

# Spousal maintenance: 'Tenor of life' now more tenuous?

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## Changing times for spousal maintenance on divorce and separation in Italy and England

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Last month, employers in Britain with more than 250 staff were required by law to publish gender pay gap figures. Figures produced by [statisita.com](#) on the gender pay gap in Italy in 2017 reveal that women earned on average about Euro 15 per hour less than men.

Such figures are significant for a number of reasons, one being whether the opportunities exist for women to secure sufficient remuneration (ultimately leading to financial independence) following divorce. A recent shift in the approach to spousal maintenance on divorce in Italy has put this issue into sharper focus, whilst in England, the courts are still grappling with the veracity of the perhaps inaptly-named '*meal-ticket for life*' maintenance award.

The sea change in Italy comes from the Supreme Court decision from the '*First Section*' (sentenza No 11504/17) involving the divorce of Lisa Lowenstein and Vittorio Gritti which overturned the practice embraced over the previous three decades, whereby a married couple's standard of living was the guiding principle in determining the amount of maintenance payable to a spouse on divorce. Ms Lowenstein had been awarded E2m per month by the Italian Court of Appeal, but also wanting her debts paid, she appealed to the Italian Supreme Court. The Court of Cassation rejected her claim and held that divorcees who have sufficient independent resources or who are capable of working will not automatically receive maintenance payments. In the past, these had been assessed on the basis that ex-spouses had the right to retain their 'tenor of life' established during the marriage. Moreover, the Supreme Court stated that the obligation to pay an ex-spouse could be an obstacle to a divorcee starting another family, interpreting such scenario as being a right guaranteed by the ECHR. Alternative interpretations of Art 8 aside, this case probably hails the end of large divorce settlements in Italy – a prominent example being the E1.4m (£1.2m) per month payable by Silvio Berlusconi to his second wife following their separation in 2009. The case sends also sends a clear signal that the Italian courts no longer put '*first families first*'.

Compare the current state of play and the approach to spousal maintenance in the English Court where, incidentally, the '*first family first*' principle is alive and well.

In England and Wales, whilst we can look to the case of *SS v NS* [2014], to discern how English judges have questioned the moral and ethical question of why (on divorce) the law permits the imposition on a party to pay spousal maintenance potentially until the death of the payee, we also have to grapple with the controversial decision of *Mills v Mills* [2017]. In *Mills*, the Court of Appeal ordered a husband to increase his monthly maintenance payments to his former wife (divorced 15 years previously) from £1,100 to £1,441 per month to meet her basic needs on a joint lives basis, to cover housing costs, even though these had been covered in the original capital award. The husband's appeal was heard by the Supreme Court in May and it will be interesting to see whether the English Supreme Court Justices give a nod to last year's decision by their Italian counterparts when they deliver judgment. By then, we may also have the decision of the '*Sezioni Unite*' section of the Italian Supreme Court which recently wrestled with the issue of spousal maintenance following the decision in the Gritti case. Its decision should be forthcoming within the next few months too.

We do have some clarity from the recent Court of Appeal judgment in *Waggott v Waggott* [2017] in which, in addition to a capital sum of £10m (£11.4m), a wife claimed that she should be entitled to maintenance from her husband's future income bonuses long after their divorce as a result of the support she gave to her husband in building up his businesses during the marriage. The Court of Appeal rejected this argument and confirmed that an earning capacity is not capable of being a matrimonial 'asset' to which the sharing principle applies.

Interestingly, the current approach in Italy more accurately reflects the law in Scotland, where spousal maintenance is limited to three years, if payable at all, in order to allow for a period of adjustment. If we go back only a decade, in *Miller v Miller*; *McFarlane v McFarlane* [2006] an English

case, the (then) House of Lords emphasised that the '*3 year principle*' was intended to enable the court to '*cushion the blow*' of divorce by providing funds to enable a spouse to find employment or retrain or to adjust to a lower standard of living.

A refreshing perspective was recently given direct to family lawyers by the UK's most senior judge, Baroness Hale, president of the UK Supreme Court. In her speech, the phrase '*meal-ticket for life*' was said to be patronising and demeaning and Baroness Hale highlighted the fact that marriage is a partnership in which the spouses often play different roles for their mutual benefit and for the benefit of their children and elderly parents. Research had shown that a person who gives up work, even for a few years, in order to concentrate on child care or other family responsibilities will never make up what they have lost. In Baroness Hale's view, the goal of divorce settlements should be to give each party an equal start on the road to independent living and, sometimes, the only way to achieve this is by open-ended maintenance awards.

For the English and Italian Courts and for divorcing spouses in both countries, the vexed issue of term spousal maintenance remains very much in the balance. Perhaps the new gender pay gap figures will inform spouses and the family courts with an injection of realism as to how difficult or attainable that financial adjustment could be. In the meantime, we look forward to the imminent guidance from both superior courts as to how maintenance awards may be fairly assessed for both '*payee*' and '*payer*' on marriage breakdown.

**Withers LLP acted in Miller v Miller [2006]**

# Authors

Suzanne Todd

PARTNER | LONDON

Divorce and family

 +44 20 7597 6164

 [suzanne.todd@withersworldwide.com](mailto:suzanne.todd@withersworldwide.com)

Natalie O'Shea

PROFESSIONAL SUPPORT LAWYER | LONDON

Divorce and family

 +44 20 7597 6083

 [natalie.o'shea@withersworldwide.com](mailto:natalie.o'shea@withersworldwide.com)