The Court of Appeal in Hamilton v Hamilton [2013] EWCA Civ 13 has recently clarified that it is possible for a divorcing couple to agree a settlement which provides for the payment of money over time without it being capable of later variation.

**Instalment order or series of lump sums?**

Let us suppose that H agrees to pay W a total of £1m. They agree that H will pay it over four years in equal tranches of £250,000. One way of giving effect to the agreement is an order for a lump sum payable by instalments: H do pay W a lump sum of £1m, payable in four instalments as follows etc. However, W may not like this. Unlike an order for a lump sum, an instalment lump sum order can be varied. H can apply for more time to pay. H can even apply to reduce the amount payable under the instalment order. So, payees in W’s situation often propose a different way of drafting the order. Section 23(1)(c) allows the court to make an order for one party to pay the other such ‘lump sum or sums’ as set out in the order. W might therefore suggest that the order be drafted as a series of separate lump sums, ie H do pay £250,000 on date 1; H do pay £250,000 on date 2, etc. The idea is that each payment of £250,000 is a separate lump sum order (contained in different paragraphs of the same physical court order). Each lump sum order is therefore incapable of variation, either as to timing or as to the amount payable.

In **Hamilton**, the parties appeared to have chosen the latter option, ie a series of lump sums. The order provided for W to pay H the following lump sums, setting out five amounts payable on different dates totalling £450,000 (with provision for all remaining sums to be paid earlier if W sold her company before the last sum was due). On payment of the first lump sum, the matrimonial home was to be transferred to W and capital claims dismissed. There was liberty to apply as to implementation and timing.

Subsequently, W paid £240,000 due under the order, leaving £210,000 unpaid. H applied to enforce. W applied to vary the order, on the basis that it was an order for a lump sum payable by instalments, and thus variable under s 31(2)(d). She sought to be relieved of her obligation to pay any of the remaining sums, relying on Tilley v Tilley (1980) Fam Law 79 and subsequent cases including Myerson v Myerson [2010] 1 WLR 114.

At first instance, Parker J held that the order was an instalment order and thus variable. She held that any order for the payment of money over time was, in reality, an order for a lump sum payable by instalments. Where the substance of what had been agreed was a single sum over time by instalments, it was not possible to draft the order in a way which prevented it from being variable. On the facts, Parker J decided not to extinguish W’s liability to pay any of the sums, but allowed her several more years to pay the outstanding sums.

H’s appeal to the Court of Appeal was dismissed. The Court of Appeal held that Parker J had been wrong to say that any order for the payment of money over time must be an order for a lump sum by instalments. The parties and the court do have a choice, and can elect for lump sums. However,
on the facts they held that Parker J had been right to hold that this order was an instalment order. The court was entitled to consider whether the order accurately reflected the underlying agreement between the parties approved by the court. If there was a disagreement as to whether the terms of the order were, in reality, correct, the court had to assess what the parties agreed, against the objective factual matrix. Ordinarily the language of the order will settle matters, but, in the event of a dispute as to the nature of the agreement, the court was entitled to look to the surrounding facts and circumstances which bear upon the terms as drafted. Here, the judge had been entitled to conclude that H and W had agreed a lump sum of £450,000 to be paid in instalments over time, and so she was right to say that this order was an order for a lump sum payable by instalments, and thus variable.

Baron J (with whom Thorpe and Kitchin LJJ agreed) concluding her judgment by saying “in future, parties may consider that a recital at the beginning of an order which sets out the basis of the agreement in terms of a potential variation would put disputes of this type beyond doubt.” If you are drafting a consent order which includes the payment of money over time, such a recital is clearly crucial to prevent a later court interpreting what looks like a series of lump sums as a variable instalment order.

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