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Galloway, Kathrine; Wilson, Geoff

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Reimagining Spouse Maintenance: Are Our Clients Missing Out?

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I. INTRODUCTION

In 2017, the Turnbull government announced a comprehensive review of the *Family Law Act* in light of ‘profound social changes and changes to the needs of families’ and ‘the importance of ensuring the Act meets the contemporary needs of families and individuals’.¹ The terms of reference reiterated the ‘desirability of finality in the resolution of family disputes’²—in other words, endorsing the ‘clean break’ principle.³

While the law commands that marriage is a union for life,⁴ the law also provides for no-fault divorce which recognises the need for parties to have the ability to move on with their lives as individuals, freed from the constraints of the union. The popular perception of marriage is a romantic or emotional union between two people. It is also described as a contract,⁵ implying freedom of association between two citizens. Others, however describe marriage as a contract between a couple and the state.⁶ The terms of the union are prescribed by the state,⁷ and the state is thus also implicated in the terms of the parties’ disengagement.

There are policy reasons for the state’s involvement, including the understanding of the nuclear family as the building block of society, and an economic institution. Certainly, the genesis of marriage at law lay in the desire to control property, through regulating women’s relationships and thereby regularising the identity of children.⁸ In the contemporary Australian context family law has continued in this vein, having evolved as an economic policy lever.

Outside matters of custody, the broad premise of family law is the state redistribution of wealth within the nuclear family—where wealth comprises property and income. In Australia, redistribution occurs under the *Family Law Act 1975* (Cth) pursuant to s79 as to property, and ss72 and 75 in respect of spousal maintenance.⁹ Property orders are made where the Court ‘is satisfied that, in all the circumstances, it is just and equitable to make the order.’¹⁰ By contrast, there are many legislated considerations to found an order for spousal maintenance¹¹ although the Australian courts focus on three principles: the clean break, the parties’ needs, and capacity to pay.¹²

¹ Hon George Brandis, ‘Australian Law Reform Commission, Terms of Reference for the Review of the Family Law System’ (27 September 2017) <<https://www.alrc.gov.au/inquiries/family-law-system/terms-reference>>.

² Ibid.

³ Espoused in ss81, 90ST of the *Family Law Act 1975* (Cth).

⁴ *Marriage Act 1961* (Cth), s5.

⁵ Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989), 123–4.

⁶ Carol Smart, ‘Marriage, Divorce and Women’s Economic Dependency: A Discussion of the Politics of Private Maintenance’ in Michael D A Freeman (ed), *The State, the Law and the Family: Critical Perspectives* (Sweet and Maxwell, 1984) 9, 17.

⁷ Through, eg, the *Marriage Act 1961* (Cth) and the *Family Law Act 1975* (Cth).

⁸ See, eg, Kate Galloway, ‘Marriage and Equality: What’s Love Got to Do with It?’ (2015) 40(4) *Alternative Law Journal* 225.

⁹ It occurs also under the *Child Support (Assessment) Act 1989* (Cth).

¹⁰ *Family Law Act 1975* (Cth), s79(2).

¹¹ Ibid, s75.

¹² *Family Law Act 1975* (Cth), ss72, 81.

The Family Court's role in wealth redistribution through property and maintenance orders reflects an ideological position of the desirability of individual self-sufficiency.¹³ The institution of family is the desired social and economic building block of society, but parties are expected to be able to fend for themselves outside the marriage. Releasing parties from marriage without fault is a major and important reform that gives voice to the parties' desire for individual identities, freed from marriage relations. However, the application of the *Family Law Act*, notably its maintenance provisions, fails to comprehend its role as an economic policy lever sitting within wider economic structures.

We suggest in this paper that it is imperative for family law, including in the application of spousal maintenance, to take account of the broader institutional structures that shape economic security. In particular, we are interested in the effects of these structures on the economic standing of women and how they contribute to the feminisation of poverty. We suggest that there is no clean break to the extent that women in particular are impoverished upon marriage breakdown. So long as women remain economically disadvantaged relative to men in society more broadly, family law, including spousal maintenance, has a role to play in supporting women's economic independence.

In posing the question 'are our clients missing out' we analyse the capacity of spousal maintenance in Australia to comprehend women's economic reality in aiming for a 'clean break'.

We paint a picture of the structures that affect women's access to financial resources including money management within the household, wage gaps, unpaid caring work, lack of access to paid parental leave, and less superannuation than men. Against this background, we observe the reluctance of the Australian courts to award spousal maintenance, and contrast the Australian experience with that in the UK.

In analysing the current environment, we suggest both a policy response, and a practitioner response—one that calls on family lawyers to reconsider the importance of spousal maintenance, and to incorporate it into our advice for clients as a vital plank in achieving a financially equitable exit from marriage.

II. MARRIAGE AS AN ECONOMIC INSTITUTION

As we have foreshadowed, spousal maintenance plays a role in women's economic equality. It represents a court-mandated redistribution of financial resources between separated spouses. The role of spousal maintenance arises from the reality of the household—including marriage—an economic system.

While marriage breakdown is intensely emotional, the purpose of the law's intervention (outside custody) is economic. Understanding the foundation of economic exchange within a marriage can assist to understand what is at stake.

Historically, the husband's responsibility for intra-familial resource distribution was embodied in the doctrine of coverture. It reflected Biblical precepts of the husband or father's

¹³ In the UK context, see, eg, Helen Reece, *Divorcing Responsibly* (Hart, 2003).

moral duty to provide the necessities of life.¹⁴ Although expressed as a duty, there was no enforceable right vested in women or children.

Perhaps reflecting this historical understanding of property—ie resources—in marriage, economists have tended to discount the inner workings of the household, including marriage, as an economic institution. Before the Industrial Revolution, the household was a centre of economic life where each member played a role. Industrialisation took both men and women outside the home to work and earn and broke up the traditional extended networks of kinship support as people flocked to the cities. Women had previously played an integral role in the household, and therefore the general economy but in the newly nuclear family living in the city, work outside the home became difficult once women became mothers. At this point, women either needed to take work in (piece work) or become financially reliant on their breadwinner husband.

Such reliance presupposes a redistribution of resources within a family from the breadwinner to his wife and children. From the perspective of the state, however, and an economic system that focuses on market forces, the family—or household—is an integrated whole whose inner distribution is not relevant. The early *Harvester Case*¹⁵ came up with the living wage, calculated on the basis of the needs of a married family man: a ‘fair and reasonable’ wage for an unskilled male worker required a living wage that was sufficient for a ‘human being in a civilised community’ to support a wife and three children in ‘frugal comfort’.¹⁶

In Australia, the *Harvester Case* institutionalised the role of married women as dependents. The consequences continue, in lower wages associated particularly with feminised work, and internalised assumptions of gendered roles in the family—particularly related to the care of children and consequently paid work outside the family.¹⁷

In the 1980s economist Gary Becker put forward an economic theory of the family for the first time.¹⁸ Now looking a little dated in terms of gender stereotypes, Becker explains in economic terms the specialised roles of men and women within the family. He explains that the family is more than a unitary economic entity, although Becker’s family is traditional, and is headed by an altruistic male.¹⁹

On this original account of the internal economics of the family, men earn higher wages and so it is ‘rational’ that women stay home caring for children while men enter paid employment and build their careers outside the home. The ‘rationality’ of the higher income earner continuing their (his) career is a frequent motif throughout marriages, justifying the lower income earner (the wife) staying at home with children.²⁰ Although rational choice does not provide a full picture of spousal relations—which involve internalized gender norms and often power imbalances—Becker’s contribution is to show a connection between labour specialisation, and the household as a complex system of economic exchanges.

¹⁴ William Blackstone, *Commentaries on the Laws of England* (1765–1769), Book 1, Chapter 15, III.

¹⁵ *Ex Parte H V McKay* (1907) 2 CAR 1.

¹⁶ *Ibid* 3–4.

¹⁷ See, eg, Petra Bueskens, *Modern Motherhood and Women’s Dual Identities: Rewriting the Sexual Contract* (Routledge, 2018).

¹⁸ Gary S Becker, *A Treatise on the Family* (Harvard University Press, 1981).

¹⁹ *Ibid* 192. For a critique, see Carole Pateman, *The Sexual Contract* (Polity Press, 1988), 129.

²⁰ See, eg, Bueskens, above n 17.

In the traditional version of the family, as illustrated in the *Harvester Case* and on Becker's account, it is assumed that a breadwinner husband, as head of the family, is responsible for distributing economic resources within the family. Submissions to the Court in the *Harvester Case* included housekeeping as part of the family budget—an amount afforded to the wife for weekly household expenses. But the role of the altruistic or benevolent male breadwinner remains a deeply embedded institutional norm.²¹ Indeed, for some it is axiomatic that the husband's role is that of provider for a dependent wife.²² Whether implicit or explicit, and despite the significant reforms wrought by the *Family Law Act*, the 'fundamental structure of marriage and family...is premised on women's economic dependency on men.'²³

Contemporary marriages are, of course, now marked by women's dramatically increased workforce participation. A combination of social shifts accompanying second wave feminism, the *Sex Discrimination Act 1984* (Cth), women's increased educational opportunity and achievement, maternity leave, and greater access to childcare have created conditions conducive to women's work outside the home.

Yet there is ample evidence of ongoing differences between the experiences of husbands and wives in workforce participation and financial standing.²⁴ In particular, and despite commitment to equality within the relationship, couples experience a significant change in their financial standing including through workforce participation, following the birth of a child. It is women who tend to bear the burden, with increased unpaid labour within the home even where they work full time, and lower participation rates in full time paid work. The consequences include lower superannuation balances.²⁵ It should be remembered that superannuation is formulated on the assumption of a lifetime of fulltime work. Relative to men, women have a greatly-interrupted work life, higher rates of part time or casual work, and are generally lower-paid.

For these reasons, as Pahl observes, 'it is misleading to see the household as a single unit whose members are in the same structural position.'²⁶ In other words, the majority of married women continue to be dependent on a breadwinner husband. Resources—time, labour, and finances—will be distributed within the household according to its own norms. Sociological research identifies different 'modes' of money management and control within couples. But it also confirms that labour specialisation and money management in intimate relationships tends to be gendered.²⁷

²¹ See, eg, Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989); Jean Bethke Elshtain (ed), *The Family in Political Thought* (University of Massachusetts Press, 1982).

²² David Blankenhorn, Don S Browning and Mary Stewart Vanleeuwen, *Does Christianity Teach Male Headship? The Equal-Regard Marriage and Its Critics* (Wm B Eerdmans Publishing Co, 2004).

²³ Carol Smart, 'Marriage, Divorce and Women's Economic Dependency: A Discussion of the Politics of Private Maintenance' in Michael D A Freeman (ed), *The State, the Law and the Family: Critical Perspectives* (Sweet and Maxwell, 1984) 9, 11; Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004).

²⁴ Summarised, for example, in Bueskens, above n 17.

²⁵ Association of Superannuation Funds Australia, *Women's Economic Security in Retirement* (May 2018) <https://www.superannuation.asn.au/ArticleDocuments/359/1805-Women_Security_Retirement.pdf.aspx?Embed=Y>.

²⁶ Jan Pahl, 'The Allocation of Money within the Household' in Michael D A Freeman (ed), *State, Law and the Family: Critical Perspectives* (Sweet & Maxwell, 1984) 36, 47.

²⁷ Susan Gabrielle Meagher, 'Persistent Inequalities: The Distribution of Money, Time and Care' in S K Schroeder and L Chester (eds), *Challenging the Orthodoxy* (Springer, 2014) 79; Himmelweit et al, 'Sharing of Resources within the Family and the Economics of Household Decision Making' (2013) 75(3) *Journal of Marriage and Family* 625.

Marriage is thus an economic institution: a tool for the distribution of resources. It works together with the labour market in providing financially for women. The state is similarly involved, through social security mechanisms but also through family law. Importantly, and the point to be made here, is that spousal maintenance functions within this social context. However, where a marriage might be constituted by the couple's identities as part of a 'virtuous' community, upon separation they become individuals marked by and through their property²⁸ and by extension, their financial capability.

Couples are likely to enjoy a community of trust, 'cherish[ing] the idea that individual income pertains to the unit: "our money".'²⁹ By contrast, family law pits the parties against each other, requiring each to make a claim against formerly common financial resources. The parties must alter their perception of the common good to make way for their individual interests into the future. Their position is informed also by the economic structures outside the relationship: the labour market, the state through social security, the housing market (whether rental or ownership); by social norms, and by social support structures (including extended family and childcare).

We suggest then, that spousal maintenance must take its place as a vital economic tool in bridging the parties' shift from marriage as an institution of resource distribution, to individuals functioning within broader (public) economic structures. We question, however, the role of the courts in determining spousal maintenance in meeting this goal.

III. SPOUSAL MAINTENANCE: THE COURTS' APPROACH

Spousal maintenance remains a feature of family law in both Australia, and in England and Wales. This part provides an overview of the principles of spousal maintenance in both jurisdictions, and its interplay with property distribution.

A. Principles of Spousal Maintenance: Australia

In Australia, spousal maintenance is, apparently, 'rare, minimal, and brief'.³⁰ It remains, however, a 'lever' in the *Family Law Act* for the redistribution of economic resources within a marriage or following separation, together with property,³¹ child support,³² and any financial agreements.³³ The question we grapple with here is whether this 'lever' is sufficiently deployed to serve clients' best interests.

A party to a marriage is liable to maintain the other where they are reasonably able to do so, and where the other is unable to support themselves adequately because of caring responsibilities for the couple's child, because of their age, incapacity or employment, or for any other reason.³⁴ These can be summarized under two heads, namely as the need for

²⁸ Ruth Deech, 'Matrimonial Property and Divorce: A Century of Progress?' in Michael D A Freeman (ed), *State, Law and the Family: Critical Perspectives* (Sweet & Maxwell, 1984) 245.

²⁹ Jan Pahl, 'The Allocation of Money within the Household' in Michael D A Freeman (ed), *State, Law and the Family: Critical Perspectives* (Sweet & Maxwell, 1984) 36.

³⁰ Juliet Behrens and Bruce Smyth, 'Spousal Support in Australia: A Study of Incidence and Attitudes' (Working Paper No 16, Australian Institute of Family Studies, February 1999), vii.

³¹ *Family Law Act 1975* (Cth), s79.

³² *Child Support (Assessment) Act 1989* (Cth).

³³ *Family Law Act 1975* (Cth), Part VIIIA.

³⁴ *Family Law Act 1975* (Cth), s72(1) (for marriages) and s90SF(1) (for de facto relationships). Affirmed in *Hall and Hall* [2016] HCA 23, [3]-[5].

maintenance, and the capacity to pay. Without satisfying these two requirements, there will be no liability for maintenance.³⁵

The Court is empowered, under s74 of the *Family Law Act*, to make such maintenance order that it thinks proper. There is, further, the overarching consideration of the need for a ‘clean break’, manifested in the court’s duty to finally determine the parties’ financial relationship.³⁶ The nature of the order, its quantum and duration do not adhere to any fixed formula in the Australian context. Rather, the threshold of entitlement to maintenance and how it manifests, is determined with reference exclusively to those matters listed in s75(2).

The 20 factors enumerated in s75(2) are designed to elicit the parties’ need for maintenance, and their capacity to pay. They are predominantly financial, including the capacity for paid employment, but recognize also unpaid caring responsibilities for dependents, and the contribution a party has made to the earning capacity of the other.³⁷

1. Need

The liability for maintenance is established according to the applicant’s need for ‘adequate support’, reflected in s72(1): a party will be liable for the maintenance of their spouse if the other party is ‘unable to support themselves adequately’. Fehlberg points out that ‘the threshold question regarding the applicant’s financial position is not “need”, but whether she can support herself “adequately”’.³⁸ To reframe this observation however, it is the adequacy of support that determines an underlying question of need.³⁹

‘Need is a relative concept’⁴⁰ and what amounts to adequate support has been well-traversed by the courts. As indicated by the range of relevant factors in s75(2), there is no set standard, or formula, for determining spousal maintenance. Nor is adequacy determined according merely to a subsistence level of maintenance—which without more may otherwise have satisfied a question of ‘need’.

Thus, the question whether the applicant can support herself ‘adequately’ is not to be determined by reference to any fixed or absolute standard but having regard to the matters referred to in s 75(2) and more specifically the paragraphs of that subsection identified above. Nor is that question to be determined upon a ‘subsistence’ level...⁴¹

The overarching principle in determining what is adequate, is reasonableness in the circumstances:

[T]he husband is liable to maintain the wife only to the extent that she is incapable of supporting herself adequately, and again ‘adequately’ imports a standard of living which is reasonable in the circumstances, including the circumstance that the parties are no longer

³⁵ *Budding v Budding* [2009] FamCAFC 165, [281].

³⁶ Encapsulated in s81, *Family Law Act 1975* (Cth).

³⁷ Section 75(2)(j), *Family Law Act 1975* (Cth).

³⁸ Belinda Fehlberg, ‘Spousal Maintenance in Australia’ (2004) 18 *International Journal of Law, Policy and the Family* 1, 13.

³⁹ See reference to ‘need’ for example, in *In Marriage of Gamble* (1978) 32 FLR 198, 202, 211, cited in *In Marriage of Bevan* (1993) 120 FLR 283, 290; *In Marriage of Wilson* (1989) 96 FLR 316, 329.

⁴⁰ *In Marriage of Wilson* (1989) FLR 316, 321.

⁴¹ *In Marriage of Mitchell* (1995) 120 FLR 292, 308. See also *Budding*, [42]; *In Marriage of Bevan* (1993) 120 FLR 283, 289.

husband and wife and that the assets and resources which were formerly available to them both in common have now been divided between them.⁴²

The parties' standard of living leading up to separation is relevant, but there is 'no fettering principle that the pre-separation standard of living must automatically be awarded where the respondent's means permit.'⁴³

A standard of living that in all circumstances is reasonable for the party claiming maintenance is not necessarily the same standard as that enjoyed by the party who is ordered to pay maintenance. Normally, as in this case, the party who is ordered to pay maintenance is the party who generates the means and income out of which the maintenance is to be paid. Similarly, the standard of living that in all circumstances is reasonable for the wife in this case, is not necessarily the same standard as that enjoyed during cohabitation.⁴⁴

However, where the respondent is able to provide for the applicant at a pre-separation level, 'it may be proper to make an order which broadly achieves that result'.⁴⁵ This does not mean, however, that there is no *upper* limit of 'adequacy':

the measure of need is a variable factor which must take into account a variety of circumstances not the least of which is the appropriate standard of living of the parties. Where the capacity of the husband is such that he is able to provide maintenance for the wife at a level that enables both of them to continue to enjoy a standard of living equivalent to that which they enjoyed for some time prior to the separation or which enables the wife to enjoy a standard of living which may be higher than the average in the community it may be proper to make an order which broadly achieves that result.⁴⁶

In determining a party's adequacy of support both as to liability for maintenance and as to its quantum, there is no guiding principle as to the relative weight of the s75(2) factors, leading one commentator to describe Australian spousal maintenance jurisprudence as 'incoherent' ie:

more than vague or unpredictable in result: it refers to the fact that the Act directs the court to have regard to a bundle of often inconsistent factors and policies, and gives no basis for preferring some over others... Incoherence is regrettable, however, since it is likely to produce confusion, lack of predictability, and capricious variations among different judges and different registries of the court. The apparent arbitrariness associated with maintenance awards may make it difficult for litigants to perceive the results of cases as just. Further, it may inhibit the making of fair settlements of cases.⁴⁷

Despite the apparent lack of guidance, the s75(2) factors inherently draw attention to consideration of the applicant's capacity for self-sufficiency.⁴⁸ This necessarily involves weighing up the applicant's capacity for paid employment—or training to enhance employability—with their caring responsibilities as enumerated in s75(2). The requirement of

⁴² *In Marriage of Nutting* [1978] FLC 77,094, affirmed in *In Marriage of Bevan* (1993) 120 FLR 283, 289–90. This reflects the requirement in s75(2)(g) of the *Family Law Act 1975* (Cth) to consider 'a standard of living that in all the circumstances is reasonable'.

⁴³ *In Marriage of Bevan* (1993) 120 FLR 283, 290.

⁴⁴ *In Marriage of Wilson* (1989) 96 FLR 316, 320

⁴⁵ *In Marriage of Gamble* (1978) 32 FLR 198, 202.

⁴⁶ *Ibid.*

⁴⁷ Richard Chisholm, 'Spousal Maintenance', paper delivered at the 5th National Family Law Conference, 1992, Perth, Australia.

⁴⁸ *In the Marriage of Astbury* (1978) 34 FLR 173, 178.

self-sufficiency is highlighted through the finding of an obligation on the recipient of spousal maintenance to mitigate their need for maintenance. A party can achieve this, for example, by making reasonable attempts to earn an income.⁴⁹

Recognising the experience of women's interrupted careers in particular, the court will take account of 'wider social circumstances' and the employment market in considering the applicant's adequacy of support ie their self-sufficiency.

A wife's ability to support herself adequately depends in part on a number of external factors. The generally depressed level of wages paid to women, their lower level of training in workforce skills and their relatively high unemployment level may need to be considered. In some situations it might be appropriate for a party to seek to improve his or her skills or to acquire further qualifications and to ask for maintenance as an interim measure.

Even in a case where it is thought appropriate for a party to seek employment rather than to rely upon maintenance from the other party this may not conclude the matter if it proves impossible to get a job. Women without skills and with no recent work experience competing in a tight job market may not be able to secure any job at all. The court may need to consider whether the party in question has made genuine efforts to seek work. The fact that a person is in receipt of unemployment benefits would go some way to establishing that he or she is seeking employment.⁵⁰

While future needs—and the capacity for self-sufficiency—is the focus of the s75(2) factors, the court may also consider past contributions to the 'income, earning capacity, property, and financial resources' of the other party.⁵¹ However, in all circumstances maintenance will only be available if the threshold of need for 'adequate support' is met: 'if it is demonstrated that a party can support herself adequately, then it is difficult to see when any of the considerations under s75 (2) become relevant considerations.'⁵²

Unlike the rehabilitative focus of so many of the other factors, this provision sounds more in compensation.⁵³ However as the court pointed out in *In Marriage of Rowan*:

To say that because she has contributed her moneys during the marriage to the household expenses and therefore is entitled to receive something at the end of the marriage is a proposition I cannot agree with. This is tantamount to seeking a reimbursement for moneys expended during the marriage and if this were a valid or relevant consideration it should apply to both parties. Where parties marry and each has a separate income and these incomes are disbursed in the ordinary expenses of a marriage, and cannot be traced into any identifiable property, it is in my view quite contrary to the concept of the marriage relationship and to the principles in the Family Law Act to permit afterwards an accounting of moneys spent by each towards the normal expenses attendant on a marriage and to enable either party thereafter to seek a reimbursement of the moneys so spent.⁵⁴

⁴⁹ See, eg, *In the Marriage of Astbury* (1978) 34 FLR 173; *In Marriage of Taguchi* (1987) FLC ¶91-836.

⁵⁰ *In the Marriage of Astbury* (1978) 34 FLR 173, 178.

⁵¹ *Family Law Act 1975* (Cth), s75(2)(j).

⁵² *In Marriage of Rowan* (1977) 30 FLR 353, 367.

⁵³ See discussion in Fehlberg, above n 38.

⁵⁴ *In Marriage of Rowan* (1977) 30 FLR 353, 367.

Generally, the past contribution provision is assumed to encompass only financial contributions, although in *In Marriage of Hope*,⁵⁵ the court accepted contribution in kind. Of note also, the framing of contributions as a consideration for spousal maintenance differs from that relevant to distribution of property.⁵⁶

2. *Capacity to Pay*

In addition to ‘need’ (or more precisely, the lack of adequate support) the court will award spousal maintenance only where the respondent has the capacity to pay. In determining capacity to pay, the court considers not only the party’s income but also their property, financial resources and earning capacity. The weighing of these factors is therefore similar to establishing the adequacy of the applicant’s support, through consideration also of the s75(2) factors.

[P]rovisions ... in s 75(2) ... constitute a direction to compare the financial circumstances, needs and obligations of each party. This means...that the court must balance the reasonable needs of the spouse seeking maintenance as against the reasonable needs of the spouse against whom the claim is made. If one spouse is living in relative poverty, it is not open to the other spouse to point to his or her need to maintain a luxurious lifestyle as an excuse.⁵⁷

Where the respondent holds capital assets, an order may be made on the basis that the party might borrow against those assets.⁵⁸

3. *Interplay With Property Claims*

In determining both the need for and capacity to pay spousal maintenance—two sides of the same coin—the court will consider the making of orders concerning property. Section 75(2) specifically requires consideration of any property order made under s79 of the *Family Law Act 1975* (Cth).⁵⁹ Therefore, in addition to considering each party’s income and earning capacity, the court weighs up their property and resources. Indeed, maintenance and property are closely related in a number of ways.

In terms of ascertaining ‘adequate support’, on the one hand despite having property a party may not be able to support themselves adequately. Fehlberg points out therefore, that maintenance will therefore not necessarily be out of the question.⁶⁰ In *Mitchell*, for example, the Court considered the wife’s limited earning capacity, the way in which the proceeds of the property order would need to be disbursed as a consequence, and the husband’s standard of living and financial circumstances. On balance, the Court found that that the property order would not disqualify her from an order for maintenance.⁶¹

On the other hand, even where a party may demonstrate a lack of adequate support due to a lack of income, they may have sufficient property to support themselves adequately and therefore not succeed in a claim for maintenance. As with other factors, an order will be made based on the facts of the case and what is reasonable in all the circumstances.

⁵⁵ [1977] FLC 90-294.

⁵⁶ Under *Family Law Act 1975* (Cth), s79. See, eg, *In Marriage of Rowan* (1977) 30 FLR 353.

⁵⁷ *In Marriage of Tyson* (1993) 113 FLR 356, 366.

⁵⁸ *Maroney* [2009] FamCAFC45.

⁵⁹ *Family Law Act 1975* (Cth), s75(2)(n).

⁶⁰ Fehlberg, above n 38.

⁶¹ *In Marriage of Mitchell* (1995) 120 FLR 292, 308.

In making a determination as to property, the court will consider the parties' relative contributions in addition to s75(2) factors. Ultimately, however, a property award is determined according to what is 'just and equitable'.⁶² Spousal maintenance on the other hand, is determined according to need and capacity. Illustrating how closely maintenance and property can work together, Campbell points out that 'demonstration of one party's unmet needs that cannot be answered by a maintenance order may well warrant the conclusion that it is just and equitable to make a property settlement order.'⁶³

Further complicating the differentiation between the two, there is a variety of different forms for each order including lump sum, periodic payments, and property transfer, sometimes making it difficult to differentiate between property and maintenance components. This will become relevant in the context of claims for social security.⁶⁴

Because property is a relevant consideration in determining spousal maintenance, property is addressed first and only then will maintenance be addressed:⁶⁵ 'The reason why [the s74 discretion] must be exercised after the s79 exercise is because [s79] establishes the background against which s74 must operate, that is, the financial circumstances of the parties.'⁶⁶

Further muddying the waters is the possibility of a maintenance component of a property settlement. There is a 'needs-based' component to property under s79 that may arise where a party is likely to have prospective financial needs but where they otherwise may not qualify for spousal maintenance. Thus '[a] party may be in a position to make reasonable provision for his or her own maintenance and yet remain at an overall disadvantage when the financial resources of the parties are compared.'⁶⁷ Strictly speaking however, this is not spousal maintenance but falls within property. It does, however, indicate the close relationship between these two mechanisms of resource allocation.

B. Principles of Spousal Maintenance: England

Spousal maintenance is used by the English courts to adjust the financial resources of the parties on divorce (or nullity or judicial separation), usually in conjunction with other orders, pursuant to the *Matrimonial Causes Act 1973* ('MCA 1973').

The court only has power to order maintenance on a decree of divorce, nullity or judicial separation;⁶⁸ no maintenance is available to a cohabitee in their own right, regardless of the length of the cohabitation. Cohabitees can only make claims on behalf of any children.

Orders can be made on a joint lives basis (so that payments end only on death, remarriage or further order) or they can be for a fixed term (but not beyond death or remarriage). Where making an order for a fixed period of time (a 'term order'), the recipient may apply to court to extend the term unless the court has made an order to the contrary.

⁶² *Stanford v Stanford* (2012) FLC 93-495.

⁶³ Jacky Campbell, 'Stanford: Whatever Happened to the Four Steps?' (November 2013) <https://fortefamilylawyers.com.au/wp-content/uploads/2013/11/FFL_485582_Stanford%E2%80%94whatever-happened-to-the-four-steps.pdf>.

⁶⁴ Fehlberg, above n 38, 22.

⁶⁵ *In Marriage of Anast and Anastopoulos* (1981) 7 Fam LR 728.

⁶⁶ *In Marriage of Clauson* (1995) 18 Fam LR 693, 705.

⁶⁷ *In the Marriage of Dench* (1978) 33 FLR 156, 164.

⁶⁸ Section 23(1)(a) and (b), MCA 1973.

Maintenance is always variable.⁶⁹ Either party can apply to the court for a variation or termination, and the court will consider all of the circumstances before making an order. Interim orders can also be made.

The English court's approach to maintenance is considered to be one of the most generous jurisdictions to wives in the world.

In deciding how to resolve an applicant's financial claims on divorce, the court must consider 'all of the circumstances of the case', where the first consideration is to the welfare of any children⁷⁰ and otherwise includes:

- 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;
- 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;
- c. the standard of living enjoyed by the family before the breakdown of the marriage;
- d. the age of each party to the marriage and the duration of the marriage;
- e. any physical or mental disability of either of the parties to the marriage;
- 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.

When making spousal periodical payments orders, the court is under an obligation to consider (a) whether a 'clean break' is possible,⁷¹ and (b) whether the periodical payments should be made only while the payee adjusts, without undue hardship, to the termination of their financial dependence on the payer.⁷² However, that is as much guidance as the statute provides.

Fortunately, the courts have provided further guidance. Ultimately, the court seeks to achieve a fair outcome. In doing so, it considers three principles: needs, compensation, and sharing. These three principles were explained by the Supreme Court in *Miller v Miller; McFarlan v McFarlane*.⁷³

1. Needs

Needs is one of the crucial section 25 factors. In 2014, the Law Commission highlighted concerns about inconsistencies and regional disparities, and the lack of statutory definition of

⁶⁹ section 31, MCA 1973.

⁷⁰ section 25, MCA 1973.

⁷¹ section 25A(1), MCA 1973.

⁷² section 25A(2), MCA 1973.

⁷³ [2006] UKHL 24.

‘needs’, which was making things more difficult for litigants in person in particular.⁷⁴ Consequently, the Family Justice Council published a guide for orders concerning ‘needs’.⁷⁵ It emphasizes that:

- the objective should be to enable a transition to independence, to the extent that that is possible in light of:
 - the choices made within the marriage,
 - the length of the marriage,
 - the marital standard of living,
 - the parties’ expectation of a home and
 - the continued shared responsibilities (importantly, child care).
- It is generally right and fair that relationship generated needs should be met by the other party if resources permit. It is possible for long-term dependence to be created by decisions for one party to discharge family obligations at the expense of the development of their employment potential.
- The main needs in most cases are for housing and income, but the two are linked and must be considered in the round. It is for the court to determine the level and duration of the need, and whether the need can be best met by capital or income provision.
- Need is measured by assessing the available resources, and the standard of living during the marriage (the longer the marriage, the more important this factor will be). A party may be expected to suffer some reduction in standard of living having regard to the overall objective of a transition to independence.

In *G v G*, the Court interpreted the Guide to mean that a fair result will ‘not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage’. Instead, ‘the aim is independence and self-sufficiency based on all the financial resources that are available to the parties’.⁷⁶

In determining ‘lifestyle’ as ‘needs’, there are further considerations. Although the marriage does not form the basis for sharing future resources, the lifestyle enjoyed during the marriage is relevant—setting the benchmark for assessing the parties’ independent lifestyles. Further, the length of the marriage establishes the period for which the relevant lifestyle should be enjoyed. So, for short marriages, the award provides a transition to a lower long-term standard of living—or at least one that is not contributed to by the other spouse.⁷⁷

How the parties have conducted their marriage is similarly relevant, notably with respect to the birth and care of children. Where childcare has interfered with a party’s capacity for self-sufficiency then the court will compensate that including through continuing dependence. Such continuing contribution will account for the recipient’s day-to-day care of children. In other words, the parties’ choice about care of children is relevant both to day to day care and to the funding of independent households.⁷⁸

⁷⁴ Law Commission, *Matrimonial Property, Needs and Agreements*:

<https://www.lawcom.gov.uk/project/matrimonial-property-needs-and-agreements/>

⁷⁵ *Guidance to Financial Needs on Divorce* <<https://www.judiciary.uk/publications/guidance-on-financial-needs-on-divorce-edition-2-april-2018/>>.

⁷⁶ *G v G* [2012] EWHC 167, [136].

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

As to the duration of a maintenance order, the court must consider whether to make a joint lives order, or a term order. In doing so, the court must consider:

- The statutory steer towards the termination of obligations at the earliest point which is just and reasonable, but the termination should only occur if the payee can adjust to it without undue hardship.
- Termination should not be justified by reference to an evidential foundation, not crystal ball gazing or pious exhortation.
- There is a distinction between “hardship” and “undue hardship” – the recipient may be expected to suffer a degree of hardship.
- It is open to the court to impose steps down in the amount to be paid to anticipate future changes in circumstances.

In considering whether to make a joint lives or term order (extendable or not extendable) the FJC recommend that the court take into account not only the age and health and mobility of the parties, but various considerations relating to work and earning capacity, and the care of children and dependents. Thus, the parties’ qualifications and work experience, the length of time since last employment and the availability of retraining are all relevant. Coupled with caring responsibilities, it is the net financial gain for the recipient party and the paying party’s ability to pay that are relevant in determining maintenance.

2. Compensation

Maintenance orders not only deal with need, but also have a compensation aspect. The Court summed this up in *Miller v Miller; McFarlane v McFarlane*:⁷⁹

[Compensation] is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband’s enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer.

However, it is a concept that the lower courts have struggled with. In *SA v PA*,⁸⁰ for example, Mostyn J rejected the arguments accepted in the Supreme Court in *Miller; McFarlane*, and referred to the principle of compensation as ‘extremely problematic and challenging both conceptually and legally’.⁸¹ According to Mostyn J, ‘it will only be in a very rare and exceptional case where the principle will be capable of being successfully invoked’. The court must be able to say ‘with almost near-certainty, that the claimant gave up a very high earning career [over a long period] which had it not been foregone would have led to earnings at least equivalent to that presently enjoyed by the respondent.’⁸² If compensation is awarded, it was to be reflected in periodical payments rather than a ‘premium or additional element on top of the needs-based award.’⁸³

⁷⁹ [2006] UKHL 24.

⁸⁰ [2014] EWHC 392.

⁸¹ *Ibid* [24].

⁸² *Ibid* [36].

⁸³ *Ibid*.

Of note, the case law post-December 2014 offers little guidance or insight into the continued value placed on the compensation principle by the judiciary.

3. *Sharing Earning Capacity*

There is no principle that post separation income should be shared. In the more recent case of *Waggott v Waggott* the Court of Appeal stated that '[a]ny extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break.'⁸⁴ More broadly, there would be a number of factors inhibiting the court's capacity to include future income in its determination.

First, it would 'apply to every case in which one party had earnings which were greater than the other's, regardless of need'⁸⁵—a significant number of casts. As Lady Hale had pointed out in *Miller*, 'the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation.'⁸⁶

Secondly, the court would need to 'assess the extent to which the earning capacity had accrued during the marriage'⁸⁷—a necessarily difficult, if not impossible, task. Even if the court could determine a point of reference to determine the accrual of an earning capacity, it would need then to determine its duration, whether employment changes were reasonable, whether to invoke notions of fairness or rely solely on facts, and so on. Ultimately, therefore, 'this branch of the road to achieving a clean break would be devoid of clear signposts.'⁸⁸

Finally, it is the foundation of the sharing principle that it applies to marital assets, namely 'the property of the parties generated during the marriage otherwise than by external donation'.⁸⁹ Earning capacity is not property and is therefore not caught by the principle of sharing.

Although not applying to future earnings (or earning capacity), the sharing principle does apply to bonuses, as illustrated in *H v W*.⁹⁰ The parties had been in a relationship for 19 years with one adult child. W was 43 and H was 55. H worked in a bank, earning £250,000 with a bonus of £225,000. H gave gloomy predictions for his future bonus but had received £200,000 (between judgment and appeal).

At first instance DJ White awarded W 25 per cent of H's bonus going forward. On appeal, King LJ concluded that that the District Judge had not been wrong to use a percentage to divide H's bonus in circumstances where 'the family income is routinely made up of salary and bonus and the bonus represents ... a significant proportion of the total...'⁹¹ King LJ described the relevant process as first identifying 'a figure which would represent the W's maximum reasonable maintenance entitlement taking into account all the circumstances of the case'.⁹² As bonuses are uncertain, it is logical to express such an amount in percentage terms, with reference to the historical occurrence of bonuses and the likely future success of the firm.

⁸⁴ [2018] EWCA Civ 727, [123].

⁸⁵ *Ibid* [124].

⁸⁶ *Ibid* citing *Miller v Miller; McFarlan v McFarlane* [2006] UKHL 24, [144].

⁸⁷ *Ibid* [125].

⁸⁸ *Ibid* [126].

⁸⁹ *Charman v Charman (No 4)*, [66].

⁹⁰ [2013] EWHC 4105.

⁹¹ *Ibid* [38].

⁹² *Ibid* [38].

The approach then is to

calculate a total figure for maintenance which covers what [the judge] finds to be her ordinary expenditure together with such sum as would provide for ... additional, discretionary, items which will vary from year to year and which are not reflected in her annual budget. ... [T]he court will then make a monthly order to be paid for from salary at whatever rate the District Judge feels to be fair, and the balance to be expressed as a percentage, of the net bonus up to a stated maximum each year.⁹³

While this approach has been endorsed,⁹⁴ Roberts J has pointed out that ‘there is no absolute requirement for adopting this solution in every case which involves receipt by the payer of a discretionary element to his or her income award. It is a matter of balance and degree.’⁹⁵

4. *Interplay With Property Redistribution and the Capitalisation of Income Claims*

As explained above, the court will adjust the financial resources of the parties on divorce (or nullity or judicial separation), in order to achieve a fair outcome, on the basis of the statutory guidance and the principles established by case law.

One of the most important considerations will be the needs of the parties. The parties have a need for capital (largely housing) and income. As explained above, maintenance can be ordered to meet an income need. Other orders can be made to meet capital needs such as transferring property, or making a lump sum order.

Whereas (as explained above) sharing is not a consideration when the court is looking at maintenance, it is a major consideration when looking at capital claims. The parties' respective contributions during the marriage are regarded as equal, and therefore it is logical that the combined fruits of those contributions could be equally shared at the end of the marriage.

As explained above, when making spousal periodical payments orders, the court is under an obligation to consider (a) whether a ‘clean break’ is possible (section 25A(1), MCA 1973). One way in which this can be achieved is by capitalising an applicant’s income claims. In seeking to achieve a fair result, the court can order the payment of a lump sum in lieu of ongoing maintenance, in addition to the capital awarded to meet their capital needs.

How this is done can vary considerably. One method is the Duxbury model. Duxbury calculations produce a lump sum which if invested to achieve capital growth and income yield (both at assumed rates and after income tax on the yield and capital gains tax on the realised gains), could theoretically be drawn down in equal inflation-proofed instalments over a period (usually, the estimated actuarial life expectancy of the recipient), but would be completely exhausted at the end of that period.

The Duxbury tables allow the capitalised lump sum to be calculated by reference to:

- Sex.

⁹³ Ibid [39].

⁹⁴ See, eg, *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 per Mostyn J; and *B v B* [2014] EWHC 4545 per Roberts J.

⁹⁵ *B v B* [2014] EWHC 4545.

- Age.
- The level of annual income needed.

The Duxbury assumptions contemplate a medium risk investment strategy and include a gross rate of return of 3.75 per cent, based on predictions and approximations of income yield (3 per cent), capital growth (3.75 per cent), a deduction for inflation (3 per cent) and life expectancy. The use of these assumptions continues to receive judicial support, despite an era of low interest rates.

A Duxbury fund is likely to form part of the award to a financially dependent party in cases where a clean break can be achieved. A Duxbury fund may also provide a useful cross-check as to whether an equal division of the capital assets would meet the financially dependent party's needs.

The courts have emphasised that their objective is fairness and the limitations of a Duxbury calculation mean it has been described as 'a tool not a rule'. In some cases it will be appropriate for the capital sum to be amortised, so that the capital itself is preserved.

There are a number of issues with the current system in England and Wales, most notably flexibility versus certainty; and variation.

Firstly, Judges in England and Wales enjoy a wide scope of judicial discretion in relation to the size and duration of maintenance payments. Many jurisdictions apply a range of considerations to give judges scope and independence in their decision-making, but England and Wales stands out for the broad judicial discretion it applies in considering all aspects of each and every case.

As recognised by the Law Commission in 2014, this has led to a lack of consistency across the country. The FJC Guidance has tried to address this, but the reality is that where you have a system with such a wide discretion there are always going to be differences.

Secondly, maintenance is always variable. If there is a fall in the payer's income, he or she can apply to vary it downwards. If there is an increase, the recipient can apply to increase it. The court is not constrained by the standard of living enjoyed by the family before the breakdown of the marriage. The court can also capitalise maintenance on a variation application.

IV. SPOUSAL MAINTENANCE: POSSIBILITIES FOR PROGRESS

Of note,

[w]hile spousal support is available under the terms of the legislation to both men and women (in contrast to the position under earlier law), all the evidence suggests that men are the vast majority of payers and women the vast majority of payees.⁹⁶

Anecdotally, family law practitioners might report that no party is satisfied with the court's orders as to property and maintenance. By definition though, cases that end up in the courts are both likely to involve a relatively significant resources pool, and for whatever reason, an

⁹⁶ Juliet Behrens and Bruce Smyth, 'Spousal Support in Australia: A Study of Incidence and Attitudes' (Working Paper No 16, Australian Institute of Family Studies, February 1999).

intractable dispute. The data however, continues to show women's economic inequality as a feature of society broadly and post-separation life in particular.

This raises the question of whether our clients are somehow missing out in family law determinations generally, and spousal maintenance in particular. We ponder then, on possible solutions.

A. Other Jurisdictions

In the first place, both Australia and the UK might look to other jurisdictions to explore alternative means of providing spousal maintenance. In contrast to the court's flexible approach in England and Wales on issues of maintenance for example, some countries favour a more formulaic (and certain) approach.

In Germany, for example, the court often uses official guidelines, notably the Dusseldorf table, which provides certainty in maintenance calculations, including child and spousal payments.

In other countries, notably Scotland, Cyprus, Germany and Switzerland, the term for maintenance can be strictly limited. The private members bill recently tabled in the British Parliament⁹⁷ seeks to reflect the position already seen in Scotland, amongst other countries, where the courts take a very restrictive approach to the award of spousal maintenance, and legislation provides that financial provision should be made for a period of not more than three years from the date of divorce. To the extent that this privileges self-sufficiency, its effect is not dissimilar from the Australian approach.

Joint lives maintenance is almost non-existent in France, unless one partner is of pensionable age or incapacitated. The situation is even more stark in Estonia where maintenance is paid in only two circumstances: if the receiving spouse is disabled or of pensionable age and therefore unable to work; or where there are children under three.

Globally, it seems, that spousal maintenance is a less favorable mode of providing financial security post-separation or divorce.

B. Blue-Sky Thinking

So long as spousal maintenance remains in the background, as it is in Australia, it will be underutilized as an economic lever for separating spouses, and for women in particular. Yet the criticisms leveled at the English approach need to be considered also.

There are a number of possible pathways to reform, including some that are already on the table in the UK.

1. Restrictive Quantum and Term

Following in the footsteps of *SS v NS*, the more restrictive approach to calculating the quantum and term of payments of spousal maintenance appears to be gaining ground in England. As a result, orders for spousal maintenance on the basis of joint lives may be expected to become less common. This direction of travel is taken to an extreme in Baroness Deech's latest Private Members Bill — the Divorce (Financial Provision) Bill 2017-29, where she seeks to create a strong presumption of a five-year fixed term.

⁹⁷ The Divorce (Financial Provision) Bill.

Section 5 reads:

- 1) In deciding whether and in what terms to exercise its powers to make a periodical payments order in favour of one of the parties to the marriage, the court must take into account —
 - (a) any economic advantage derived by either party from contributions by the other, and any economic disadvantage suffered by either party in the interests of the other party or of their family;
 - (b) the fair sharing between the parties of any economic burden of caring after divorce for a child of the family under the age of 16 years; and
 - (c) that a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such periodical payments as is reasonable to enable that party to adjust to the loss of that support in divorce over a period of not more than **five years** from the date of the decree of divorce, such period not to be exceeded 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.

It is extremely unlikely that Baroness Deech's Bill will receive Royal Assent. It remains in its early legislative stages, and those private members bills to progress significantly are few and far between.

However, the Divorce (Financial Provision) Bill has engendered a great deal of debate amongst lawyers and non-lawyers alike. Is the concept of spousal maintenance inimical to the idea that a married couple are equal? Would tight restrictions on spousal maintenance encourage parents back to the work place? Is the idea that marriage is life-long sufficient to justify relieving people from decisions made about working when the marriage comes to an end? Baroness Deech has been critical of the current law, claiming that lifelong support is unjustified and 'undignified' for recipients, and reflects a 'victim mentality'. This criticism has been recognized in other quarters also.⁹⁸

Hitchings and Miles⁹⁹ have recently responded to these criticisms, and highlighted:

- Many women still have less economic capacity than most men to deal alone with the economic shock of divorce, not least thanks to the distribution of childcare and labour market participation.
- Many women incur a considerable 'motherhood penalty' in reduced earning capacity and savings/pension accumulation – the impact of which will be felt following divorce.
- Their research showed that clean breaks are prevalent; spousal maintenance was awarded in just 16 per cent of cases.

They conclude:

Some might argue that the solution lies in increased female labour market participation and equal pay. Further work is undoubtedly needed to enable more equal sharing of paid and unpaid labour within marriage and other relationships. But it is not clear that couples can or should be required to arrange their lives that way. And it is certainly not clear that

⁹⁸ See, eg, discussion in Fehlberg, above n 38.

⁹⁹ 'Meal Tickets for Life? The Need for Evidence-based Evaluation of Financial Remedies Law' [2018] Fam Law 993.

the law of financial remedies should be reformed in order drastically to curtail the support it offers long before that more equal society has arrived.

Rather than being ‘undignified’, or reflective of or reinforcing a ‘victim mentality’, receiving the benefit of orders that acknowledge the economic impact of how a couple have chosen—or have been required by circumstance—to raise their children protects the dignity of the primary carer, more fairly distributing between the parties the full economic impacts, positive and negative, of their marital partnership.

However, in a recent letter to the editor of *Family Law*,¹⁰⁰ Baroness Deech responded:

Now that 72% of women are at work outside the home, and returning to education in mid-life is easier than it used to be, it is hard to argue that time out from the job market for a limited period damages women’s prospects for the rest of their lives. Yet many judges treat all ex-wives as dependents, whether they have had children or not. Indeed, the more self-sufficient an ex-wife is, the less she will receive by way of support, and she will even be advised to give up work when divorce is looming. The law is regressive: if the ex-husband has no resources, then the wives will get nothing, while the wives of richer husbands will never need to support themselves – and theirs are the cases that go to the Supreme Court, resulting in new precedents and making the news...

The default position of many judges and academics is that women should be regarded as exempt from the job market after marriage. We doubt whether the same view will be taken of the husbands who stay at home and take care of the children for a while. As a consequence, the unattractive logic of that position is that either the Government should give up calling for equal female representation in the professions and on company boards etc, or that divorce should be made more socially unacceptable because it results in permanent damage to women’s standards of living...

Which comes first – equality at work, affordable childcare and flexible working patterns, or reformed spousal support? I agree with Eric Clive, who was responsible for the successful 1985 Scottish law on financial provision, that there is ‘something fundamentally repulsive about the whole idea of dependent women’. And I think that it is only when a reformed financial provision and property law based on equality is promoted that women will push for, and achieve, better working conditions and more respect. This is what has come about in other jurisdictions with more equal law.

Certainly in the long term, it is hoped that labour market conditions and childcare will support women’s full economic participation. In the meantime however, marriage and motherhood are a real threat to women’s economic independence.¹⁰¹ So long as the state has jurisdiction over private intimate relations, it has a responsibility to reduce the impacts of structural inequality.

Further, the construct of self-sufficiency embedded in family law provisions is one of the atomistic individual, the liberal ‘self’ who is separated from all others. That is an unrealistic appraisal of human lives. During our lives we are variously dependent and interdependent.¹⁰² Rather than separated and independent actors – the model of autonomy implicit in ‘self-

¹⁰⁰ [2018] Fam Law 1251.

¹⁰¹ Bueskens, above n 17.

¹⁰² Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012).

sufficiency’ – ‘we are always dependent on others for the possibility of autonomy’.¹⁰³ Family law implicitly, if not explicitly, recognises this and its redistributive tools—including spousal maintenance—reflect the waxing and waning of economic fortune within the family, including post-separation. Accepting interdependence allows a more complete comprehension of parties’ economic standing including their capacity for ‘adequate support’.

We suggest that there is somewhat of a dialectic involved in spousal maintenance. A spouse’s status as individual is central to their claim upon the other for maintenance, for maintenance will afford the claimant the financial wherewithal to pursue their own interests independent of the other. At the same time, and reflected in the clean break principle, spousal maintenance represents a form of ongoing dependence on the other: a reminder of the parties’ mutually intertwined finances and personal relations.

For this reason, ‘independent’ women and ‘dependent’ women are one and the same. Society has played its part in rendering women dependent on men but even outside institutional structures, our health, caring responsibilities, and fortunes necessarily place us in economic and personal relations with others. Baroness Deech’s approach fails to recognise this.

2. *Fix Your Own Oxygen Mask First*

An alternative approach, certainly in the Australian context, is to consider spousal maintenance first of all. If a spouse’s capacity to adequately support themselves on a day-to-day basis is first attended to, then they can be considered not in a position of ongoing dependence on another but rather have the financial capacity to stand on their own two feet.

From this vantage point a financially self-sufficient ex-spouse is in a better position to consider the bigger picture of property. Through looking after an applicant’s immediate and even medium-term financial needs—those of adequate support—the applicant becomes a self-determining party to any subsequent property redistribution.

Although primary consideration of spousal maintenance contradicts the courts’ rationale for prioritizing the property settlement, it can instead be seen to support the ‘clean break’ principle. It does so through the potential of a longer-term and therefore more sustainable outcome for the applicant spouse.

V. CONCLUSION

The longer-term outlook brings us back to the introduction of this paper. For it is generally women who claim spousal maintenance, and it is generally women who experience greater economic hardship relative to men. To the extent that spousal maintenance, together with property settlements, is an economic tool, it surely must be deployed in a way that enhances economic outcomes.

In the Australian context, we suggest therefore that a reappraisal of the sequence of determining property and spousal maintenance might achieve better long-term economic outcomes. In the more generous English context, contemporary debate represents, perhaps, a backlash. While there may be arguments in favour of promoting self-sufficiency to a greater extent, there is danger inherent in arguments that assume women’s equality and therefore women’s capacity for financial standing equal to that of men.

¹⁰³ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012), 46.

So long as the family remains an economic institution demanding women's free labour, while other institutions including the labour market and the state are structured to depend upon women's unpaid work, and while those same institutions fail to engage women's full capacity as equally rewarded workers, the state must provide mechanisms of economic support. One of those is spousal maintenance, an under-utilised tool. Family law practitioners provide a vital service not only in advising their clients of the possibilities for maintenance, but in bringing the argument to the courts to effect a change in orientation that can only assist their clients to become truly self-sufficient.