he intends to marry. The court decided that such behaviour should not be taken into account.

The position can best be explained by another conduct case in 2006, *FS v JS* [2006] EWHC 2793 when the High Court Judge, Mr Justice Burton (though not normally a divorce Judge), gave a ruling which the San Francisco omnibus man would have understood if not agreed with. This was because this progressive Judge used the modern reality TV show/Simon Cowell vernacular and explained that if behavioural conduct is to play a part in divorce financial cases then the true objective test was whether that behaviour amounted to a "gasp factor" and not a "gulp factor" !

Family Group

If you would like more information on FSI's services, please visit fsilaw.com where you will find all our latest news, publications and events. Alternatively, contact Alan Kaufman, head of family law, +44 (2) 3723 4000.

Examples of gasp inducing conduct

The law reports are littered with a large number of cases where a spouse has failed to persuade a Court to take into account their other half's conduct. It clearly has to be an exceptional and extreme case for the Court to decide not to disregard it. The great majority of cases before the English Court where conduct was held to be sufficiently gasping relate to domestic or other violence such as the case of the wife who had taken out a contract on her ex-husband resulting in a four year prison sentence for incitement for murder (until then the husband had dutifully been paying ordered maintenance for 35 years!); or the case of attempted rape of the wife by the husband; or the younger wife using her much older husband's money to fund a high lifestyle whilst at the same time keeping him locked up in a caravan and then putting him into an old people's home.

There are then a series of sexual conduct cases which were thought sufficiently gasp worthy. Whilst having an affair or maybe more than one certainly does not meet the threshold, cases where sex has amounted to sufficiently extreme conduct to be taken into account include the case of transsexual husband who had been a woman (even capable of producing two children with his wealthy wife). However, during the whole 12 years of the marriage he had never told his wife of his biological background and she did not suspect anything with the result that he was denied any financial claim whatsoever because of such conduct.

Another case involved a wife conducting a secret affair over a number of years with her father-in-law (a very special type of adultery obviously) and the very recent case of *C v T* [2009] AER(D) 43 where the husband sexually assaulted his grandchildren, took and also made indecent photographs which he then put on the internet and was

eventually charged, pleaded guilty and was sentenced to a minimum 3 years of imprisonment. The wife had £4.3m of assets and the husband had a half share in a property worth approximately £100,000 and a very small pension fund. They both had very limited or nil earning capacity. The husband said he needed financial support from the wife when he came out of prison. The Judge held that the husband's conduct was the "grossest breach of trust" and because of this and other reasons he should have no financial claim at all against the wife over and above his retention of his £100,000. This decision was fully upheld when the husband tried to obtain permission to appeal to the Court of Appeal. This case gives a good idea as to the bar which has to be overcome for conduct to be relevant as the Court of Appeal Judge said that looking at the husband's conduct alone - "on any view the husband's treatment of the wife's family was so appalling and its legacy of misery has been so profound as plainly have entitled the Judge to reach his decision".

Then there have been in recent years a new type of category which falls into the gross and obvious conduct and this is financial misconduct. Examples of this which have been taken into account are a husband massively increasing the mortgage on the family home without telling his wife which led to a possession action and a substantial loss of family wealth; a wife's participation in the husband's attempts to commit suicide with a view to gaining assets; and a husband wilfully dissipating assets and frittering away the marital wealth prior to separation. It is clear, however, that financial misconduct during the course of the litigation, e.g. dishonest or a serious lack of disclosure, does not normally affect the financial award but the guilty party is penalised in respect of the costs of the case.

When does inequitable conduct have to occur and how does it affect the award

The cases also indicate that the conduct, if relevant, does not have to be such that it caused or primarily caused the breakdown of the marriage. There have been cases where conduct has been taken into account even after separation or even after the divorce itself. There are even cases where behaviour that might be more caused by misfortune or some might say, illness e.g. alcoholism, is taken into account.

Although it can, such conduct does not necessarily extinguish the wicked spouse's claims altogether. It may reduce substantially what would otherwise be a large claim of the spouse or the Court may give the innocent party an award at the top end of the possible bracket which might be awarded.

The US experience

As ever with our brethren in the United States, unified and united they may be on most important policy issues but when it comes to divorce and spouses' financial claims each State is a law unto itself. There are a large number of States, particularly those where there is "no fault" divorce, when the general principle is that bad behaviour or fault plays no part in the division of the marital estate or spousal support. This is the general rule in States like California where allied to the no fault divorce there is normally a community of property regime.

Family Group

If you would like more information on FSI's services, please visit fsilaw.com where you will find all our latest news, publications and events. Alternatively, contact Alan Kaufman, head of family law, +44 (2) 3723 4000.

In those States (and there are a lot them) where there is fault divorce, different States either by statute or by case law have different principles applying to the taking into account of a spouse's bad conduct.

So, for example, New York will disappoint the woman on the Clapham trolley as they appear to be following the way of the English Courts. In a recent case, it was said that the test on deciding whether the equitable distribution of the marital assets should be affected by the husband's "bad" conduct (i.e. extra marital affair, child as a result of that affair and lies to his wife about the paternity of the child) was not "egregious" enough to justify an impact on the equitable award. Trust a New York Judge to come up with such an old English word as egregious. The original Latin meant "standing out from the flock" and modern dictionaries refer to it as meaning "extremely or outstandingly bad". In other words not that different from the English "gasp" factor.

Other States have ruled that fault can only be taken into account if it has economic consequences, for example this is the position in Kansas and Pennsylvania. Examples of economic fault which could be taken into account in these States are dissipation of assets, excessive or abnormal spending, destruction of property, diverting marital or community income to pay for an addiction and such like. It should be noted that in some States there is a distinction between the way the marital estate is divided up and the effect on a spouse's right to income support.

There are other States, such as Missouri, where for the conduct to be taken into account it must be shown to have placed an undue burden on the other spouse or the marital partnership. A leading case there ruled that the test was not for the Court to focus inordinately upon a particular incident

or even a series of incidents but that the Court must concentrate on conduct only when one spouse's misconduct changes the balance so that the other must assume a greater share of the partnership load. Even then this barrier is not easy to overcome and in one case in Missouri the wife's chopping through the door of the family home after separation was held not to be relevant conduct as it did not place any burdens on the marital relationship. In another case in South Carolina, with the similar burden test, the Court held that the husband's misconduct (standard adultery) neither caused a dissolution of the marriage nor imposed additional burdens on the wife and therefore should not be taken into account.

There are some States where, contrary to English law practice, the conduct be taken into account it must predate the marriage breakdown and in New Hampshire it has even been held that if fault is to be considered, then that fault must be shown to have been the main cause of the end of the marriage.

As regards the impact of relevant fault on the financial award, again different States have different practices. There are some where the Court has held that relevant fault should not be given too much weight in working out a financial settlement whilst others have had cases which have held that a spouse's misconduct was the principle factor awarding the most or all of the property to the other spouse. For example, there was an Alabama case where the husband's adulterous lifestyle was one factor amongst several which led to an award of nearly all the property to the wife.

In another case similar to the one in England, a Pennsylvania Appeal Court held that the husband's efforts to have his wife killed was sufficient for the whole of the marital estate to be awarded to the wife.

Conclusion

In England and Wales, unless you are an outrageous miscreant, you can misbehave and not worry about your conduct affecting the financial outcome if you want to divorce. In the United States it's the luck of the draw as to which State takes your divorce. In any event, our men and women on the Clapham and San Francisco omnitrolley will remain in a splendid state of confusion.



Our team of family lawyers under Alan Kaufman's leadership provide pragmatic advice to individuals wishing to solve/prevent family disputes.

Family Group

If you would like more information on FSI's services, please visit fsilaw.com where you will find all our latest news, publications and events. Alternatively, contact Alan Kaufman, head of family law, +44 (2) 3723 4000.