Financial Provision: A formula will do nicely, sir!

David Hodson

This article proposes formulae for calculating capital distribution and spousal maintenance on divorce. It does not seek to replace or reform the law. It seeks to help some couples and lawyers make better progress to a settlement and provide more certainty and predictability. The formulae are relatively easy to operate and can be adapted to IT Web based resources.

The family law profession waits for the Law Commission proposals on financial provision on divorce to become law, if that occurs. Yet meanwhile the higher courts continue to give uncertain and sometimes contradictory judgments and guidance. Accordingly, it is incumbent on the profession to fill the vacuum in practice to create certainty and predictability for our clients and to encourage out of court resolution.

One way forward, and a way increasingly used around the world, is via formula calculations. They are not to replace the law or lawyers and we should not have binding outcomes by formula alone. They are to help cases along the road to a settlement, to put the case law and higher court judgments into a logical and systematic context and to help more clients do more of the resolution process themselves.

I accept many will run scared and horrified from such an approach, in part for jurisprudential reasons, in part from the fear of all things ‘techie’ and mathematical and in part because of the bad experience from the CSA formula. But in IT, and the calculations behind web-based solutions, is where many in our society now expect to find their answers.

In Charman (2006) in the High Court, Mr Justice Coleridge stated that “Extraordinary energy, extraordinary entrepreneurial or other wealth generating skill, combined with the sheer size of fortune” have “a tendency to overwhelm the s25 exercise however carefully performed”, he concluded: “Tariffs are a bit crude and purists would protest that this is an incursion into the hallowed s25 exercise but are they, in the end, likely to produce a less fair result than any other unscientific exercise of judicial discretion? And they have the advantage of increased certainty. Of course they are non-binding and only guidance. S25 would continue to prevail. I forbear from suggesting one at this stage in this case lest it be thought I have applied it to arrive at my decision. I have not. But a tariff of percentage bands which decreased as the size of these extraordinary fortunes increased might prove to be helpful guidance and, ultimately no less fair than the current expensive uncertainty.”

Reference to tariffs is perhaps not so far from formulae. Perhaps perversely by not giving us a practical and clear blueprint for family finance resolution, the higher courts created a debate on another way of getting to a fair resolution according to clear, discernable family law principles. Formulae and tariffs must be one obvious starting point.
These formulae are based on what is probably present case law in England and/or frequent practice in reading out of court settlements.

**The capital calculation formula**

Total resources at date of separation \( A \)

Increase in resources to date of settlement/final settlement \( B \)

*Resources available for settlement, \( A + B \) \( C \)*

Pre-marital assets (probably pre cohabitation), indexed to date of settlement \( D \)

Gifts properly excluded, indexed to date of settlement \( E \)

Inheritances, indexed to date of separation \( F \)

Element of \( B \) which is post separation acquisition of wealth unrelated to endeavours during the marriage \( G \)

*Matrimonial resources, \( C – D – E – F – G \) \( H \)*

Simple equal division, \( H /2 \) or \( H \times 50\% \) \( I \)

*Preliminary outcome, unless \( I \) is less than needs and/or subject to s25 MCA factors \( I \)*

Additional capital for compensation for applicant, including capitalized compensation \( J \)

Any capitalised spousal maintenance for clean break \( K \)

*Outcome, \( I + J + K \) \( L \)*

All items need assistance from solicitors or very careful explanatory notes. The outcome needs to be reviewed taking into account the particular circumstances of the case, perhaps fine tuning and tweaking or perhaps material departures. An advantage is that future case law developments can be – or should be – fitted into an overall scheme of a calculation of financial provision.

**Reasons to depart from the capital calculation formula:**

- Longer marriages are more likely to include non matrimonial assets because of mixing and mingling and use during the marriage, items \( D - F \) above
- The matrimonial home even if a pre/non marriage asset is likely to be subject to equal division
- Indexation of non-marital assets by way of uplifting value may not always be appropriate and it is necessary often to distinguish between passive growth e.g. through ordinary market forces and active growth e.g. through endeavours to increase the value of the asset
- Charman special contribution but rare
- Liquid and illiquid assets cannot be treated alike in the final division
- Credit will be given for the party taking assets with so called risk
- Case law authority on refinements to the formula e.g. developing case law on when inheritances will or will not be brought into account
- All s25 factors e.g. health
- “Needs” always trumps first the automatic sharing of marital assets and secondly the non-division of non matrimonial assets
- Dangers of too strict adherence to categorisation of property and each case must be approached on its own facts “with the degree of particularity and generality appropriate to the case” (Nicholls LJ in Miller)

The spousal maintenance calculation formula

But why stop with capital? Why should income, especially income resulting from work undertaken the marriage, not be shared when there are generally similar needs of the spouses, making allowance for child costs? There is here some difference of opinion. Unlike capital arising during the marriage which is subject to a starting point of automatic equal sharing, a number of court cases have said that the income arising from work during the marriage should not be shared and is only based on needs, however generously interpreted. This has been criticised as gender biased and inconsistent. Certainly during the immediate few years after the marriage when inevitably both are adjusting to the end of the marriage and financial dependency, there is a strong argument for some sort of sharing, thereafter tailing off.

In such circumstances, is it possible to devise a spousal maintenance formula to produce some consistency of approach across a range of cases.

I have successfully used this formula in mediations and casework, for both the paying party on the receiving party. Many have commented that it has a sense of fairness and evenhandedness in the first years after the separation and divorce. It presumes the husband is the primary earner and the wife is the primary carer but with a good level of contact to the husband. It presumes the children spend the bulk of their time with the mother but have good periods with the father although can work equally well if it is a more equal division of time. Its distinctive is that it recognises the cost to both parents of looking after the children, to be deducted from available income before calculating any appropriate spousal maintenance

- Total net income of husband $A$
- Total net income of wife $B$
- Total income resources $(A + B)$ $C$
- Direct school fees, extras and related educational expenses $(D)$
- Additional child expenses to be paid direct $(E)$
- Sub Total $(C – D – E)$ $F$
- Child maintenance needs of wife as primary residence parent $(G)$
- Child maintenance needs of husband as other residence parent $(H)$
- Subtotal, being available income for parties themselves $(F – G – H)$ $J$
- Divided equally for shared needs, being $J/2$ or $J x 50%$ $K$
- Less total net income of wife $(B)$
- **Spousal periodical payments** $(K – B)$ $L$

By way of example, a husband earns £120K net $(A)$, a wife earns £15K $(B)$ with £35K school fees $(D)$ and £20K other direct children’s expenses $(E)$ and agreed direct children’s cost of the primary carer is
£20K pa (G) and of the 5 nights a fortnight secondary carer is £16K (H). The total available income is £135K (C, 120 + 15), the amount after school fees and other direct children expenses is £80K (F, 135 – 35 – 20) and the amount available after child support for each parent is £44K (J, 80 – 20 – 16). This amount remaining for the adults of £44K is divided equally between them to produce £22K (K). From this is deducted the wife’s own income of £15K to produce spousal maintenance of £7K (L, 22 – 15).

The total income (A and B above) will naturally include income of whatever form including bonuses and commissions. One benefit of such a formula is that it can be applied to regular monthly income and also to one off annual payments. It could include in exceptional cases a notional income attributed to one party who should be producing an income at a certain level but is not. This formula is flexible to permit adjustment if a wife later gains an income after time at home caring for a child.

The children’s educational costs and related expenses (D) such as school fees invoices, school trips, uniform are then deducted. If the parties have chosen private education of any form to continue post divorce, this cost should first be taken off the available income resources. The court order or settlement will direct who will pay these expenses. There are then non educational direct children expenses (E) which include private health insurance, medical expenses, opticians, dentists, sports equipment and holidays other than with one parent. These are items payable to a third party, although it will need to be resolved who will pay what and how amounts are passed to the party who will make the payments.

Even if a parent cares for children for only one night a fortnight, there are indirect costs of accommodation and some direct costs which should be taken into account and shared. Increasingly, children spend good amounts of time with each parent. Naturally the primary carer has the greater need and this can be calculated by reference to assessments of needs or other methods e.g. CSA formula. But the other parent, perhaps with a third or half of school holidays and three to five nights staying contact a fortnight has considerable indirect accommodation costs and direct costs. Perhaps the ratio might be in the sort of order of e.g. 100 per month for the primary residence parent and 50 - 70 for the secondary carer. Some realistic allowance must be included.

These two amounts of child support for each parent (G and H) are deducted from the available income. The remainder (J) is literally what is left for the parents as single adults.

The formula involves substantially less work on detailed budgets, is more flexible for future years and changes can be operated by parties without material involvement of solicitors and takes more account of child support of the secondary carer.

The formula probably stops being appropriate a few years after the divorce when a review of circumstances is often advisable to fine tune fairness and a less formulaic approach may be appropriate, also to take into account the importance of adjusting to the end of marital dependencies and possible clean breaks or term orders. But it is of considerable value in the few years after the separation and until adjustment arises

**Reasons to depart from the spousal maintenance calculation formula:**

- one party has been attributed a mortgage earning capacity which is taken into account in the calculation of capital e.g. because of disparity of division of liquid capital, so this mortgage cost should act as a deduction before sharing out available income
- one party has work related costs, e.g. travel to work, work clothing, tools etc.
- child care costs should be considered e.g. to allow a mother to take employment
- clean break and/or term orders should always be considered
one party has greater needs than the other - but these will not be child related as this will be taken into account. In the post-White world of reasons to depart from equality, there will have to be very good reasons why one spouse as a single person immediately post divorce should have materially greater needs than the other

- may be inappropriate in bigger money cases
- may be inappropriate where there are welfare benefits
- may be inappropriate when issues of compensation above “needs” may arise, although rare
- indexation may be appropriate for the child support for each parent as it is entered into the formula at a needs basis. However the spousal maintenance should not be indexed on this formula because it will be flexible for annual reviews based on income
- when the recipient has attained self sufficiency
- where a payer is able to show a higher income stream derives wholly from endeavours and perhaps new employment post separation and divorce
- when the pension sharing order takes effect and the payer has retired
- on the recipient cohabiting
- when the children have left full time secondary education.
- when there are any health or other special needs

The reasons to depart from this formula are where the solicitor has a more specific and specialist role in advising on what departures are fair. But this formula is an excellent starting point and in a good number of cases will be a fair finishing point.

The IT imperative in divorce financial settlements

I admit to riding a now rather ancient hobbyhorse. From well before the time of the Web, I have felt that the mass volume litigation of family law finance disputes with high costs and considerable uncertainties of outcome requires the clarity and predictability that arithmetic formula can produce as a starting point. The far reaching impact of divorce financial disputes on the wider families, to children, employment of the parties in the workplace and across society generally is no longer viable and acceptable.

The Web has changed our lives, but seemingly not family law resolution. The CSA calculation was botched initially and in its many subsequent reincarnations. The myriad of figures in At A Glance can be judicially brushed aside with a wave of the discretionary wand. However in the rest of our lives, we are accustomed to and expect the highly personalised and interactive calculations of the Web. From car insurance to mortgage quotes; holiday flights to hotel choices and internet banking: there are so many examples in which we input information and receive an answer and solution. Many web sites contain incredibly complex, sophisticated yet hidden formulae and calculations, requiring entry of many variables which then produce very personalised outcomes.

I do not accept that save for a minority of cases we are unable to devise a formula for the majority of family law finance cases. Outcomes would not be binding but they would take the parties substantially further down the road to a settlement than at present solicitors considering statute law from 1973 and the latest (too often conflicting) higher court decisions. Some disputes will be inappropriate for any formula. Some need a day in court, but not as many as are going through the courts at the moment. Some will need tweaking and variations to the formula outcome. I believe a number of couples will find the outcome of a formula, and the process of getting to it, as fair especially as it should involve less cost and delay.

I consider that our law by being often uncertain through wanting to allow personalised individual justice as well as unclear higher court decisions effectively encouraging litigation has actually created its own unfairness. Family law has refused to accept what the Web can do for our clients and the resolution
process. It has failed to listen to what people really want in this present era. The time now come to embrace the IT opportunities in the family resolution system

**Conclusion**

Each case is different. But people involved in family disputes seek more certainty. Some seek a fairness and flexibility found in the mediation room and not found in the court room. Some seek a formula to work without substantial intervention from lawyers. Some want help getting closer to a fair and final outcome than the present system provides. Some want their solicitors to fine tune a basic fair outcome to their special circumstances.

The time has come for the creation of a fair resolution model, based on existing fairness principles of family law but through a complex, sophisticated mathematical formula, available on the web, as a good and well advanced starting point to the final settlement.

In the 26 miles and 385 yards of the marathon which too often is how family law finance resolution is perceived, there must be scope to use IT and formulae to help our clients avoid the first 25 miles! A formula will do very nicely, sir!

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