

The law on maintenance should be reformed to provide a formulaic approach

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The law on maintenance remains one of the most contentious aspects of family law, leaving couples grappling with uncertainty. High-profile 'big money' cases dominate headlines whilst the reality for ordinary couples is far less visible. The lack of guidance under s 25 of the Matrimonial Causes Act 1973 ('MCA 1973') results in a system that is unpredictable and costly. Couples find themselves at a loss as to how to fairly resolve maintenance disputes. A formulaic approach to maintenance is required to provide clarity and fairness.

Section 25 of the MCA 1973 sets out a checklist of factors for the courts to consider to award maintenance fairly including the welfare of children, the standard of living, and financial needs of parties. The legislation leaves much to judicial discretion. Over 40 years, three key principles have evolved -needs, compensation, and sharing¹ – to guide judges, but in practice, remain open to vastly differing interpretations. In *Miller V Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 the House of Lords emphasised that 'needs' should consider the standard of living during the marriage, leading to a generous maintenance award for the wife. In contrast, in *Tattersall v Tattersall* [2013] EWCA Civ 774, [2014] 1 FLR 997, where the parties' financial means were significantly more limited, the court adopted a minimalist approach, focusing only on basic needs.

Discretion is intended to allow flexibility, but in practice, leads to inconsistent outcomes. Duration and value of awards can vary dramatically based on judges'

interpretations. In *White v White* [2000] UKHL 54, [2000] 2 FLR, long marriages were awarded substantial maintenance, while short marriages often result in no maintenance, as in *E v L (Financial Remedies)* [2021] EWFC 60, [2022] 1 FLR 952. This uncertainty makes it difficult for couples, especially modest-income households, to predict the financial outcome of their divorce.

The unpredictability of maintenance places a significant burden on divorcing couples. Those without legal representation, often due to legal aid cuts,² are left to navigate a complex system without the appropriate guidance. Combined with the financial and emotional strain of divorce, this often results in lengthy disputes and escalating legal costs.³ In *M v M (Financial Remedies)* [2020] EWFC 41, [2020] 2 FLR 1048, parties incurred costs of £594,000, leaving each spouse with only £5,000.

This 'calamitous waste of resources'⁴ demonstrates how the lack of guidance forces many couples into lengthy litigation.

Mediation and alternative dispute resolution are encouraged, but these methods are most effective when the parties have a clear starting point. Without a formulaic approach, couples struggle to estimate entitlements and are often unwilling to enter productive negotiations. A clear, predictable framework like that prescribed in Canada⁵ would provide a baseline for mediation, enabling couples to begin discussions with a better understanding of their likely financial future.

1 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24; [2006] 1 FLR 1186.

2 Legal Aid, Sentencing and Punishment of Offenders Act 2012, c 10, s 9.

3 Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014)

4 *RM v TM* [2020] EWFC 41, [3].

5 *Spousal Support Advisory Guidelines*, 1st ed (Ottawa: Department of Justice Canada, 2008).

Jurisdictions, such as Australia⁶ and Scotland,⁷ have adopted structured approaches to spousal maintenance, which could serve as models for reform in England and Wales. In Australia, maintenance is time-limited and promotes financial independence, while Scotland's approach provides clearer guidelines for maintenance duration and reflects the evolving financial roles of spouses in modern marriages. Both frameworks offer flexibility in exceptional cases to maintain fairness.

Baroness Deech proposes a 5-year statutory time limit on maintenance⁸ to encourage financial independence and reflect changing gender roles. Judicial trends support this, steering away from 'joint lives' principle of periodical payments towards a 'clean break'. Joint lives principles are out of step with modern family dynamics, where women are more likely to return to work and have high-paid roles. A time limit would provide certainty and prevent the perpetuation of the outdated 'meal ticket for life' stereotype. However, exceptions must exist for cases where longer-term support is necessary, especially when children or caregiving responsibilities are involved.

As Baroness Hale points out, statutory formulas can operate harshly,⁹ particularly where one spouse is disadvantaged due to child-rearing or long-term financial dependence. To ensure fairness, a formulaic approach should leave room for judicial discretion, allowing 'sufficient time'¹⁰ for the recipient to make adjustments such as returning to employment. Flexibility is especially important in cases involving primary caregivers, who are disproportionately women.¹¹ Mostyn J highlights that any formula must avoid

perpetuating outdated assumptions about the roles of men and women.¹²

The Law Commission's 2014 report proposed guidelines for maintenance awards, providing greater predictability, whilst still allowing for flexibility in longer marriages or exceptional circumstances.¹³ These reforms would reduce the emotional and financial strain on divorcing couples. A formulaic approach, perhaps a rebuttable presumption of a statutory time limit, would provide a clear starting point for couples to assess their potential financial entitlements and facilitate negotiations. This would promote gender equality by encouraging parties to strive for financial independence post-divorce.

The discretionary nature of s 25 MCA 1973 continues to perpetuate inconsistent outcomes, leaving couples uncertain about the financial futures. The lack of clear structure often results in unfair and inefficient decisions, especially for those from modest-income households. However, this reform must avoid being purely mathematical.¹⁴ An element of judicial discretion should be reserved for cases involving long-term caregiving or financial dependence to prevent disadvantaging primary caregivers, particularly women. A formulaic approach, with a degree of flexibility, would ensure more consistent and fair outcomes, benefitting both parties and the efficiency of the family courts.

With this annual Competition, 4PB aims to encourage current law students, as well as those who have completed their studies and are actively seeking pupillage, to explore the realm of Financial Remedies law in the hope that they will be inspired to consider practice in this area of law.

6 Family Law Act 1976 (Cth), s 77.

7 Family Law (Scotland) Act 1985, s 9.

8 Divorce (Financial Provision) Bill [HL] (2019), HL Bill 111-I.

9 *Miller v Miller; McFarlane v McFarlane* [127].

10 *D v D (Transitional Maintenance)* [2017] EWFC 26, [44].

11 Stokoe E, McGlynn S, and Marshall CR, 'Financial Consequences of Divorce for Women in the UK' (2017) *Journal of Social Policy*.

12 *V v V* [2016] EWFC 33, [16].

13 Law Commission, *Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014).

14 *M v M* [2014] [39].