Warning: A final Financial Order is *essential*, but is it *really* final?

Consultant Family Solicitor Lauren Greenhalgh highlights the latest developments with regards final Financial Orders obtained upon divorce.

I *always* advise to have a final financial order in place by the conclusion of divorce proceedings. As with any written agreement, a final financial order certainly provides clarity, security and protection (one would hope) to all concerned.

Such an order details how assets held by the parties (either in their sole names or jointly with one another or with a third party) are to be divided upon divorce (if not already divided), records present and future financial arrangements of the family and seeks to dismiss the parties' future financial claims against each other.

It is preferable to agree financial settlement terms out of Court, but if this is not possible then I advise that an application to the Court for guidance is essential.

Until now I would advise that such orders are *essential* and unless *exceptional* circumstances arise a final financial order is exactly that…. Final.

The purpose of this article is two-fold: To raise awareness that despite the grant of Decree Absolute and dissolution of a marriage a former spouse can nevertheless return at some future point and stake a claim against assets ascertained following separation that effectively had nothing or little to do with them. Therefore, in my view, a final financial order is essential. On the other hand, further to recent case developments, despite having a *final* financial order in place circumstances may arise that render it reasonable and necessary to *vary* the terms of the order. Hence the order is *not* final.

Difficulties can arise when there is no Financial Order in place – *Wyatt and Vince*

Many will have heard of the Supreme Court case of *Wyatt and Vince, reported in March 2015*. Ms Wyatt won her appeal to make an application for financial relief against her former husband Mr Vince, some 31 years after their separation and 22 years after the conclusion of divorce proceedings.

Ms Wyatt and Mr Vince married in December 1981. They had a 7 month old son at the time and Ms Wyatt had a daughter from a previous relationship who was almost 2. Mr Vince treated Ms Wyatt's daughter like his own. They were travellers in Bath and had little by way of income and assets. It is fair to say they had a low standard of living. They separated in 1984 and Ms Wyatt moved to Lowestoft with the children. She was in receipt of benefits. Mr Vince provided no substantial financial support for the children.

They divorced in 1992, 8 years after their separation. Decree Absolute was granted on 26 October 1992. Mr Vince believed a final financial order had been filed at Court following Decree Absolute dismissing their financial claims against each other. Ms Wyatt denied this and no evidence was found to support his argument.

In 1993 Ms Wyatt started a new relationship and she and her partner had 2 children together.

In 1995 (11 years after separation) Mr Vince began green energy company Ecotricity, which makes wind turbines from recycled materials to produce electricity. Today Ecotricity is a multi-million pound business and is reported to be worth in the region of £57m.

Ms Wyatt made an application for financial relief from Mr Vince on 19 May 2011. Mr Vince asked for her claim to be struck out on the basis that she had no reasonable ground to bring it and that there had been an abuse of the Court. The High Court dismissed Mr Vince's strike-out application on 14 December 2012 and he was ordered to pay interim maintenance to Ms Wyatt to help her pay her legal fees. Mr Vince appealed to the Court of Appeal and was successful. The Court of Appeal struck out Ms Wyatt's claim and ordered her to repay Mr Vince a share of the payments he had made in respect of her legal fees.

Ms Wyatt then appealed to the Supreme Court who unanimously allowed her appeal. It was at the Supreme Court that Ms Wyatt was granted permission to make an application for financial relief against Mr Vince. The original decision of the High Court was reinstated. Whilst it was ruled that a Court cannot simply strike out a claim for financial relief on the basis of a low prospect of success, it was nonetheless acknowledged that Ms Wyatt faces "*formidable difficulties*" in bringing her claim.

This case is most unusual, not least because of the lengthy separation and divorce period but also because Mr Vince's business was set up some 13 years following the breakdown of their relationship. It could be argued that Mr Vince's multi-million pound fortune was 'exceptionally' created by him alone, it was his entrepreneurial skills that made the business a success, without any contribution from Ms Wyatt, and so why should she be entitled to a penny?! Further, when they were together Ms Wyatt enjoyed a relatively low standard of living and so why should that change? Were it not for the fact that Ms Wyatt raised Mr Vince's son (who incidentally now lives with Mr Vince, reaping the benefits of his father's millions) and daughter (considered a child of the family) without adequate financial support from him, it is doubtful whether Ms Wyatt will succeed in claiming any financial relief from Mr Vince at all.

For now we shall have to await the outcome of Ms Wyatt's claim. I suspect a settlement will be negotiated between lawyers out of court and such agreement may not be publicised. The Judge sitting in the Supreme Court commented that perhaps a mortgage free property would satisfy Ms Wyatt's claim. He may well be right. Mr Vince would indeed be sensible to try and negotiate a confidential reasonable settlement (reflecting the Judge's opinion) out of court. After all, providing a mortgage free home and a 'rainy day' modest capital lump sum in order to bring an end to proceedings swiftly and allow them both to move forwards with dignity would surely be a drop in the ocean to Mr Vince who is a very successful businessman worth nearly £60m?

Each case must of course be considered on its own merits.

This case does however highlight the importance of obtaining a final financial order at the conclusion of divorce proceedings. Whether parties believe it is unnecessary to have one in place, perhaps because at that time there are no or little assets to share, or because they trust an informal agreement as to the division of assets will suffice, it is certainly "*better to be safe than sorry*". No-one knows what the future holds but, for the

majority, one's financial status generally increases over time (including income and property, capital and pension assets). It cannot be stressed enough that a final financial order recording a financial settlement between former spouses is *essential* in order to protect one's self, family and future.

A final financial order may be *essential*, but is it *really* final?

A final financial order is usually final. This essentially means that neither party can return at a future point in time and vary terms, unless in *exceptional* circumstances.

The present law – *Barder and Barder (Caluori Intervening)* [1988] AC 20

This was indeed an exceptional case whereby the former wife killed herself and the children only 5 weeks following the making of a final financial order.

The main principles of the case qualifying variation of a final financial order were as follows;

(i) That the 'new events' invalidated the basis or fundamental assumption upon which the order was made. In this case the sad premature death of the former wife and the children most certainly impacted on the purpose of the order – which was primarily to meet the financial needs of her and the children. Clearly with her death and the children's death only 5 weeks following the order they no longer had a housing or financial need.

(ii) The new events occurred within a relatively short period of time from the date of the order: whilst no precise limit was set down, it was 'extremely unlikely' that it could be as much as a year and in most cases will be 'no more than a few months';

(iii) The application for leave to appeal out of time should be made reasonably promptly;

(iv) The grant of leave to appeal should not prejudice third parties who have acquired interests in property in good faith for valuable consideration.

It still remains though that these circumstances are rare. There is also great strength in public policy interest that there indeed be finality in litigation. Again, each case must be considered on its own facts.

In the case of *Dixon and Merchant* [2008], the former wife received a capitalised lump sum of £125,000 in respect of her £7,500 monthly maintenance claim and then remarried 6 months following the making of the order. The former husband sought to argue that this was a *Barder* event. The Court of Appeal disagreed.

In the case of *Williams and Lindley [2005]*, former wife received 70% of the assets and then pretty much immediately remarried and so "Justice cried out for a remedy".

A rare Appeal – *Critchell and Critchell* (22 April 2015) Court of Appeal [2015] EWCA Civ 436

The wife's appeal was allowed and the financial Consent Order varied, dismissing the husband's 45% Charge over the former matrimonial home (worth about £190,000) following the husband's father dying and husband inheriting £180,000 within a month of the order. This was a 'needs-based' case and husband's inheritance was considered a Barder event which invalidated the basis upon which the consent order had been made. The Judge found that since the original order had been based upon need, while the wife's need had remained the same, the husband's inheritance meant that he no longer needed his share in the former matrimonial home.

The husband appealed against this but the Court of Appeal dismissed his appeal finding also that the original order would have met wife's housing needs and enabled husband to pay off his debts at a future date, leaving the parties in fairly equal capital positions in terms of the equity in their properties. The impact of the inheritance so soon after the hearing was that the husband no longer needed his interest in the former matrimonial home to discharge his indebtedness. There had been a fundamental change in the needs of the parties.

Whilst the judgement in this case is not intended to change the law and is merely a case whereby the *Barder* principles have been applied, this decision may open the flood gates for many more cases of this nature. Again, every case must be considered on its own merits and *no one size fits all*!

It is however very interesting to note these developments and clearly lawyers must now be careful not to advise that final orders are 100% final, as indeed they may not be.

In conclusion, it is still advisable to obtain a financial order from the Court upon the conclusion of divorce proceedings to ensure, as far as possible, that your former spouse cannot return at some point in the future and make further financial claims against you. If there is little by way of assets and there is risk that your former spouse will not co-operate and agree a financial order, and you feel the costs involved in pursuing a financial order may be disproportionate, first you would be wise to be the Petitioner within divorce proceedings (to not only take control of proceedings but also keep open your claim for financial relief). Second, seek advice as to how best to protect assets acquired before marriage and/or following separation and other available options. I maintain that '*prevention is better than cure*'.

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