

Spousal maintenance on marital breakdown – how to protect the financially weaker spouse?

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London (England) – “Divorce Capital of the World” (for the weaker spouse)

1. England has a reputation for being the divorce “capital” of the world. This is for two reasons.
2. First, it is relatively easy to secure jurisdiction. An individual's entitlement to divorce here is derived from vaguely defined concepts about their connection to England, known as their "habitual residence" (in simple terms, where they usually live) and "domicile" (where they consider their permanent home to be). The parties' nationalities, birthplaces, place of marriage and where they have lived for the majority of their lives, may prove irrelevant if one or both parties is habitually resident or domiciled here.
3. Second, our law is regarded as the world's most generous to the financially weaker spouse (who I will refer to as “the wife”) when determining settlements on divorce. English law regards "breadwinning" and "homemaking" as being of equal importance. The starting point is that the capital built up during a long marriage will be split equally regardless of who “earned” the money. The English Court has

jurisdiction over assets held worldwide. Generous provision is also made for spousal maintenance, which can be made on a lifelong basis at a high level.

High profile cases

4. In 2014 financier Sir Chris Hohn a hedge fund manager was ordered to hand over about a third of a £1 billion fortune to his wife. The 49-year-old had wanted half of the money, but the judge awarded her 36 per cent of her husband's fortune - £337 million - following a trial in London. Perhaps the most surprising thing is that many observers believed she could have appealed this award, on the basis that there should have been equal division.
5. The "Laura Ashley" divorce (Chai v Peng). The wife of the owner, a former Miss Malaysia, battled for 3 years and spent £6 million in legal fees (funded by way of "maintenance" orders but unfortunately not with this firm!) to secure the English Court's jurisdiction. She finally secured jurisdiction, enabling her to pursue her financial claim, in January 2016.

Protection of the financially weaker spouse in England through spousal maintenance

6. I am now going explain the generous provision available in England for maintenance.
7. What is maintenance? There are two types of maintenance:
 - a. maintenance for children; and
 - b. spousal maintenance.

8. Maintenance for children is dealt with by a government imposed scheme. It is based on a set percentage of the payer's gross income. This is adjusted to reflect the amount of time children spend in each parent's care. If a "maximum" assessment is made because a husband's income exceeds £3,000 per week, it can be topped up by application to the court for additional payments.

9. Spousal Maintenance is also available. On a divorce in England, the court can order different "tiers" of maintenance for the financially weaker spouse:
 - a. No maintenance (bronze medal) – a "clean break". This means there are no ongoing payments and no future claims can be made.

 - b. Maintenance for a term (silver medal) – Maintenance can be ordered for a fixed period (e.g. until a child finishes university or the husband's retirement). The term can be extendable, so that a wife can apply to continue receiving payments. Alternatively the court can order at the outset that no application can be made to extend the term.

 - c. Joint lives maintenance (the "gold medal"). This continues until the husband or wife's death, a further order of the court or the wife's remarriage. This is most commonly ordered in cases where a wife has acted as a "homemaker" and the husband has been primary financial provider.

10. What is the reason for spousal maintenance? Is it to support the wife for the rest of her life at the standard of living enjoyed during the marriage? Is it to “share” in the husband’s continued wealth generation after separation? Or, is it a “safety net” to meet basic needs to enable separating families to move towards independent living?
11. The English House of Lords (now the Supreme Court) has said that maintenance can compensate a financially weaker spouse for giving up a career, by being paid at a higher level. Also, in a “big money” case the level of spousal maintenance can exceed a spouse’s actual needs, so that savings can be made for retirement.¹
12. The court can decide on which “tier” of maintenance should apply using the wide discretion applied by the individual judge. In a recent case the court ordered a clean break (no maintenance) even where there were two young children and the mother was not working. The Court of Appeal held that this decision was within the Judge’s discretion.² This can make results unpredictable and negotiations difficult.
13. The level of maintenance is also discretionary and up to the individual judge to decide. There is no statutory scheme. Maintenance in high net worth cases can reach significant six-figure sums, as it is not limited to basic needs.

¹ *McFarlane v McFarlane; Parlour v Parlour* [2004] EWCA (Civ) 872

² *Matthews v Matthews* [2013] EWCA Civ 1874 CA

14. The Court has regard to all the circumstances of the case, including the length of the marriage, the financial resources (including income and earning capacity), the ages of the parties and the standard of living enjoyed during the marriage. The most important factor is that of needs.
15. In practice, this comes down to the circumstances of each individual's case: establishing the financial resources of the parties, and then analysing schedules of expenditure prepared by each party.
16. Maintenance is always variable, so if the paying spouse's income drops, the court can order payments to be reduced. The payments can be "capitalised". That means a lump sum payment is calculated in place of the remaining period of maintenance, giving the parties a "clean break".

How to protect the financially weaker spouse - Practical Steps

17. Secure the jurisdiction, if possible. In an international case, look carefully at whether there may be jurisdiction in England and Wales for divorce and financial remedies. Do the parties have a home in England, or other connections to the country?
18. Secure the home. Applications can be made for notices at the Land Registry to protect the wife's occupation of properties which are not owned in her name.
19. Applying for interim maintenance (Maintenance Pending Suit). Interim maintenance can be obtained, even if the issue of where the divorce

takes place has not yet been determined. This maintenance can also cover legal costs.

20. Obtain disclosure and secure assets. The financially weaker spouse can be protected by emergency measures in the English Court:

- a. Freezing orders;
- b. Injunctions to prevent transfers of assets to third parties;
- c. Orders against third parties to obtain information or disclosure;
and
- d. Enforcement measures to secure disclosure and payment of maintenance. This can include committal to prison for non-payment.

The International Perspective

21. Penningtons Manches have recently undertaken research to compare the approach to spousal maintenance in 16 different jurisdictions: from “most generous”, or “most dependent” depending on your point of view, to “least generous” or “most self-sufficient”, again depending on your point of view. That research reveals a wide difference in approaches.

- 1) Israel - No form of maintenance available under Jewish law
- 2) UAE – Under Shariah law, no maintenance possible post-divorce.

- 3) Finland – Both parties are expected to work and support themselves. Court-ordered maintenance is possible but does not happen in practice.
- 4) Japan – No spousal maintenance after divorce but a legal obligation to share the expenses arising after the marriage, even after separation.
- 5) Russia – Very limited legal grounds for spousal support and any awards are for modest amounts**
- 6) US – Texas – Limited support – but both spouses have to show that they have tried to earn enough to support themselves.
- 7) 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.
- 8) Scotland – Only awarded in limited circumstances and for a maximum of 3 years.**
- 9) Germany- Emphasis on spousal independence after divorce. Maintenance only awarded until financial independence achieved.
- 10) New Zealand – Ongoing maintenance is awarded in limited circumstances for a temporary period

- 11) Nigeria – Spousal maintenance quite commonly awarded.
- 12) **England and Wales – Historically, maintenance commonly awarded, even for life. Now an increased emphasis on achieving financial independence.**
- 13) Republic of Ireland – The obligation to maintain a dependant spouse continues after divorce. There is no “clean break” available under Irish law and maintenance continues until death or remarriage.
- 14) Singapore – Wives often receive ongoing maintenance but are expected to make a reasonable effort to get a job.
- 15) US – California – Ongoing maintenance awarded in most cases.
- 16) India – Highly generous provision. Maintenance can be not only for a spouse but also extend to members of the spouse’s family.

Change in approach in England

22. In England there has been a change in approach by the judiciary in recent cases towards self-sufficiency and away from ongoing dependence.

23. Lifelong awards of maintenance are being discouraged. Instead, the court is encouraging the transition to independent living. Recent cases

suggest that maintenance should now be calculated based on financial needs alone, rather than the principles of compensation and sharing³.

24.This reflects a society that is changing. 25% of UK FTSE 100 public company directors are women, up from 12% in 2011. Women are more often the high earner/breadwinner.

25.Similarly, care of children is increasingly shared between the father and mother.

26.In the recent case of *Wright*, the court confirmed that a wife should become self-sufficient within a two year period (she had failed to find work for 11 years after her divorce). This underlines a growing trend to require a spouse to realise her earning capacity. This was reported in the UK newspapers as the judge telling the wife to “Get a job!”

27.The English court is required to consider the possibility of a clean break in every case, provided that there is no “undue hardship”. This requirement has been somewhat ignored until recently. The change has been in the court’s acceptance that this means that **some** hardship is actually acceptable.

28.The way forward may be a more scientific calculation of needs. The Law Commission (the body which recommends changes to the law) has recommended investigating whether a formula to calculate maintenance can be devised. This guidance could give a range of outcomes, in figures, within which the separating couple might negotiate.

³ SS v NS (Spousal Maintenance) [2014] EWHC 4183 (Fam) – Mostyn J

29. Despite these changes, England is likely to remain an attractive jurisdiction for the financially weaker spouse, as seen by the cases (and huge awards) discussed earlier.

What about the financially stronger spouse?

30. I am going to conclude by asking how to protect the financially stronger spouse from inflated claims for maintenance in England, and what practical steps can be taken.

31. First, take early English advice. This is particularly the case if the parties have a connection to England or have moved to England. It may be that jurisdiction can be secured in a jurisdiction less generous than England. Time is often of the essence, particularly in European countries, where the first court in which proceedings are filed can have exclusive jurisdiction.

32. Second, consider a prenuptial or postnuptial agreement. Prenuptial and postnuptial agreements are given increasing weight by the English Court.

33. Prenuptial agreements can specify the amount of maintenance payable and whether there will be a “clean break”. A properly drafted prenuptial agreement is likely to be upheld. However, ultimately, the English Court will not leave a wife in a position of real need, and can override an agreement that is unfair. In those circumstances, a claim for spousal maintenance would still be available.

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