INTERNATIONAL FAMILY LAW REPORT

FROM DEPENDENCY TO SELF-SUFFICIENCY: THE INTERNATIONAL SPOUSAL MAINTENANCE BAROMETER

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England has a reputation for being the most generous jurisdiction to the weaker financial party, with no limit on the term upon which spousal maintenance can be set. Joint lives maintenance has historically been the norm, representing a stark contrast to much of the rest of the world.

There are many common threads in family law across jurisdictions but also some very significant differences – particularly the wide variation in approach to spousal maintenance (or alimony). In Scotland, Sweden, Finland and New Zealand, financial independence for both spouses is at the heart of the court’s approach and the obligation to maintain a spouse is not imposed, save for a short period or in exceptional circumstances. But there are jurisdictions at the other end of the spectrum which provide ex-spouses with generous and long lasting income.

Against this international background there has been a recent re-examination of the fundamental purpose and justification for ongoing spousal maintenance in England and Wales. The decision about whether to award it, how much and for how long is a highly discretionary judicial exercise based upon the criteria in s.25 of the Matrimonial Causes Act 1973 and mirrored in the Civil Partnership Act 2004.

But those principles were debated and decided upon in a very different era. Not only have the positions of men and women in the workplace altered dramatically but social and gender expectations have also changed. In the early 1970s, 92% of men and only 53% of women were working. Today, 72% of men and 67% of women are in employment.

Many judges and legal professionals feel that the legal framework for spousal maintenance in England and Wales should be changed to promote clearly the notion that financial independence is not only desirable but expected after divorce given the changing economic positions of men and women.

In a private members’ bill, the Divorce (Financial Provision) Bill, Baroness Deech is urging the UK Parliament to revisit the fundamental law governing financial provision on divorce. The bill includes a five year cut off for spousal maintenance, save in cases of serious financial hardship. In a somewhat controversial interview with the Financial Times, Baroness Deech stated that spousal support sends a “bad message” to women.

Although there is lots of talk about how women should be half of the Supreme Court and they should have half the seats of FTSE boards, we have a whole area of law which says that once you are married you need never go out to work, that you are automatically entitled to everything you might need even if the marriage breaks down and it’s your fault.

But recent cases have shown that the current judicial approach, although still generated from a 43 year old statute, is very much geared towards encouraging women to work and the principle that women who do not work should not be rewarded more than those who do.
# Landmarks in England and Wales from 1865 to 2015

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Details</th>
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<tbody>
<tr>
<td>1865</td>
<td><em>Sidney v Sidney</em> (1865) 4 Sw &amp; Tr 178, 34 LJPM &amp; A 122</td>
<td>“A man should not be allowed to treat marriage as a ‘mere temporary arrangement, conterminous with his inclinations, and void of all lasting tie or burden’… According to your ability you must still support the woman you have first chosen and then discarded.”</td>
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<td>1984</td>
<td><em>Matrimonial and Family Proceedings Act 1984</em> (MFPA)</td>
<td>Enacted. Imposed a duty to consider a clean break and the power to dismiss spousal maintenance claims.</td>
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<td>The MFPA 1984 inserted section 25A(1) and (2) of the MCA 1973 which explicitly states that “…the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court thinks just and reasonable” and that any spousal maintenance ordered should be “…only for such term as would…be sufficient to enable the [receiving] party…to adjust without undue hardship…”</td>
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<td>Joint lives spousal maintenance awards continued to be the norm. The burden was placed on the paying party to demonstrate that the recipient had the ability to become self-supporting by a certain date if a set term was to be imposed by the court.</td>
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<td>1997</td>
<td><em>G v G</em> [1997] 1 FLR 368</td>
<td>Term orders deemed inappropriate if the recipient could not adjust within the fixed term.</td>
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<td>2006</td>
<td><em>Miller v Miller, McFarlane v McFarlane</em> [2006] UKHL 24</td>
<td>Influenced by the non-discriminatory principles laid down in <em>White</em>. Periodical payments not limited to needs only and a term order not appropriate where insufficient capital for a clean break.</td>
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<td>2008</td>
<td>The recession</td>
<td>The impact of the recession made it more difficult to achieve a clean break, leading to an increased reliance on spousal maintenance orders.</td>
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<td>2012</td>
<td><em>L v L</em> [Financial Remedies: Deferred Clean Break] [2011] EWHC 2207 (Fam), [2012] 1 FLR 1283</td>
<td>Lifelong maintenance revised to two years and five months to enable the wife to get back on her feet, and the amount cut. This case reflects the modern reality that women often have a career track record that can be utilised post-divorce and that the care of children is often shared.</td>
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<td>2013</td>
<td><em>Matthews v Matthews</em> [2013] EWCA Civ 1874</td>
<td>No justification for a nominal spousal maintenance for the wife despite two children aged six and three. She had a proven career record and earned more than her husband.</td>
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<td>2014</td>
<td><em>Chiva v Chiva</em> [2014] EWCA Civ 1558</td>
<td>Maintenance limited to two years for a wife with a two year old. Wife (an actuary) could work an extra three days per month to become self-sufficient within that two year period. She had historically earned more than her husband.</td>
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<td>2014</td>
<td><em>Murphy v Murphy</em> [2014] EWHC 2263 (Fam)</td>
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<td>2014</td>
<td><em>SS v NS</em> [Spousal Maintenance] [2014] EWHC 4183 (Fam)</td>
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<td>2015</td>
<td><em>Wright v Wright</em> [2015] EWCA Civ 201</td>
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<td>2015</td>
<td><em>WD v HD</em> [2015] EWHC 1547 (Fam)</td>
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ENGLAND AND WALES – THE JOURNEY FROM PATERNALISM TO AUTONOMY

The law in England and Wales is currently closer to the dependency end of the international spousal maintenance barometer along with California, Singapore and Nigeria while Israel, Japan and Finland are much closer to the self-sufficiency end.

The court can also decide upon the level of income provided by the new spouse irrespective of his wealth or lack of it. Finland, by contrast, put the onus on the new spouse. In Finland, if the new spouse has the potential to become self-sufficient, his income is considered to be an asset and the maintenance is reduced accordingly. This approach is rather unusual where the dependant spouse’s earning power is small. In Singapore, the maintenance creditor to undergo a further formal process. The court imposes a clean break on a wife with two minor children.

The Family court will always maintain a variation if needed) is appropriate was addressed in Wright v. Wright. To show they have tried to earn an income autonomy hard to achieve. And just as family law in England and Wales, the statutory test of whether the court can order maintenance is possible other than by the civil law. The court imposed a clean break on a wife with two minor children.

When the very different approaches to the question of self-sufficiency achievable. The court has the power to order maintenance in every case, even if this involves some (not undue) hardship for the recipient. Maintenance only awarded in Israel, Japan and Finland.

In Ismail v. Ismail, the court can order maintenance is possible other than by the civil law. The court imposed a clean break on a wife with two minor children.

The court can also decide upon the level of income provided by the new spouse irrespective of his wealth or lack of it. In Japan, the new spouse needs to allow the financially weaker party to save capital to achieve a very wide discretion for the courts to order maintenance. The court can order maintenance to extend to “joint family” members.

In Hindu law and the Special Marriage Act, the obligation to maintain a Hindu family member is an inherent duty. To decide about the maintenance, the court considers the income needs of the dependant party, the income potential and the financial adjustments that they might make. In Nigeria, there was a three-year-old child and no real evidence about the financial potential. She was told by the court that it was highly discretionary and the financial adjustments that they might make. The court can order maintenance to extend to “joint family” members.

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In high-flying, the Court of Appeal has rejected the applications to vary the original joint lives maintenance order. The Court has emphasized the importance of respecting the just and fair balance maintained by the original awards, and the necessity for all parties to accept the economic reality and uncertainties when entering into a long-term relationship. The Court has further highlighted the importance of post-marriage independence and a clean break.

The cases of W v W and K v K have been discussed in detail to illustrate the differences in the approach taken by the courts in the two jurisdictions.

SO WHERE ARE WE NOW?

In England and Wales, highly fact-specific decisions continue to obstruct the quest for clear, guidelines on spousal maintenance and the assessment of need.

Mr Justice Mostyn’s guidance on spousal maintenance in SS v ANS is a reminder that the possibility of a transition to independence should be considered in every case, even if this involves some (but undue) hardship for the recipient.

The focus is now on maintenance being paid in full, with the amount of maintenance being calculated on the basis of the income of the paying party and the needs of the receiving party. The court will take into account factors such as the length of the marriage, the standard of living during the marriage, the earning capacity of both parties, and the professions and responsibilities of each party.

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INTERNATIONAL FAMILY LAW AT PENNINGTONS MANCHES:

Penningtons Manches acts in some of the leading cases in England and Wales representing clients including professionals, entrepreneurs, wealthy individuals, landowners, those in the public eye, or for their partners. The family law team has unparalleled expertise in the field of international family law.

Our team includes six Fellows of the International Academy of Family Lawyers (IAFL), an organisation of the world’s leading international family law practitioners. In addition, members of our team hold leadership positions in other key global family law organisations, including the Family Committee of the International Bar Association (IBA), the Private Client Commission of the International Association of Young Lawyers (AIJA) and the International Family Law Committee.

AUTHORS:

James Stewart is one of the leading international family lawyers in England and one of only three family lawyers to be included in the 2015 London Super Lawyers ‘Top 10 list’. Ranked highly in all legal directories, James is also one of The Lawyer’s ‘Hot 100’ which highlights those ‘at the very top of their game’. He is Parliamentarian and Fellow of the International Academy of Family Lawyers (IAFL) and co-chairs Multilaw’s Private Client, Trust and Family Law Practice Group. He is a member of the International Section of the American Bar Association (ABA) and is well-known for his expertise in Anglo-American divorce. He also serves on the Consultation Board of Practical Law.

James is General Editor of Family Law: A Global Guide (3rd edition, 2015) and has co-authored chapters on Russia and Ukraine for International Pre-Nuptial and Post-Nuptial Agreements.

Rebecca Dziobon is a specialist family lawyer with extensive experience advising high net worth (often international) clients on their finances after relationship breakdown. She is the Penningtons Manches Family Knowledge Lawyer authoring legal materials and articles including the pensions and trusts content for LexisNexis PSL Family. She regularly writes for New Law Journal, Solicitors Journal, Family Law Journal, Resolution’s The Review and Pensions World. She is a former member of YRes, Surrey and Resolution’s Pensions, Tax and Property Committee, and is a current member of Resolution and the Association of Women Solicitors.

The primary source text for this report is Family Law, A Global Guide (Thomson Reuters 2015) which includes chapters on 45 key jurisdictions throughout the world. Each chapter contains a section on spousal maintenance: http://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?recordid=6405