IAFL Introduction to European Family Law
'Virtual Kyiv' Webinar

Maintenance: current thinking, and where is it going?

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Supporting Documents

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Maintenance – current thinking, where is it going?

I. Introduction

1. This is a short presentation on current trends in the court's approach to spousal maintenance orders in financial remedy proceedings in England and Wales. It will cover:
    a. Established principles;
    b. Current thinking;
    c. Possible direction of the law in the future;
    d. Cross-border enforcement of maintenance decisions post-Brexit

2. This handout also includes a brief summary of the rules applicable to child maintenance. However, these will not be explored during the presentation.

II. Spousal Maintenance: established principles

3. The court's power to order a spouse to pay periodical payments to the other is found in section 23(1)(a) of the Matrimonial Causes Act 1973 ('MCA 1973'). A corresponding power exists under section 72/Schedule 5 of the Civil Partnership Act 2004, which now allows both homosexual and heterosexual couples to enter into a civil partnership.

4. When determining what order, if any, the court should make under s. 23(1)(a) MCA 1973, it is guided by the principle of fairness. It must have regard to all the circumstances of the case, first consideration being given to the welfare of any minor child of the family (s. 25(1) MCA 1973). In particular, the court must have regard to the following factors listed in section 25(2) MCA 1973:

> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
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> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
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> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
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> (d) the age of each party to the marriage and the duration of the marriage;
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> (e) any physical or mental disability of either of the parties to the marriage;
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> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit . . . which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

5. Where the court is minded to make an order for spousal maintenance it must consider "whether it would be appropriate to require those payments to be made only for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party" (s.25A(2) MCA 1973).

6. The term of an order for spousal maintenance can be fixed or open-ended (so-called 'joint-lives order'). If it is fixed, the term can be extendable or non-extendable pursuant to s.28(1A) MCA 1973. If it is extendable, the payee can apply to extend the duration of the term before its expiry. An "exceptional justification" is required to extend a term order (Fleming v. Fleming [2004] 1 FLR 667 per Thorpe LJ at [12], approved in Yates v. Yates [2013] 2 FLR 1070, CA per Thorpe LJ at [9], but doubted in McFarlane v McFarlane [2009] 2 FLR 1322 and SS v. NS (Spousal Maintenance) [2015] 2 FLR 1124). Whether the term of the order is fixed or not, it does not extend beyond the death of either of the parties to the marriage or the re-marriage of the payee (s.28(1)(a) MCA 1973), or a further order.

7. Importantly, the court has a duty to consider whether a 'clean break' would be appropriate (s. 25A(1) MCA 1973). The importance of the 'clean break' principle was emphasised by Lady Hale (as she then was) in the House of Lords decision of Miller v. Miller, McFarlane v. McFarlane [2006] UKHL 24. She stated:

> [125] "In its original form, s 25 of the 1973 Act directed the court to try and place the parties in the financial positions in which they would have been had the marriage not broken down and each had discharged their financial obligations towards the other. This made perfect sense when the assumption was that the financial obligations undertaken, mainly by the husband, at marriage endured for life even if the marital consortium came to an end (…) But it made less sense once the basis of divorce was that the marriage had irretrievably broken down, the law no longer drew formal distinctions between the obligations of husbands and wives, and the court had a wide range of powers to distribute their resources in such a way as to enable each to go his or her separate way.
>
> [126] Hence the assumption of lifelong-obligation was repealed by the Matrimonial and Family Proceedings Act 1984, following the report of the Law Commission on Family Law – The Financial Consequences of Divorce Law Com No 112 (HMSO, 1981). The Commission's reasoning (see para 17) was essentially pragmatic. **In the great majority of cases, it simply was not possible to enable two households to continue to live as if they were one. Nor in many cases was it desirable to perpetuate their mutual interdependence. The whole point of a divorce is to enable people whose lives were previously bound up with one another to disentangle those bonds and lead independent lives.** But at least the discredited objective had encouraged a sort of equality: if the marriage had not broken down, the

couple would still be enjoying the same standard of living. The object, therefore, was to get as close as possible to that for both of them. John Eekelaar dubbed this the 'minimal loss' principle (I used to refer to it as the principle of 'equal misery').

(…)
[133] **Section 25A is a powerful encouragement towards securing the court's objective by way of lump sum and capital adjustment (which now includes pension sharing) rather than by continuing periodical payments. This is good practical sense. Periodical payments are a continuing source of stress for both parties. They are also insecure. With the best will in the world, the paying party may fall on hard times and be unable to keep them up. Nor is the best will in the world always evident between formerly married people. It is also the logical consequence of the retreat from the principle of the lifelong obligation. Independent finances and self-sufficiency are the aims**. (…)"

8. Having identified the three main rationales for redistribution of financial resources upon divorce, namely needs, compensation and sharing, Baroness Hale added:

[144] "(…) **in general (…) it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation.** (…)

[154] There is obviously a relationship between capital sharing and future income provision. **If capital has been equally shared and is enough to provide for need and compensate for disadvantage, then there should be no continuing financial provision**."

9. In practice, whether or not an order for spousal maintenance is made, and if so, for how long and how much, is determined by reference to the parties' respective needs and earning capacities, the length of the marriage, the age of the parties, and the parties' standard of living. The relevant principles were succinctly summarised by Mostyn J. in SS v. NS (Spousal Maintenance) [2015] 2 FLR 1124 at [46] as follows:

"Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:

i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the Claimant. Here the duration of the marriage and the presence of children are pivotal factors.

ii) **An award should only be made by reference to needs**, save in a most exceptional case where it can be said that the sharing or compensation principle applies.

iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

iv) **In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without**

undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.

v) **If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former**.

vi) **The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence**.

vii) The essential task of the judge is not merely to examine the individual items in the Claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the Respondent's available income that should go to the support of the Claimant.

viii) Where the Respondent's income comprises a base salary and a discretionary bonus the Claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis.

ix) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.

x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.

xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party."

10. In Quan v. Bray & Others [2019] 1 FLR 114, FD, Mr. Justice Mostyn went even further than point (v) above, by stating that joint-lives orders are "exceptional" (at [48]-[49]). These comments echo the spirit of the Supreme Court's recent decision of Mills v. Mills [2018] 2 FLR 1388, SC (see below).

III. Spousal Maintenance: current thinking

11. There are three important areas of development:
    a. Relationship between capital and income
    b. Applications to vary an existing order for spousal maintenance
    c. Shift away from joint-lives orders?

Relationship between capital and income

12. The Court of Appeal in Waggott v. Waggott [2018] 2 FLR 406, CA recently held that an earning capacity built up during the course of the marriage was not an asset that should be shared between the parties. The court's reasons were as follows (per Moylan LJ at [123]-[125]:

[123] **Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break.** In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in Jones v Jones.

[124] **Looking at its impact more broadly, it would apply to every case in which one party had earnings which were greater than the other's, regardless of need. This could well be a very significant number of cases. Further, if this submission was correct, I cannot see how this would sit with Lady Hale's observation in Miller that, even confined to "(i)n general", "it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation"** (para 144) or her observation as to the effect of "(t)oo strict an adherence to equal sharing" (para 142).

[125] **Additionally, it would inevitably require the court to assess the extent to which the earning capacity had accrued during the marriage. This would require the court to undertake the exercise to which there are the powerful objections** referred to by Wilson LJ in Jones v Jones. Where would the court start and by reference to what factors would the court determine this issue?

13. This decision is consistent with the principle enunciated in Jones v. Jones [2011] 1 FLR 1723, CA, that a capital value should not be ascribed to a spouse's earning capacity. The Court of Appeal's ratio was applied in O'Dwyer v. O'Dwyer [2019] 2 FLR 1020, FD. Francis J stated at [22]:

> "it is now settled law that income cannot be shared. An award of periodical payments (absent rare compensation cases) must be based on properly analysed arithmetic reflecting need, albeit that the judge is still left with a significant margin of discretion as to how generously the concept of need should be interpreted".

14. English courts continue to enjoy a very wide discretion in assessing "needs". In FF v KF [2017] EWHC 1093 (Fam) Mostyn J stated at [18]:

> "**So far as the "needs" principle is concerned there is an almost unbounded discretion**. The main rule is that, save in a situation of real hardship, the "needs" must be causally related to the marriage. Like equity in the old days, the result seems to depend on the length of the judge's foot. It is worth recalling that Heather Mills-McCartney was awarded over £25m to meet her "needs" (McCartney v McCartney [2008] EWHC 401 (Fam)). Mrs Juffali was awarded £62m to meet her "needs" (Juffali v Juffali [2016] EWHC 1684 (Fam)). In the very recent case of AAZ v BBZ [2016] EWHC 3234 (Fam) the court assessed the applicant-wife's "needs" in the remarkable sum of £224m. **Plainly "needs" does not mean needs. It is a term of art. Obviously, no-one actually needs £25m, or £62m, or £224m for accommodation and sustenance. The main drivers in the discretionary exercise are the scale of the payer's wealth, the length of the marriage, the applicant's age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise**."

Applications to vary an existing order for spousal maintenance

15. The Supreme Court in Mills v. Mills [2018] UKSC 38 recently reaffirmed three Court of Appeal authorities (Pearce v. Pearce [2003] EWCA Civ 1954, North v. North [2007] EWCA Civ 670 and Yates v. Yates [2012] EWCA Civ 532) supporting the principle that a payor should not indemnify a payee for her poor financial decisions on an application by the payee to increase the quantum, or extend the term, of an order for spousal maintenance. The question before the Supreme Court was:

> "In circumstances in which at the time of a divorce a spouse, say a wife, is awarded capital which enables her to purchase a home but later she exhausts the capital by entry into a series of unwise transactions and so develops a need to pay rent, is the court entitled to decline to increase the order for the husband to make periodical payments to her so as to fund payment of all (or perhaps even any) of her rent even if he could afford to do so?"

16. The Supreme Court held that the answer was yes. Lord Wilson stated [at 40]:

> "By its terms that question asks only whether a court would be "entitled", rather than obliged, in the circumstances there identified to decline to require the husband to fund payment of the rent. Its reference to the court's entitlement to do so serves to respect the wide discretion conferred upon it by section 31(1) and (7) of the Act in determining an application for variation of an order for periodical payments. But, (…) the Court of Appeal [in Pearce, North and Yates] has expressed itself in forceful terms; and a court would need to give very good reasons for requiring a spouse to fund payment of the other spouse's rent in the circumstances identified by the question. A spouse may well have an obligation to make provision for the other; but an obligation to duplicate it in such circumstances is most improbable."

17. Accordingly, the judge at first instance had been entitled to decline to vary the order for spousal maintenance so as to require the husband to pay the wife's rent. The Supreme Court also emphasised that describing "joint-lives order" as a meal-ticket for life was misleading as such orders can always be brought to an end by a further order of the court (at [25]). This comment is however unlikely to do much to ameliorate the negative public perception of joint-lives orders in England in the 21st century.

Shift away from joint-lives orders?

18. Mr. Justice Mostyn's comments in SS v. NS and Quan v. Bray & Others on the "exceptional" nature of joint-lives orders, and the steer in favour of term orders, appears to reflect current social conceptions of the fair distribution of the financial burden between former spouses. The spirit of these comments is echoed in Miller and McFarlane and Mills, and indeed in many civil jurisdictions.

19. See for instance the Swiss approach to maintenance. The Swiss Supreme Court handed down two major decisions on spousal and child maintenance in 2018, published at ATF 144 II 377ss and ATF 144 II 481ss. They stand for the position that the court is guided by the 'clean break' principle. Accordingly, per the Swiss Supreme Court, a mother who has ceased working in agreement with the father in order to become the primary carer of their

child is expected to resume part time work (50%) when the child starts primary school, to increase her working hours up to 80% when the child starts secondary school, and to work full time when the child reaches the age of 16.

20. The Swiss Supreme Court's rationale is that both parents are responsible for meeting the child's needs and to maximise their earning capacity in order to do so. This responsibility flows from their joint parental rights, and generally their joint decision to have a child together. A parent cannot require the other to be responsible for the entirety of the child's needs, the Swiss Supreme Court held.

21. However, Mr Justice Mostyn's comments do not sit comfortably with previous authorities. In C v C (Financial Relief: Short Marriage) [1997] 2 FLR 26, CA, Ward LJ stated (at p.45):

> "the question is whether, in light of all the circumstances of the case, the payee can adjust – and adjust without undue hardship – to the termination of financial dependence and if so when. **The question is, can she adjust, not should she adjust** (…)
> **It is necessary for the court to form an opinion not only that the payee will adjust but also that the payee will have adjusted within the term that is fixed (…) if there is uncertainty about the appropriate length of the term, the proper course is to impose no term but leave the payer to seek the variation** (…)."

22. A similar view was expressed in Murphy v. Murphy [2014] EWHC 2263 (Fam) where the court refused to impose a term expiring when the children of the family finished secondary education. However, the law is clearly moving away from this approach. Term orders are becoming the norm. The courts are also increasingly reluctant to make orders for nominal spousal maintenance (eg. £1 p.a.) as a safety net allowing the payee to bring an application to vary maintenance upwards in the future (see eg. Matthews v. Matthews [2014] 2 FLR 1259, CA, and WD v. HD [2017] 1 FLR 160).

IV. The future: where is it going?

23. The Divorce (Financial Provision) Bill 2017-19, known as 'Baroness Deech's Divorce Bill' has been re-introduced before Parliament on 20 January 2020 for a first reading. It is now titled the Divorce (Financial Provision) Bill 2019-20 and is sponsored by Baroness Shackleton of Belgravia.

24. The bill proposes to introduce a maximum term of 5 years for orders for spousal maintenance, "unless the court is satisfied that there is no other means of making provision for a party to the marriage and that that party would otherwise be likely to suffer serious financial hardship as a result" (section 5(1)(c)). This constitutes an increase from the 3-year limit put forward in the initial version of the bill by Baroness Deech. Incidentally, 3 years is the limit currently imposed by statute on orders for spousal maintenance in Scotland, save in highly exceptional circumstances.

25. The bill has attracted stringent criticism from practitioners. Baroness Hale herself stated that the bill was "more threatening" to the "social security system of the family" than the introduction of no-fault divorce in England. In her speech to the International Centre for Family Law, Police and Practice in July 2019, she also said:

> "I can see the attractions of all of this when set against the agony, the uncertainty and the expense of seeking our tailor-made solutions when the parties cannot be helped to agree something sensible.
>
> "But I question how one size fits all can possibly meet the justice of the case or fulfil the role of the family in shouldering the burdens which it has created rather than placing them upon the state. I fear that it assumes an equality between the spouses which is simply not there in many, perhaps most, cases."

26. The obvious counter-argument is that the "fairness" of a "tailor-made solution" can mean very little to those who have had to spend their live savings on legal fees. Even for those who have the means to litigate, it is questionable whether "fairness" – on which both judges and reasonable people disagree – is invariably preferable to achieving certainty and a measure of fairness, which preserves family savings and family ties, in a way that "fairness" achieved through litigation does not.

27. Independently of the financial viability of litigation, "shouldering the burdens which a family has created" is, with respect, the responsibility of both parents. Unless the law sends a clear signal to both parents that they are jointly responsible for supporting the children of the family, and that they are ultimately expected to support themselves independently of each other, many will fail to organise their married lives in a way that ensures that they do not become dependent on the State to meet their needs in the event of a divorce.

28. As for "equality" between the spouses, on Baroness Hale's own account, that is not what divorce is about. As she stated in Miller and McFarlane: "The whole point of a divorce is to enable people whose lives were previously bound up with one another to disentangle those bonds and lead independent lives."

29. There is also an important gender dimension to this debate. The overwhelming majority of orders for spousal maintenance are in favour of women. Many women nowadays are taking on demanding, remunerative careers placing them on equal, if not sometimes superior, economic footing than their partners. Although it is true that women, by and large, take on a greater share of childcare than men do, this is not invariably the case. As the economic balance of many families has shifted, so have the expectations in relation to gender roles within the family. There has also been an important shift in modern culture towards individualism and rights, and away from responsibilities. Seen against this backdrop, neither the letter nor the spirit of the Divorce Bill is surprising.

V. A note on Brexit

30. Following the United Kingdom's withdrawal from the European Union on 31 January 2020, legal relations between the United Kingdom and the EU are governed by the now concluded Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement').

31. Under the terms of the Withdrawal Agreement, and pending agreement on long term arrangements, the EU Regulations and Directives (or certain provisions of them) referred to in the Commentaries below continue to apply reciprocally until the end of the transition period (31 December 2020). Reference should be made to articles 67 to 69 of the Withdrawal Agreement for the detail of these transitional provisions.

32. Pursuant to art 67(2)(c) of the Withdrawal Agreement the EU Maintenance Regulation continues to apply (so far as reciprocal enforcement and recognition is concerned) to decisions given in legal proceedings instituted before the end of the transition period (31 December 2020), and to court settlements approved or concluded, and authentic instruments established before the end of that period.

33. For the sake of completeness, Art 129(1) of the Withdrawal Agreement provides for continued application during the transition period of the 2007 Hague Maintenance Convention and the 2007 Lugano Convention.

VI. Child Maintenance

34. The court's jurisdiction to make orders for child maintenance is limited. The amount of child maintenance payable is normally calculated by the Child Maintenance Service ('CMS'), a government agency, in accordance with a set formula.

35. The court can only make an order for child maintenance if the CMS has no jurisdiction or if one of the exceptions contained in Section 8 of the Child Support Act 1991 ('CSA 1991') applies.

36. The CMS has jurisdiction if both parents and the child are habitually resident in the UK (s.44 CSA 1991). Further, even when this criterion is met, the CMS has no jurisdiction to make an assessment for child maintenance in shared care cases, where each parent cares equally for the child or children of the family.

37. Where the CMS has jurisdiction, the court can only make an order for child maintenance where one of the exceptions contained in section 8 CSA 1991 applies. These are as follows:

    a. The parties have entered into a written agreement providing for the absent parent to pay child maintenance to the other and the order is in the same terms as the agreement (s.8(5) CSA 1991)

    b. The child is attending a fee-paying school and/or undergoing some other training and the order is made solely for the purposes of requiring a parent to meet the costs of such education/training (s.8(7) CSA 1991)

    c. The child is disabled and the order is made solely for the purpose of meeting the expenses attributable to the child's disability (s.8(8) CSA 1991)

    d. The CMS has assessed the income of the parent against whom an order is sought at the maximum limit (currently £3,000 gross pw/c. £13,000 gross pm.)

    e. Where an order is sought against a parent with care of the Child.

38. A fuller explanation of the rules applicable to child maintenance in England and Wales is beyond the scope of this presentation.

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ALIMONY FOR ADULT SON/DAUGHTER in UKRAINE:
legislative guaranties and judicial approach

Like in most European countries, Ukrainian parents are obliged to support their children up to the legal age of their majority. Generally, all minors (persons up to 18 years old) are entitled to maintenance (alimony).

At the same time, in Ukraine even adults (persons over 18 years old) who continue their education may request alimony from their parents. This right may be executed until a person reaches the age of 23. However, contrary to maintenance of minors, which is imperative for parents, maintenance of adults who continue their education may become obligatory for their parents only if they have an appropriate level of income.

Alimony recovery for a adults may be voluntary or compulsory:

- voluntary procedure – based on the notarized agreement;
- compulsory procedure – based on the court decision.

Thus, upon compulsory procedure the parent with whom the adult child resides, or the adult child himself may apply to the court with the claim on collection of alimony during the period of studying.

The court determines the amount of alimony in a fixed amount or in a share of the payer's income (the applicant chooses the method of recovery at his discretion). Usually alimony in a fixed amount are determined when the payer's income is unstable. If the payer has a regular income, then the alimony is determined proportionally to his / her income. This rule is similar for maintenance of minors and adults within compulsory (court) procedure.

Although Ukraine belongs to the Romano-Germanic legal system, judicial practice and legal conclusions of the Supreme Court play an important role in application of laws.

During the past few years the Supreme Court has issued important legal narratives within the cases on alimony recovery for adults, which shall be taken into consideration by lower instance courts in further similar cases:

- In the resolution dated February 08, 2018 in case № 205/1302/16-c the Supreme Court declared:

  > *"... alimony recovered by the court for the period of education, the duration of which may vary (in particular expulsion from university or upon another grounds) and shall be controlled within enforcement proceedings. The period established by the court for alimony recovery up to 23rd birthday is preclusive and aims to protect the rights of the defendant in the case of continuation of education by the child after reaching the age of 23...".*

  Thus, the Supreme Court explained that the age of 23 is the maximum age for alimony recovery based on continuing of education. However, under certain circumstances (e.g. expulsion from the university) an adult may lose the right to maintenance beforehand. In this case, parents may continue to maintain their adult daughter/son only voluntarily.

- In the resolutions dated February 25, 2020 in case № 521/4397/17 the Supreme Court declared:

  "...If an adult needs financial support in connection with education up to the age of 23, family law provisions regarding additional expenses for the child maintenance do not apply to these legal relations…".

  Thus, upon reaching 18 years a person is entitled only to alimony recovery. However, none "additional expenses" may be recovered in favor of an adult (this special right may be executed only in favor of minors).

- In the resolution dated April 17, 2019 in case № 644/3610/16-c the Supreme Court recognized as false the conclusions made by lower instance courts that during part-time studying the adult plaintiff has the opportunity to work and earn for a living, which release his parents from obligation to maintain him.

  Thus, the Supreme Court confirmed that adults who continue their education have the right to receive financial support from their parents regardless of the form of education (part-time or full-time) and regardless of such adults' ability to support themselves during studies.

- In the resolution dated November 08, 2018 in case № 766/12242/16-c the Supreme Court declared:

  "...when determining the adult's necessity for maintenance, the court shall take into account all sources of his/her income, the obligation of both parents to provide appropriate financial support and their ability to provide it…".

  Therefore, one of the elements which shall be proven within the case on adult's alimony recovery is such adult's necessity for maintenance based on his/her level of income.

- In the resolution dated September 23, 2018 in case № 346/103/17 the Supreme Court declared:

  "... the defendant is not relieved of the obligation to pay alimony during his adult child's vacation period, since such time is included into the period of education…".

  Thus, an adult person entitled for alimony shall receive it, in particular, during the vacation period of education.

- In the resolution dated May 20, 2020 in case № 635/1139/17 the Supreme Court declared:

  "...failure to provide any evidence to prove the circumstances that would indicate that an adult needs financial assistance in connection with education (incurring the cost of food, travel, accommodation, purchase of textbooks, etc.) may be grounds for denial of satisfaction a statement of claim…"

  Thus, the Supreme Court explained that the burden of proving the need for maintenance in connection with education is imposed on the plaintiff.

All abovementioned conclusions of the Supreme Court show that parents' obligation to support their children, who continue education after reaching the age of 18 (regardless of the form of education), arises from the combination of the following legal facts:

1) the children's age is between 18 and 23;

2) the adult children continue their education;

3) the adult's necessity for maintenance in connection with education;

4) the parents' financial ability to provide such support (parents shall be able to work and have the level of income, which allows them to support themselves and their adult children during education).

Separately it should be noted that the court decision on alimony recovery for minors may not be automatically prolonged when the minor reaches the age of 18 and continue education.

In such situation such adult child (or one of the parents) may apply to the court with a new claim for alimony recovery based on the fact of continuing education.

Thus, Ukraine's family legislation related to the issue of children's financial support is rather liberal. In Ukraine, adult persons between age of 18 and 23, who continue their education, may request for financial support from their parents. Such possibility has a positive impact on the quality of Ukrainian higher education, because while receiving alimony the student may be deeply involved into educational process rather than to be bothered by his financial status. Of course, the best way to deal with the issue of alimony is to conclude a notarized agreement on the mutually beneficial terms. However, if no agreement can be reached, the adult child's right for alimony may be protected by court. Judicial practice confirms that upon properly prepared claim the courts usually issue decision in favor of the plaintiffs (alimony recipients).

In most European countries, the duration of formal child support payments ends when the child turns 18. However, this period can be extended until children finish full-time education. The age limit for student's support varies from country to country. For instance, in the UK parents continue paying until the age of 20, in Germany and France – until 25, in the US – until 21. To my mind Ukrainian approach in this regard is quite reasonable and is a sort of golden mean.

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ALIMONY FOR ADULT SON/DAUGHTER in UKRAINE:
Legislative guarantees and judicial approaches

Kyiv, 19th of March, 2021

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LEGISLATIVE GUARANTEES:

Ukrainian parents are obliged to support their children up to the legal age of their majority.

As a general rule, all minors (persons up to 18 years old) are entitled to maintenance (alimony).

At the same time, in Ukraine even adults (persons over 18 years old) who continue their education may request alimony from their parents. This right may be executed until a person reaches the age of 23.

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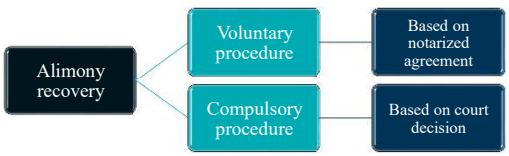
Alimony recovery for an adults may be voluntary or compulsory:



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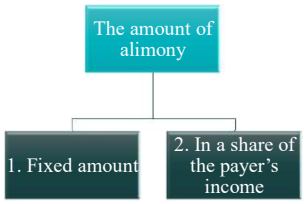


1. Usually alimony in a fixed amount is determined when the payer's income is unstable.

2. If the payer has a regular income, then the alimony is determined proportionally to his / her income.

4

Judicial approach:

- In the ruling dated February 08, 2018 in case № 205/1302/16-c the Supreme Court declared:

"... alimony recovered by the court for the period of education, the duration of which may vary (in particular expulsion from university or upon another grounds) and shall be controlled within enforcement proceedings. The period established by the court for alimony recovery up to 23rd birthday is preclusive and aims to protect the rights of the defendant in the case of continuation of education by the child after reaching the age of 23...".

5

Judicial approach:

- In the ruling dated February 25, 2020 in case № 521/4397/17 the Supreme Court declared:

"...If an adult needs financial support in connection with education up to the age of 23, family law provisions regarding additional expenses for the child maintenance do not apply to these legal relations…".

- In the ruling dated April 17, 2019 in case № 644/3610/16-c the Supreme Court recognized as false the conclusions made by lower instance courts that during part-time studying the adult plaintiff has the opportunity to work and earn for a living, which release his parents from obligation to maintain him.

6

Judicial approach:

- In the ruling dated November 08, 2018 in case № 766/12242/16-c the Supreme Court declared:

"...when determining the adult's necessity for maintenance, the court shall take into account all sources of his/her income, the obligation of both parents to provide appropriate financial support and their ability to provide it…".

- In the ruling dated September 23, 2018 in case № 346/103/17 the Supreme Court declared:

"... the defendant is not relieved of the obligation to pay alimony during his adult child's vacation period, since such time is included into the period of education…".

7

Judicial approach:

- In the ruling dated May 20, 2020 in case № 635/1139/17 the Supreme Court declared:

"...failure to provide any evidence to prove the circumstances that would indicate that an adult needs financial assistance in connection with education (incurring the cost of food, travel, accommodation, purchase of textbooks, etc.) may be grounds for denial of satisfaction a statement of claim…"

8

Judicial approach:

Parents' obligation to support their adult daughter / son, who continue education after reaching the age of 18 (regardless of the form of education), arises upon combination of the following legal facts:

1) daughter's/son's age is between 18 and 23;
2) adult daughter/son continues his/her education;
3) adult's daughter/son necessity for maintenance in connection with education;
4) parents' financial ability to provide such support (parents shall be able to work and have the level of income, which allows them to support themselves and their adult daughter / son during education).

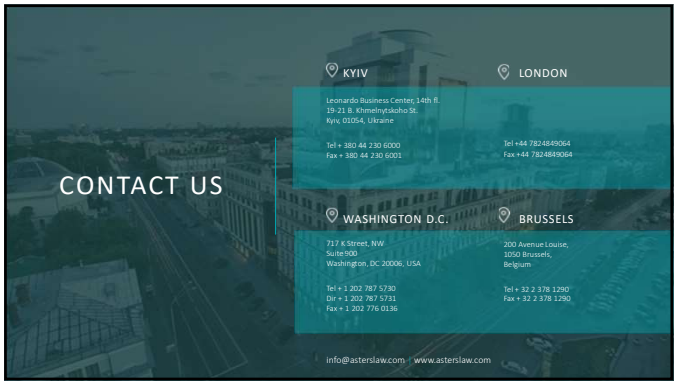
9

CONCLUSIONS:

Thus, Ukraine's family legislation providing children's financial support is rather liberal. In Ukraine, adult persons between age of 18 and 23, who continue their education, may request for financial support from their parents.

Of course, the best way to deal with the issue of alimony is to conclude a notarized agreement on the mutually beneficial terms. However, if no agreement can be reached, the adult child's right for alimony may be protected by court.

10



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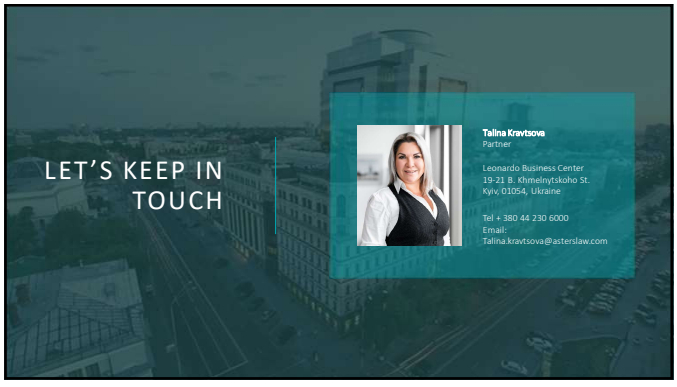

12

MAINTENANCE IN REPUBLIC OF IRELAND
CIARA MATTHEWS

Overview and background

A husband at common law has always been under a duty to maintain his wife but there is no corresponding duty on a wife. He also had a moral duty under common law to maintain his legitimate children.

Article 41.2 of the Irish Constitution provides, under the heading "The Family":

41.2.1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

41.2.2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

When Article 41 was created in 1930's Ireland, it reflected the State's attitude towards women, confined to the home and that it was the State's obligation to ensure her duties there were not neglected. Society has since changed and calls have been made to hold a referendum to amend Article 41 as many consider its provisions sexist and archaic.

It should also be noted that there was a marriage bar in Ireland which required single women to resign from their job on marrying and disqualified married women from applying for roles in the civil service. This was only removed in 1973.

There are a number of pieces of legislation applicable to the provision of maintenance Orders in the Republic of Ireland, some only applicable to spouses and marital children. These have developed and amended since 1964. The Guardianship of Infants Act, 1964 for the first time allowed a parent to apply to the Circuit Court or High Court for a maintenance order for the support of a child in the applicant's custody. The introduction of the Family Law (maintenance of Spouses and Children) Act, 1976, first introduced the law to allow a spouse to simultaneously seek an order for maintenance for him/herself and for the support of a dependent child or children.

Liable parties

There is a legal responsibility on spouses and civil partners to maintain each other.

There is also a legal responsibility on parents, whether married or unmarried, to maintain dependent children

As regards Cohabitants, they must prove they are an economically qualified cohabitant to be eligible to seek "compensatory maintenance Orders".

Legislative provisions

Spouses can seek maintenance and interim maintenance, for themselves, and for children, under the:

1. The Guardianship of Infants Act, 1964
2. Family Law (Maintenance of Spouses' and Children Act 1976) (as amended by the Family Law Act, 1995)
3. The Family Law Act 1995 in the context of a Judicial Separation application or at any time thereafter
4. The Family Law (Divorce) Act, 1996 in the context of a Divorce application or at any time thereafter.

Orders for maintenance of children born outside of marriage can be made under the:

1. The Guardianship of Infants Act, 1964
2. Family Law (Maintenance of Spouses' and Children Act 1976) (as amended by the Status of Children Act, 1987 and The Family law Act 1995).

Orders for compensatory maintenance for an economically qualified cohabitant can be made under:

1. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010.

A cohabitant must be living together 2 years if they have children or 5 years to be a qualified cohabitant. They must also satisfy the court that they are financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship.

The 1976 Act is framed such that only the maintenance recipient can seek maintenance not the maintenance payer. "….*where it appears to the Court on application to it by either parent of the child that the other parent has failed to provide such maintenance for the child as is proper in the circumstances the Court may make an order….*"

The 1995 and 1996 Acts allow the maintenance recipient to apply for a maintenance order as well as the maintenance payer.

There is no need for the parties to be living apart for an Order to be made under any of the Acts.

Certain agreements

If the parties enter into a private contract which provides for the making of a maintenance payment or payments for a spouse or a child or both, the parties can apply under Section 8 and Section 8A of the 1976 Act for a maintenance order in the terms agreed which allows for the enforcement of the maintenance agreement as if an order. The court must be satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the spouses and/or dependent child/ren.

Parties cannot contract out of their obligations to pay nor their entitlement to seek maintenance and any such contractual provision will be deemed unenforceable as contrary to public policy. Maintenance orders are generally interim in nature as they are always open to variation. As such, there is no provision for a clean break in Irish law, however desirable that might be.

Nature of payments

Maintenance can be paid periodically (i.e., weekly, fortnightly or monthly) and/or in a lump sum (including a lump sum by instalments). Generally it is ordered as a periodic weekly or monthly payment by standing order into the payee's bank account.

Maintenance can be a fixed sum each month plus a share of other non-routine costs such as educational costs, medical, dental etc.

Spousal maintenance paid by lump sum only is rare, as there is no provision for a clean break in Irish law. Cases where that might arise would usually be limited to those with significant assets where the parties can be expected to support themselves from those assets.

Capitalised child maintenance is very rarely, if ever, ordered.

A lump sum can be ordered under the Status of Children Act, 1987 where a spouse/parent has failed to make proper contribution towards expenses incidental to the birth of a child and/or the funeral of a child.

Jurisdictional limits

There are different jurisdictional limits in different courts:

The District Court can make maintenance orders as follows:

1. To a maximum of €150 per week per child
2. To a maximum of €500 per week per spouse
3. A lump sum to a maximum of €15,000.

The Circuit Court and High Court have no jurisdictional limits and can grant maintenance orders of any amount. If the property assets exceed €3m then such cases are often brought before the High Court.

Judicial Separation and divorce cases (and maintenance applications made within such proceedings) can only be heard in either the Circuit Court or the High Court.

Calculation of maintenance amount

There is no set formula for determining the maintenance amount. It is not a mathematical exercise. The Judge must consider the following criteria but can decide what weight should be given to each criteria.

The 1976 legislation sets out the criteria the court must take into account including:

- the income, earning capacity (if any), property and other financial resources of the spouse or each parent and the dependent child/children
- the financial and other responsibilities of each spouse towards each other and/or any dependent children of the family or any other dependent children or parent towards a spouse/civil partner/the child/other child

The 1995 and 1996 Act (applicable to Judicial Separation and Divorce cases) sets out the following criteria the court should have regard to:

- the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,
- the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise),
- the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be
- the age of each of the spouses and the length of time during which the spouses lived together,
- any physical or mental disability of either of the spouses,
- the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family,
- the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived together and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,
- any income or benefits to which either of the spouses is entitled by or under statute,
- the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it,
- the accommodation needs of either of the spouses,
- the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of judicial separation concerned that spouse will forfeit the opportunity or possibility of acquiring,
- the rights of any person other than the spouses but including a person to whom either spouse is remarried.

Judges endeavour to balance the reasonable needs and outgoings of the payer and the reasonable needs and outgoings of the payee, taking into account income from all sources available to the parties, including State payments such as Child Benefit.

Judges are less likely award spousal maintenance where the spouses do not have children and both have independent income, even where the income differs.

Judges rarely award spousal maintenance for the benefit of a spouse is physically able to work and earn an income to support themselves and are not over 65 years.

There is a general expectation that a stay at home spouse will have to earn an income to support himself/herself post-separation unless there are very young dependent children whom that parent cares for.

"Term Orders", as exist in England and Wales, are not a feature of Irish Orders. Usually an application has to be made to vary the existing order due to a change in circumstances.
Pre-nuptial agreements will not fetter the discretion of the Court in determining the amount of maintenance to be paid, if any, by one spouse to another on separation or divorce.

Eligibility

A former spouse can apply for maintenance for him/herself even after Divorce so long as the applicant has not remarried.
A parent or a guardian of a child can apply on behalf of a dependent child.
A dependent child is defined as a child under the age of 18 years, or under the age of 23 years if the child is in full-time third level course of education.

If the child is over 18 and under 23 and the financial circumstances do not allow them to attend further education, maintenance can be applied for in order to facilitate further education.

If the child has a mental or physical disability to such a degree that it will not be possible for the child to maintain themselves fully, then there is no age limit for seeking maintenance for their support.

A maintenance Order cannot begin earlier than the date of the application for the order.

Ending of the Order

1. the death of the payer
2. the death of the payee
3. the death of the dependent child
4. the cessation of dependency of the dependent child
5. the remarriage of a spouse insofar as the maintenance order was in favour of that spouse
6. the marriage or civil partnership of a cohabitant

The Order will not automatically end when the payer retires.

Duty of disclosure

Each party must disclose their financial position to the Court.
In the District Court: A Statement of Means setting out details of income and outgoings is required.
In the Circuit or High Court: A sworn Affidavit of Means, setting out assets, income, debts and liabilities, outgoings and pension details.

Securing the maintenance Order

The Court often seeks to secure the order and can do so by a number of means:

1. Securing the order in the event of death by way of requiring life cover or a pension death in service payment to be made available- in Judicial Separation/Divorce cases.

2. Attachment of earnings at source –rare unless there is repeated default
3. Securing the Order on a property or asset of the payer –rare.

There is no maintenance agency.

Discrimination against the children of unmarried parents

Application no. 42734/09 E. *v* Ireland, application was made to the ECHR.

My client had brought a claim for periodic maintenance and a lump sum to the Irish courts to allow her acquire secure accommodation for her son, born outside of marriage. The Circuit Court made such a periodic payments order for €1,200 per month and a lump sum order of €500,000 to facilitate the purchase of appropriate accommodation by the mother for herself and the child. The accommodation purchased was to be held equally by the mother and the child as tenants in common, the child' interest to be held by two trustees on his behalf until he attained the age of 21 years, and thereafter to vest in him absolutely.

The father of the child appealed and the High Court overturned the Circuit Court Order as regards the lump sum. The High Court held that he had to exclude the mother and her child from obtaining any relief under the Guardianship of Infants Act 1964 as the child was a non-marital child. The High Court did not decide on the issue as to whether the Court had jurisdiction under Sections 41 and 42 of the Family Law Act 1995 to provide for the child's needs, including accommodation needs. Those sections would certainly have applied if the child was a marital child and the needs of the child would have been taken into account by the Court.

The mother brought an application to the ECHR arguing a breach of her Article 6, 8 ad 14 rights under the Convention. The Irish State acknowledged that the decision of the High Court gave rise to a situation incompatible with the right of the mother to respect for her family and private life under Article 8, taken in conjunction with Article 14, and the prohibition of discrimination as regards the enjoyment of the rights and freedoms set forth in the Convention.

It offered the mother €12,000 in non-pecuniary damage, to be divided equally between her and her child, €3,500 plus VAT in respect of costs and expenses of the application to the European Court of Human Rights and €20,000 plus VAT in respect of the costs of the domestic family law proceedings.

Importantly, the State committed to modernise and reform outdated elements of Irish family law with the objective of treating children equally, regardless of the marital status of their parents.

The State did this by the Children and Family Relationships Act, 2015, which inserts section 42A of the Family Law Act 1995 to clarify that:

"*Where the court makes an order under subsection (1)* [a lump sum Order] *that is for the benefit of a child, the court may specify in the order the manner in which, or purpose for which, the payment or payments referred to in that subsection are to be applied, including in providing suitable accommodation for the child to whom the order relates*".

Solicitor, Gallagher Shatter, Dublin, Republic of Ireland
19th March 2021