

Spousal maintenance and universal credit



Anita Mehta 4PB

Universal credit has been on the cards for what seems like years now, but its malign effects are starting to show up in cases

Universal credit (UC) is the benefit intended to help those on a low income with their living costs. It will eventually replace child tax credit, working tax credit, housing benefit, income support, income-based job-seekers allowance and employment support allowance. The government's theory behind the introduction of UC was to reduce the confusion that arose from multiple different forms of benefits, and to support people into work, by intending to make work pay (for example, by offering support of up to 85% of child care costs).

Anyone involved with advising families without income in excess of their needs about their finances on divorce must have a working knowledge of UC in order to ascertain the parties' income upon separation. The current position with UC is that new claims (either completely new, or as a result of a change in circumstances) will be for UC nationwide. The government now plans to start transferring people from existing benefits claims onto UC, with the aim of completing this by December 2023. As at April 2019, two million people were on UC and it is estimated that by the time it is fully rolled out around seven million households will be on UC (almost a quarter of the population).

One of the sad realities of divorce is that families that may have been able to meet their income needs whilst they were all living in one household are no longer able to do so when two households are required. As a result, the economically weaker party who has care of the children may need to rely on benefits after separation.

The court is obviously accustomed in these types of cases to take into account parties' entitlement to welfare benefits in order to meet needs. Notably, *Duckworth's Matrimonial Property and Finance* states that the court expects to see benefits on the schedule of assets and income:

6 State benefits

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Historically, courts have been astute to prevent breadwinners from sloughing off the responsibility of maintaining their families on to the State. But in the modern era of "nationalised" child support, New Deals for lone parents and the minimum wage, these old nostrums no longer carry any weight; instead, it has become universal practice to show tax credits on the schedule of assets and income. It must be borne in mind, however, that tax credits are means-tested against capital: so when there is going to be a transfer of liquid capital to the wife, they may cease to be paid.

Indeed the Family Justice Council clearly considered this approach would continue in its Guidance on "Financial Needs" on Divorce, which was most recently updated in April 2018. That update endorsed the view that when considering how to meet parties' income needs by spousal maintenance the court will continue to take welfare benefits into account:

"The needs of the parties are a question of fact to be determined by the court. In practice, the main components of 'financial needs' will be the need for housing and the need for regular income. Housing (and other capital needs) and income needs are linked and need to be considered in the round. How these needs are most appropriately met and by what form of order, whether by capital provision or (spousal) periodical payments or both, will depend on all the circumstances of the case, in particular the extent of the available capital and income, including – where appropriate – welfare benefits, tax credits and borrowing capacity as well as existing debts."

Broadly speaking, the district judge would consider the level of income that the economically weaker party has, or can expect to achieve from part-time work supported by benefits, and then consider whether there is a shortfall in meeting their (and any children's) needs. In short, in

the event that there is such a shortfall, the paying party is able to pay, and it is fair looking at all the circumstances, the court may make an award for periodical payments. Sometimes this is for amounts as low as a couple of hundred pounds, but the point is – it is an amount of money required to meet needs.

It is difficult to precisely identify the bracket of case where this approach is relevant, as there is no reliable data on the numbers of periodical payments orders made each year (the MoJ does not distinguish between spousal periodical payments and child support orders in its figures). It is generally understood that the majority of cases do not include orders for spousal maintenance and the reason is plain. The median annual personal income in 2016/2017 is £21,300 net, according to ONS data. In the writer's view, this is likely to be below the threshold where spousal maintenance is ordered. Therefore, the types of case that this article is relevant to, involve families where the main earner has more than the median annual income, albeit they are still families with income needs given the economically weaker party's need to rely on benefits to support a low income.

This approach has, and will, change in cases where one of the parties now has to claim UC because, unlike with tax credits, spousal maintenance is not an exempted form of income for UC. For the purposes of UC calculations, spousal maintenance is considered a form of "unearned income", which attracts the maximum reduction of a pound-for-pound from UC. As just noted, this is in contrast to tax credits, where maintenance payments were disregarded as a form of income.

Whilst the legal community has known about this change for some time, the effects are only starting to be seen more recently as UC is rolled out more widely. Suddenly, in cases where one party has to claim UC as a result of separation, there is no question of spousal maintenance because there is general recognition that it would not actually improve the circumstances of the economically weaker party. It is impossible to know whether this is leading some district judges to make greater capital or pension awards, but the writer would suggest this is unlikely, not least as it may not even be possible given the limits on capital in this kind of case.

Moreover, there are of course multiple cases where final orders have already been made which were calculated on the basis that the economically weaker party was going to receive spousal periodical payments and tax credits. Plainly, those people will be worse off, with no recourse to court. Indeed these changes may lead to more variation applications from the paying parties.

There has been – and continues to be – a huge amount of debate and controversy surrounding the introduction of UC (to date there have been apparently 1,858 references, 70 debates, seven written statements and divisions in Parliament). The debates rightly focus on the hard impact on the most vulnerable families – we have all read about very vulnerable families having to wait five weeks for the first payment, causing spiralling debt, big deductions from

UC without claimants having recourse to a review system, and concerns that the single payment system has made victims of domestic violence more vulnerable.

Notably, there has been a lot of concern about single parent families, who are already said to be worse off than under tax credits (although the figures suggested seem to vary). The Trussel Trust's written evidence from 6 March 2019 suggests that single parents with housing costs are still subject to reduced levels of benefits compared to levels in 2015. There has been a lot of opposition to the rate of UC, with some suggestion that, despite receiving UC, people can be in situations of real need. According to Ruth George MP, speaking at the Universal Credit and Debt debate on 5 June 2019:

"Even after the changes to universal credit, the Joseph Rowntree Foundation has calculated that, although 5.6 million people in working households will gain an average of £3,000 a year, 5.1 million working people will lose an average of £2,300, including 1.7 million who are already in poverty. Of non-working households, 1.9 million people will gain an average of £2,000 a year, but 2.6 million people will lose an average of £1,400 a year, with half of those—1.3 million—already in poverty. Overall, even after the changes, 7.5 million people will gain from universal credit, but 7.7 million people will lose out, including three million households already in poverty."

Hence, litigants who previously may have received an award of spousal maintenance to supplement income from work and tax credits may well still be families in situations of real need.

I would suggest that these are the families where the court in fact needs the power to award spousal maintenance the most; these are not the so-called "meal-ticket" cases. Wealthier families are more able to meet income needs from capital resources, but that may not be an option for this bracket where every penny of capital is required to stretch to the respective parties' housing needs.

Thus far, the government has been clear that it does not support the proposed changes to spousal maintenance that appear in Baroness Deech's bill; effectively the government supports the court's ability to make an unfettered spousal maintenance order in situations where it is really needed. It therefore does not seem consistent that the changes to UC will mean that spousal maintenance orders are only remedies for the wealthier couples.

I would suggest that really only family lawyers can raise these issues, as one can see how an MP may not find an individual complaining of losing their spousal maintenance to be the most vulnerable person affected by these changes in their surgery. However, this issue is not just about ensuring assistance for the vulnerable, it is also about the court's powers to ensure justice is not restricted to the wealthy.

am@4pb.com 