Comments by **Rebecca Cockcroft, Consultant and Co-Head in the Family Department at Payne Hicks Beach,** originally published by eprivateclient online on 8 February 2021 and reproduced with kind permission
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The dangers of crying 'negative contribution' in divorce proceedings

KATIE ROYALS, 08/02/2021

One of the most common misconceptions in divorce is that examples of unreasonable behaviour can impact a financial settlement. In reality, this is only the case when the bad behaviour goes beyond the norm and has been truly horrific. But, this doesn't stop this idea being tested in court, as a recent example demonstrates.

Tessa Finch earns £160,000 a year at the BBC and has accumulated a substantial pension. Her ex-husband, Barry Baker, also worked as a journalist but has not worked for some time. Together the couple had accumulated matrimonial assets of about £2.2 million before separating in about 2013 and divorcing in 2016.

Their children remained in the former matrimonial home with Ms Finch.

Ms Finch tried to reduce her ex-husband's financial remedy award of 37.5 percent of their capital plus half of her BBC pension, but her appeal was rejected by the England and Wales Court of Appeal (EWCA).

Camilla Thornton, a partner in the family team at Russell Cooke, described

this as "yet another example of a high powered working woman unsuccessfully seeking to argue in her divorce that her contribution to the marriage as breadwinner and primary carer of the children was greater than that of her less successful husband and that her husband's 'negative contribution' should be reflected in her receiving a greater share of the matrimonial assets."

But, rather than acknowledging this, the Court of Appeal described the term 'negative contribution' as an "unhelpful oxymoron", stating any such argument should have been pleaded on the basis that the husband's conduct during the marriage should be taken into account when deciding the financial split.

Rebecca Cockcroft, joint head of the family department, Payne Hicks Beach, warned about the dangers of relying on such arguments when making a case.

"The concept of weighing up one spouses contribution against the other is fraught with danger when the law tells us that we should not discriminate between the role of homemaker and breadwinner.

"The court actively discourages rummaging in the attic of a marriage with good reason. Allowing the parties to argue negative contributions is unpalatable and could encourage systemic mud-slinging which will inevitably impact on the wider family.

"The only certainty to arise from raising such arguments will be increased legal costs, acrimonious litigation and the further diminution of the family pot. Practitioners should not be encouraging clients to run cases on this basis."

The case also raises important issues about equality.

Simon Blain, a partner at Forsters, noted that since the 2000 White vs White case, the courts have been eager to demonstrate that all contributions should be treated equally.

This was originally based on a 'traditional marriage', where a wife's homemaking and child raising contributions were treated as equivalent to a husband's monetary contributions.

So why should it not apply if the roles are reversed?

Mr Blain asked: "What, though, of the small but growing number of families where the wife is both the principal earner and bears the brunt of childcare? Should this 'double burden' be recognised by the courts?"

Equality was also a concern for Philippa Dolan, a partner at Collyer Bristow.

She suggested that the "level of interest generated by this case may be because it's the wife who is having to hand over a substantial element of her assets to her husband and in this circumstance there are still sexist assumptions made, even by a dwindling number of our judges, that this is somehow wrong in principle."

Instead, she argued the most interesting thing about the case is that the Court of Appeal seems to have applied the principles of sharing, needs and conduct correctly.

"The equal sharing principle after a long marriage is frequently displaced where one side can demonstrate a need – as has happened here, it seems."

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