

## Maintenance payments and bonuses: How to share the risks and the rewards



For many couples going through a divorce, or separation, the question of how the outgoings will be met post-separation looms large over any discussions. This is even more so when there is a disparity between their respective incomes, with one party more reliant on the other to help meet the weekly or monthly expenses.

While the era of headline-capturing bonuses may have come to an end, many businesses (both large and small) choose to incentivise their employees using a variety of bonus schemes and/or commission structures. Parties, and the court, need to consider how best to address such payments in any discussions or settlement.

Much will turn on the size of the bonus and how regularly the bonus has been received. If it is a regular occurrence, and while not still guaranteed, then a judge may factor that bonus payment into their calculation of a party's annual income. A judge may therefore take that party's annual income as the figure recorded on their annual P60 each year, and look to the past years' performances, to assess the likely future income available for sharing.

Where a party holds a senior executive or managerial role, or where the party works in a sector that relies heavily on bonus schemes (for example, the banking and financial sectors), a judge's analysis of the available income may have to be far more nuanced. The vast majority of bonus schemes will be dependent on the individual's performance or the overall performance of a team, department, or company. Such bonus packages may have elements of deferred remuneration (for example, deferred share options) which may ultimately have a significant value but which may not be received until after the parties have separated or their divorce has been finalised.



While a fixed figure for a monthly maintenance figure may be the simplest answer, as it achieves certainty and ensures it will be relatively simple to enforce in the event of non-payment, the parties may well calculate their anticipated future expenditure based on the receipt of an annual bonus and therefore budget accordingly.

The recent pandemic and its far-reaching effect on the commercial world has only served to highlight how variable bonus payments can be. That unpredictability may require the judge to take a more practical approach and pragmatic view when evaluating what a party should pay by way of maintenance. Courts have generally begun to recognise the need to take a two-stage approach to this exercise, with the judge focusing on the “fixed” sum received as basic salary, and what can be paid each month from that sum; and then what proportion of the maintenance should be paid from any bonus that may be received.

The latter part of this calculation may take the form of a percentage share of the bonus, reducing over time, and ultimately ceasing within a fixed period of time after a final order has been made.

The suitability of this approach will very much depend on the circumstances of the parties. As this may result in payments being made from future bonuses, careful thought must be given to what on-going financial disclosure will need to be made by the paying party. This can include the paying party undertaking to provide notice of any change in their remuneration package, employment, and the provision of their P60 each year, etc.

Separating parties will often need to consider what is the best solution where one party receives deferred share options. These can be shares that are held in one party’s sole name, but which may not “vest” in that party (and therefore be sold or transferred) until some point in the future. It is possible that a party has received shares during the marriage, but those shares will not “vest” and therefore become that party’s asset until after separation, or after the divorce has been finalised.

Where one party will have the sole benefit of those deferred shares, then the court will often look to “discount” the current value of the asset to reflect that those shares cannot immediately be sold. This reflects the element of “risk” inherent in share options accepted by the party retaining the shares in ascribing a fixed value at the time of separation to those unrealised/unrealisable shares. In agreeing a capital payment to the other party as a way of “buying out” their interest in the shares, the party keeping those shares is assuming sole responsibility of the risk that the value of the shares may fluctuate. For example, where the receipt of the deferred shares is dependent on that party’s continued employment with the company, or on that party being treated as a “good” leaver.

A judge may be persuaded to share deferred shares equally between the parties if the shares were received during the marriage, but cannot be realised until after the marriage will have been brought to an end.

Where the receipt of the deferred shares is dependent on the general performance of the paying party, or the performance of the company as a whole, a judge may though reflect the risk element by sharing the eventual benefit of the deferred shares on a percentage basis (often with that percentage share reducing over time and/or limited for a specific post-separation period). This goes some way towards addressing the element of risk inherent in the shares, and also takes into account the possibility that the shares may achieve a reduced or nil value if the company or individual performs poorly over time.

All of the above approaches highlight the range of options available to parties, and the courts, to address the myriad of different remuneration packages that can be found in the modern workplace. From banker’s bonuses, to commission-based remuneration, or gig-economy income, the court will strive to achieve a settlement that reflects the subtleties of each family’s income. Our family team will often work with our specialist employment law teams and commercial teams to understand the finer details of a former spouse’s remuneration so that the best solution can be found and an informed decision can then be made on the terms of any settlement.

For further information, please contact the [family law team](#).



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