PENNINGTONS MANCHES

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

1865	***Sidney v Sidney (1865) 4 Sw & Tr 178, 34 LJPM & A 122*** *"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."*
1973	***Matrimonial Causes Act 1973 (MCA)*** enacted.
1984	***Matrimonial and Family Proceedings Act 1984 (MFPA)*** enacted. Imposed a duty to consider a clean break and the power to dismiss spousal maintenance claims. 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..."* 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.
1997	***G v G [1997] 1 FLR 368*** Term orders deemed inappropriate if the recipient could not adjust within the fixed term.
2000	*White v White [2000] UKHL 54, [2000] 3 WLR 1571 (26th October 2000)* Landmark ruling that created the "yardstick of equality".
2006	*Miller v Miller; McFarlane v McFarlane [2006] UKHL 24* Influenced by the non-discriminatory principles laid down in *White*. Periodical payments not limited to needs only and a term order not appropriate where insufficient capital for a clean break.
2008	***The recession*** The impact of the recession made it more difficult to achieve a clean break, leading to an increased reliance on spousal maintenance orders.
2012	*L v L (Financial Remedies: Deferred Clean Break) [2011] EWHC 2207 (Fam), [2012] 1 FLR 1283* 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.
2013	*Matthews v Matthews [2013] EWCA Civ 1874* 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.
2014	*Chiva v Chiva [2014] EWCA Civ 1558* 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.
2014	*Murphy v Murphy [2014] EWHC 2263 (Fam)*
2014	*SS v NS (Spousal Maintenance) [2014] EWHC 4183 (Fam)*
2015	*Wright v Wright [2015] EWCA Civ 201*
2015	*WD v HD [2015] EWHC 1547 (Fam)*

INTERNATIONAL SPOUSAL MAINTENANCE BAROMETER

In this review of the changing attitudes towards the provision of spousal maintenance, the Penningtons Manches international family law team looks at the current legislation and case law across 16 jurisdictions to provide a global barometer of the spectrum from lifelong support to self-sufficiency with a particular focus on England and Wales.

There are a wide range of international approaches to the calculation and duration of income provision after divorce or dissolution. Much depends on the rationale and purpose for which ongoing maintenance has been provided and the way in which case law and socio-economic factors have influenced the law through modern times.

Although some jurisdictions view maintenance as restorative only, others seek to achieve parity of income with the wealthier spouse in the name of fairness. Some countries have strict rules which limit both the amount and period over which such payments can be made. Little or no ongoing maintenance may be possible in some countries.

Most jurisdictions consider the length of marriage or partnership to be an important factor in determining ongoing maintenance. The relationship itself will also have created financial inter-dependence between the parties, the consequences of which outlive the partnership itself and, the longer the tie between the parties, the higher the moral obligation for the financially stronger party to help support the weaker one.

THE EU MAINTENANCE REGULATION

Council Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions relating to maintenance obligations has been in force in 27 EU Member States since June 2011. It is designed to automatically enforce maintenance orders made in one Member State in any other Member State without the need for the maintenance creditor to undergo a further formal process.

"Maintenance" has a wide range of meanings in different Member States and not only covers income (as in England and Wales) but also other financial provision such as lump sum payments intended as support. There has been continued legal argument over what constitutes support (and therefore maintenance under the Regulation) as opposed to a pure division of assets (which does not).

The Regulation also provides that if a maintenance decision has already been made in one Member State, it cannot be dealt with again in another, save for enforcement purposes.

Cases such as *AB v JJB (EU Maintenance Regulation: modification application procedure) [2015] EWHC 192 (Fam)* where Penningtons Manches acted for the successful wife, have clearly established that, provided jurisdiction is established under Article 3, it is now possible for foreign maintenance orders to be modified or varied in another Member State. Any revised award is likely to be based, as a starting point, on the quantum of the foreign order.

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, Finland and Japan are much closer to the self-sufficiency end.

The court adopts a highly discretionary approach in England and Wales. The lack of formula or statutory limitation means that the court can fit the outcome to each case's facts and circumstances. The court can order:

- no maintenance or
- maintenance for life (index-linked to inflation to future-proof its value) or
- maintenance for a specified term (for example, until children reach maturity) either with the possibility that the term can be extended or not.

The court can also decide upon the level of income provided by the paying party using the wide discretion provided by statute. Maintenance in high net worth cases can reach significant six-figure sums.

In England and Wales ongoing maintenance automatically ends on the re-marriage of the receiving party (usually the wife). This is the case even if the wife marries a pauper. This stems from the historical notion that the wife is to be "looked after" by her husband. Once re-married, the responsibility passes to the new spouse irrespective of his wealth or lack of it.

MOST DEPENDENT

INDIA

Family law is governed by the personal laws of the parties depending on their religion and/or the Special Marriage Act 1954 for all religions. For example, under Hindu law and the Special Marriage Act, maintenance is generally awarded on a joint lives basis.

Maintenance now provides income in line with the lifestyle during the marriage. In 2015 the Law Commission recommended that there was "sufficient basis in Hindu law" for joint life maintenance to extend to "joint Hindu family" members.

CASE LAW – See cases of *Vinny Parmvir Parmar v Parmvir Parmar (2011) 7 Scale 741* and *Jasbir Kaur Sehgal v District Judge, Dehradun & Ors. (1997) 7 SCC 7*

USA CALIFORNIA

Ongoing maintenance is ordered in most cases but courts can advise supported spouses to make efforts to become self-supporting.

A marriage of ten years or more is considered a long marriage under California law and the court has the power to make or modify spousal support orders in the future.

CASE LAW – *Re Marriage of Gavron (2003) CA 3rd 705 and Marriage of Hibbard (2015) 212 CA 4th 1007*

SINGAPORE

Wives often receive ongoing maintenance but are expected to make a reasonable effort to get a job.

The court takes a discretionary approach without reference to a single formula. It will take into account the capital award and may supplement a low capital award with a higher maintenance award (and vice versa).

CASE LAW – The court looks at the standard of living during the marriage *Lee Bee Kim Jennifer v Lim Yew Khang Cecil [2005] SGHC 209*

REPUBLIC OF IRELAND

The obligation to maintain a dependent spouse continues after divorce until death or remarriage but court ordered maintenance is unusual where the dependant spouse is cohabiting with a new partner.

There is no "clean break" under Irish law. Even where there is a full and final settlement clause in any divorce agreement, the courts can still make a change to any maintenance order.

ENGLAND AND WALES

Historically, maintenance has commonly been awarded and there is a very wide discretion for the courts to award to the weaker financial party. In the past, the wife, as the homemaker, required lifelong support, but there is now an increasing emphasis on achieving financial independence.

Cases have recently emphasised the statutory test of whether ongoing maintenance is required to alleviate "undue hardship".

CASE LAW – The case of *McFarlane v McFarlane; Parlour v Parlour [2004] EWCA (Civ) 872* provided that the court can order spousal maintenance over and above income needs to allow the financially weaker party to save capital to achieve a clean break later on if necessary.

NIGERIA

Spousal maintenance is quite commonly awarded and the civil court has the power to order maintenance for an ex-spouse or child.

Nigeria has over 250 ethnic groups. Many family law issues are decided according to customary law or Sharia law which are valid insofar as they do not conflict with natural justice, equity and good conscience.

CASE LAW – See *Odusote v Odusote (2013) 3 NWLR (pt. 1288) 478*

NEW ZEALAND

Ongoing spousal maintenance is awarded in limited circumstances for a temporary period but the amount can be generous if the standard of living was high during the union.

The court's starting point when deciding the level of ongoing maintenance will be the gap between a party's reasonable needs and what the party can provide for themselves to meet those needs.

CASE LAW – *RK v DK [2011] NZFLR [468]*

GERMANY

Emphasis on financial autonomy post-divorce. Maintenance is only awarded until financial independence is achieved.

It is generally the case that judges in the south of Germany are more generous in awarding maintenance for longer. From birth to three years old, the parent with care has the right to maintenance.

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 NS* is a reminder that the possibility of a transition to independence should be considered in every case, even if this involves some (not undue) hardship for the recipient.

In SS v NS, a term order of 27 years was cut to 11 and annual income of £60,000 to £30,000. The statutory obligation to provide maintenance to avoid only undue hardship was emphasised: "A degree of (not undue) hardship in making the transition to independence is acceptable". The recipient had to apply to extend the term order and show why it had been impossible to achieve financial independence. This burden on the recipient contrasts with earlier cases such as G v G [1997] 1FLR 368.

The reported cases suggest that from 2014 onwards, the judicial appetite for ex-spouses to provide for themselves has increased. The austerity mentality of recent years appears to have permeated the judicial consciousness so that, where the court once took a very broad brush approach, it now looks more carefully to determine whether each party can realistically provide for themselves.

In *Wright v Wright*, the Court of Appeal's confirmation of a decision that a wife should become self-sufficient within a two-year period indicates a trend against joint lives maintenance orders; a growing expectation that the financially dependant party will realise his or her earning capacity; and a reminder to consider a clean break in every case.

In Wright in 2015, a joint lives maintenance order was made. There was a three year old child and no real evidence about when the wife would be self-sufficient. She was told by the district judge that: "There is a general expectation in these courts that once a child is in year 2, most mothers can consider part-time work consistent with their obligation to their children." A term order of six years was later substituted with the level of payment decreasing over the term. The court was critical of the wife's lack of effort to find work and her over-egged income needs.

The circumstances when the safety net of nominal maintenance (to keep the possibility of a future upwards variation if needed) is appropriate was addressed in *WD v HD*. The court imposed a clean break on a wife with two minor children dismissing her nominal maintenance claim.

"The statute says that there should be the termination of periodical payments unless the payee cannot adjust without undue hardship to their termination. The wife has agreed to nominal periodical payments. It might, rhetorically, be asked how, in such circumstances, she can say that she cannot adjust without undue hardship to their termination."

However, the Family court will always maintain a discretionary approach. This is not the end of joint lives orders – as evidenced in *Murphy v Murphy* a few months before *Wright* – but recent case law shows that gone are the days when the weaker financial party could expect lifelong financial support without further examination of their earning potential and the financial adjustments that they might make to become self-sufficient.

The very different approaches to the question of self-sufficiency, even in our home jurisdictions, will continue to have an impact on the rulings of family law. Any expectation that recipients of maintenance should return to work post-divorce necessarily factors in practical extra-judicial considerations such as:

- the cost of child care – which is much higher in England than in Continental Europe
- the practical support available for (usually) wives seeking employment after a significant break from the workforce
- the availability of financial support from other sources to facilitate a transition from financial dependency (in the relationship) to income autonomy (after it ends)
- the marked pay gap that still exists between men and women.

Under Universal Credit, spousal maintenance will count as part of "household income" reducing pound for pound the credit received. Without government support, recipients may have to rely more on their ex-spouse to fill the gap between what they can provide for themselves and what they need to live on. This may make the goal of financial independence unrealistic.

Of course, continuing inequality makes the statutory goal of income autonomy hard to achieve. And just as family law in England and Wales does not operate in a domestic vacuum but is influenced and developed alongside international trends, there must be continuing social and fiscal changes outside the family court room to make the goal of self-sufficiency achievable.

MOST SELF-SUFFICIENT

SCOTLAND

Maintenance only awarded in limited circumstances and for a maximum of three years – the emphasis is on financial independence and a clean break.

In Scotland, an obligation to maintain an ex-spouse/partner ends not only on the re-marriage/partnership of the recipient but also if they enter into a de facto relationship with another.

CASE LAW – The cases of *B v B 2012 Fam LR 65* and *W v W 2012 Fam LR 99* illustrate the court's rationale when considering the issue of post-divorce/dissolution financial support.

FRANCE

Lifetime support is only awarded in extreme circumstances and, even then, not at a level to provide support at the standard of living enjoyed during the relationship.

Spouses are bound to provide financial support and assistance to the other during the marriage under the Civil Code. The court can order one spouse to pay maintenance to the other even during the couple's marriage.

USA TEXAS

1995 maintenance statute provides limited support but spouses have to show they have tried to earn enough to support themselves.

The dependent spouse must prove that they lack sufficient assets to provide for their minimum reasonable needs.

RUSSIA

Very limited legal grounds for spousal support and any awards are for modest amounts.

The focus is on maintenance meeting the basic needs of the recipients – not on the standard of living during the marriage.

JAPAN

No spousal maintenance after divorce but a legal obligation to share the expenses arising from the marriage – even after separation.

The fact that ongoing maintenance is very rarely available post-divorce makes separation rather than divorce an attractive financial option to the less wealthy party, particularly in circumstances when the division of assets will not provide sufficient resources to meet income need.

FINLAND

Both parties are expected to work and support themselves. Court-ordered maintenance is possible but is very rare.

The obligation for the parties to maintain each other during the relationship applies only during marriage or a registered partnership. There is no such duty for other types of relationship. In other Scandinavian countries the law assumes that, save in special cases, each party can get on with their lives without further obligation.

CASE LAW – See the decision of the Finnish Supreme Court in *KKO:2010:3* regarding the very rare situations in which ongoing maintenance is ordered.

UAE

Family law is based on and guided by Islamic Sharia law. There is no concept of sharing income on divorce or ongoing maintenance, rather any payments are compensatory. A father must provide support for children but a mother can only claim a modest 'carer's' allowance.

Non-Muslim ex-pats can ask for the laws of their home countries to be applied in the UAE courts, but it is rare for foreign laws to be applied.

ISRAEL

There is no form of post-divorce spousal support under Jewish law. Cohabiting couples (so called "common law" couples) are actually treated more generously in terms of post-relationship financial income support.

Applications for divorce are dealt with by the Jewish, Islamic and Christian authorities according to the religion of the divorcing spouses. Spousal maintenance can be dealt with by the civil courts as well as religious legal systems.

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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.

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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.

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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

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