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Matrimonial Property, Needs and Agreements

An Overview for Lawyers

Consultation Paper No 208 (Summary)

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THE LAW COMMISSION

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS: SUPPLEMENTARY CONSULTATION PAPER

AN OVERVIEW FOR LAWYERS

INTRODUCTION

- 1 This paper is an overview of the Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements published by the Law Commission for England and Wales in September 2012 (referred to here as the “SCP”).¹ It is an overview for lawyers, for whom many of the terms and ideas we use will need no explanation. It is available online at www.lawcom.gov.uk. Readers who are not lawyers may find it more helpful to read a less technical overview, which can be found at the same URL.
- 2 Inevitably much detail is lost in an overview of this nature and we would encourage readers to study the SCP itself. But we recognise that time is in short supply for professionals, and we do not want lawyers to be deterred from responding to the questions we ask because they are not able to go through the whole document. So in this paper we have set out our main arguments and reproduced all our consultation questions, as briefly as we feel is consistent with a presentation of the issues in sufficient depth to allow for meaningful responses. Details of how to respond are set out at the end of the document.

THE SCOPE OF OUR PROJECT AND ITS OUTCOMES

- 3 The SCP is the second publication in a project that began in October 2009 and whose initial focus was on marital property agreements – colloquially known as “pre-nups” and “post-nups”. We published our Consultation Paper, Marital Property Agreements,² in January 2011 (we refer to that paper as “the 2011 CP”). We have not yet made formal recommendations for a change in the law following that consultation; when we do so we intend to recommend the introduction of a “qualifying nuptial agreement” that would be enforceable without the exercise of the court’s discretion provided that certain preconditions are met.

¹ Matrimonial Property, Needs and Agreements (2012) Law Commission Supplementary Consultation Paper No 208.

² Marital Property Agreements (2011) Law Commission Consultation Paper No 198.

- 4 It became clear from responses to the 2011 CP that it would be helpful also to examine two other areas of the law relating to financial orders,³ namely the law relating to needs, and the scope and legal treatment of non-matrimonial property.
- 5 The law and practice relating to financial orders underwent considerable change as a result of the decision of the House of Lords in *White v White*,⁴ which introduced the “sharing principle” into the law relating to financial orders. Nevertheless, the vast majority of financial orders are concerned only with needs, because of the scarcity of assets and the difficulty of funding two households from the resources that formerly supported only one. We have taken the view that it would not be appropriate to allow spouses to use qualifying nuptial agreements in order to contract out of making provision for each other’s needs.
- 6 However, the law relating to needs is unclear and in some respects contentious; the lack of principle within the law makes it difficult to determine the extent or duration of liability to meet needs. This is a particularly pressing problem in an era where changes in the legal aid system mean that increasingly people will either litigate without legal representation or reach settlements without engaging with the courts.
- 7 The SCP therefore examines the evolution of the law relating to needs in order to explain why it lacks any principled basis, and goes on to consider the options for a principled approach to spousal support (we use that term to mean provision for needs, whether capital or income). The SCP acknowledges the difficulty of reforming this area and that principled reform will take time and further research beyond the scope of this project; it therefore also explores short-term measures that might make the law easier to operate, pending principled reform.
- 8 Non-matrimonial property is a recent concept within the law relating to financial orders. Its emergence is the result of the sharing principle; the term “non-matrimonial property” is used to describe property that is less likely to be shared provided that it is not required to meet needs. It refers generally to property acquired before the marriage or civil partnership, or by gift or inheritance at any time, and possibly to a wider range of property in some circumstances. There is no legal definition of non-matrimonial property, and there are no clear rules as to what is to happen when non-matrimonial property changes over time because either spouse has invested in it or where it is mingled with matrimonial property. In the absence of such rules, outcomes are determined by the courts on a case-by-case basis, and there is a risk of inconsistent decisions being made without regard to overall coherence.

³ We use the term “financial orders” to refer to what used to be known as “ancillary relief”, on divorce and dissolution; in this context the term does not refer to orders made under Schedule 1 of the Children Act 1989.

⁴ [2000] UKHL 54, [2001] 1 AC 596.

- 9 Similarly, a marital property agreement may state that a specified asset is not to be shared, but may fail to say what happens to it when it changes over time or is mingled with other property. We have to look at these issues in the context of qualifying nuptial agreements, and the extension of our project to encompass non-matrimonial property enables us to look at the same issues in both contexts.
- 10 Accordingly, our final Report (which we expect to publish in autumn 2013) will cover three aspects of the law relating to financial orders.
- (1) It will examine the role of provision for needs on divorce and dissolution. The recommendations we make about this are likely to be in two groups.
 - (a) Some will relate to fundamental and principled reform, and will require further research, development and piloting after completion of the Law Commission's project before there can be a change in the law.
 - (b) Other recommendations about needs will be designed for immediate implementation so as to provide short-term improvements. Of those recommendations, some will be for non-legislative measures, and few if any will require statutory amendment; those that do will be incorporated in a draft Bill.
 - (2) The Report will make recommendations about non-matrimonial property, reflected in provisions in the draft Bill.
 - (3) The Report will make recommendations about the legal status of marital property agreements and, again, the draft Bill will include clauses to reflect those recommendations.
- 11 We turn now to an overview of the SCP, Part by Part.

PART 1

- 12 Part 1 of the SCP is introductory, explaining how the project on marital property agreements came to be extended. It also summarises the consultation questions posed in the SCP, and acknowledges the very considerable help we have had from practitioners, academics, and other groups and individuals in preparing the SCP. We have had a great deal of help from Resolution (formerly the Solicitors' Family Law Association) and are most grateful to the organisation and its members.

PART 2

- 13 In Part 2 we explain the legal background to our extended project; this is ground that was covered in more detail in the 2011 CP, and will in any event be familiar to lawyer consultees. Part 2 goes through the statutory provisions and the range of orders that can be made, as well as introducing the concepts of the clean break and the concepts of needs, compensation and sharing.

- 14 The meaning of “needs” is explored in some detail, with a view to making it clear that the term refers to both income and capital provision (including housing, income needs, pension requirements and so on), whether that provision is made on an ongoing basis in the form of periodical payments or is capitalised so as to achieve a clean break. We use the term “spousal support” as a synonym for needs in this broad sense.⁵
- 15 Part 2 also introduces the practical approaches that the courts take in both the “big money” cases and the rest – the latter of course being the vast majority, where neither compensation nor sharing are relevant (and therefore where non-matrimonial property cannot be insulated from the overall consideration of the division of assets in order to meet needs).

PART 3

- 16 In Part 3 we focus on the law relating to needs in order to explain the case for reform.

Background

- 17 Although section 25 of the Matrimonial Causes Act 1973 sets out the considerations to be borne in mind when making orders, the section gives the court no objective to be achieved in making orders. The situation facing family judges has therefore been likened to that of:

... a bus driver who is given a large number of instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the bus. All he or she is told is that the driver is required to drive to a reasonable destination.⁶

- 18 The reason for this situation is historical. Before 1969, divorce in England and Wales was both fault-based and gendered. An “innocent” wife was entitled to remain married for life, and a “guilty” one could be divorced; but a guilty husband must still maintain his wife. Divorce reform in 1969 took away that foundation. The new no-fault grounds for divorce meant that the basis of financial provision in guilt and innocence no longer made sense. However, a liability to pay spousal support in some form was never questioned. In an era when very few married women were employed, the hardship caused by divorce to women was so serious that the relief of hardship would have seemed a justification in itself.

⁵ We do not intend the term “spousal support” to refer only to periodical payments.

⁶ P Parkinson, “The Diminishing Significance of Initial Contributions to Property” (1999) 13 *Australian Journal of Family Law* 52, 53, explaining Justice Chisholm’s extra-judicial writing on the equivalent Australian statute.

- 19 The Matrimonial Causes Act 1973 did originally contain an objective for financial orders; section 25 required the courts to place the applicant in the position he or she would have occupied had the marriage not broken down. The difficulties inherent in that objective were obvious: it was not practicable to do so in most cases, and conceptually it was incompatible with a divorce law no longer based on fault. The objective was repealed in the Matrimonial and Family Proceedings Act 1984, leaving the section without any stated objective. The bus driver initially had an inappropriate destination; now there is no destination at all.
- 20 In the absence of statutory guidance, the courts developed the “reasonable requirements” approach during the 1970s and 1980s. Financial provision for a former spouse was to be made, where possible, at a level that would support her (usually applicants were women) at the marital standard of living for life. In the “big money” cases where there were substantial capital assets this could be achieved by a capital award on a *Duxbury* basis; in the vast majority of cases it was not achievable at all, and the courts and parties did the best they could to stretch the available resources, including post-divorce income, to provide housing and an income for the children and the parties.
- 21 The provision, in the big money cases, of spousal support on the basis that the applicant should be maintained at the marital standard of living for life, was incongruous and unprincipled. But this passed without criticism because of the very restricted nature of the overall award; in stark contrast to the law elsewhere – particularly in continental Europe. The courts made generous provision for housing and living expenses, while denying the applicant any share of the family’s property, which was regarded as belonging to the person who earned it.
- 22 Following the decision in *White v White*⁷ there has been no real change in the law relating to needs – even though the term “reasonable requirements” should now have no place in the law of financial orders.⁸

The meaning of needs in today’s financial awards

- 23 A major reason for reform is that there is no clear law to tell us what needs are. Most family lawyers are confident that needs are something they know when they see it; none can offer a definition, although all can offer explanations and descriptions of what “needs” can include. In practice, practitioners and the courts offer a blend of pragmatism and the old “reasonable requirements” approach.

⁷ [2000] UKHL 54, [2001] 1 AC 596.

⁸ *White v White* [2000] UKHL 54 at [35] to [36], [2001] 1 AC 596, 608 to 609 by Lord Nicholls.

- 24 In the “big money” cases, where the assessment of needs is primarily driven by budgets, those budgets are inevitably founded on the expectations that arise from the marital standard of living. We find in the case law acknowledgement that there is no longer a right to be kept at the marital standard of living for life; but it is not known what standard is aimed for. The only indication of what is wanted in *Lawrence v Gallagher*, for example, is a reference to the need “for each to live comfortably in their own homes”.⁹
- 25 When family law practitioners are asked for how long needs have to be met at this level, there is, again, real uncertainty. There is an acceptance that needs may diminish over time but it is by no means clear how long support should be provided for (whether by way of periodical payments or on a capitalised basis); generally some level of support is provided for the duration of the children’s minority, but for how long after? Where needs are being met in the wealthy cases by a capitalised sum, a generous approach is taken; where needs are being met by periodical payments, there are regional variations in practice as to whether or not a term order, or a section 28(1A) direction, will be imposed.

Issues in the law relating to needs

- 26 We can summarise the problems within the law relating to needs as follows.

A lack of principle

- 27 The law has not evolved a principled basis on which a former spouse is required to meet the other’s needs after divorce or dissolution; nothing has replaced the gap left by the disappearance of the pre-1969 explanation. There is no lack of justification for the meeting of needs; but the presence of multiple justifications generates inconsistent and unpredictable outcomes.

The law is inaccessible

- 28 As we have seen, we can say, broadly, what level of needs the courts will generally award, but only by a study of the case law. Couples managing the financial consequences of dissolution are left to bargain in the shadow of the law, but it is not clear how they are to find out what the law is. This is troubling in a context where far fewer litigants will be able to get publicly funded advice following reforms to legal aid.

Uncertainty within the current law

- 29 There is real uncertainty about the level of support payable and the duration for which support is to be given, whether in the form of ongoing periodical payments or in the form of a capitalised sum. There may also be uncertainty arising from the fact that judicial discretion is exercised inconsistently across the country. Practitioners have told us that there are marked differences between courts and geographical regions.

⁹ [2012] EWCA Civ 394, [2012] 1 FCR 557 at [42] by Thorpe LJ.

Dissatisfaction with the level of awards

- 30 For decades there has been regular critical press and public comment about perceived open-ended financial liability for “undeserving” former spouses after divorce. On the other hand there remains a concern about inequality, because it is well-established that those who sacrifice earning capacity for the sake of the family tend to fare worse on divorce or dissolution.¹⁰ Typically they are women, although the old gendered division of labour within the family is no longer so deeply entrenched as it was.

The case for reform

- 31 At the heart of the unease with the law relating to needs are two quite different concerns. One is the lack of a principled basis for a law which in practice appears to aim to award lifelong support at the marital standard of living. The other concern is the position of people without legal representation who have to discover what their obligations are; their difficulties are evident from the fact that even legal advisers have difficulty in predicting what awards will be made.

- 32 There have been many calls for reform over the years, and the debate about the basis in principle for the meeting of needs after divorce and dissolution is a longstanding one. We aim to make progress in the debate and to recommend future directions, but we take at this stage the pragmatic view that even if consultation reveals pressure for change, it would be difficult to recommend immediate fundamental reform. The difficulty is not only the unlikelihood of consensus but also the fact that fundamental reform in other jurisdictions has been achieved only after extensive empirical research, and has taken a number of years to accomplish. We believe that it can be achieved in this jurisdiction, and that this consultation can function as a fresh start in the search for principle in this area of the law.

- 33 So there is a case for two quite different endeavours for our project:

- (1) to consult about the theoretical and principled basis for reform of the law relating to needs, so as to make recommendations for fundamental reform in the future; but also
- (2) accepting that principled reform will take some years to achieve, to recommend reform that will improve the current law in the meantime.

- 34 We address the first of those two aims in Part 4, and the second in Part 5.

PART 4

- 35 Part 4 of the SCP begins by asking why needs should be met at all, on any basis, after divorce or the dissolution of civil partnership. It then asks: granted that – as we argue – they should be met, on what basis should that be? We go through what seem to us to be the options, and then consider some of the implications of policy choices, before setting out our consultation questions.

¹⁰ This is set out in the SCP at para 3.41, fn 50.

Why meet needs at all?

- 36 We have heard it said that divorce and dissolution mark the end of a legal relationship and that the parties should thereafter have no responsibility for each other. We would expect legal practitioners to be well aware of the counter-arguments to this, rooted in the inevitable financial interdependence that arises during marriage and civil partnership, the choices made about different roles in meeting responsibilities, and the continuance of those responsibilities – particularly to children – beyond the ending of the relationship. Unless financial provision is made, the ending of the partnership may have consequences that are both unfair and financially disastrous for one or both parties.
- 37 A more serious attack on the continuing necessity for the law to require spousal support is the question: why should needs be met at all post-*White*? If the spouses get to share the marital property, why should either have any additional claim on the other?
- 38 There may of course be nothing to divide. More usually there will be very little, with the available capital going no more than a short way towards meeting the housing needs of any children, at best. Yet for both parties there will be costs of re-adjustment, and possibly ongoing financial responsibilities. Even in the absence of capital resources, financial provision has to be made.
- 39 Where there is something to divide in a low-income case, the value of half the equity in the house is a disastrous receipt for the financially weaker party because the capital will not re-house him or her, but it will be a disqualification for receipt of social security. So simple equal sharing is likely to leave one party with needs unmet and the other with a surplus and indeed the capacity to borrow. The resources in such families have to be distributed on the basis of needs, and there is no scope for the sharing principle. Accordingly in most cases there is no sense in which the recipient of a needs-based award is “double-dipping”.
- 40 However, in the wealthy cases, it is often clear that a half share of the parties’ capital resources is ample to enable both parties to live at or near the marital standard of living. In such cases the courts’ current practice is that no separate award based on needs is made. Again, there is no question of double recovery.

Towards a principled basis for spousal support

- 41 Clearly, then, the bus has to travel. Where is it to go? In discussing reform, we bear in mind the following values:
- (1) Clarity: the law should be reasonably easy to understand.
 - (2) Rationality: the law should be intellectually defensible.
 - (3) Fairness: the law should not leave someone with responsibility that is not theirs or that should have been shared.
 - (4) Equality: the law should not discriminate between men and women.
 - (5) Realism: reform that passes costs to the state is less likely to be implemented.

- (6) Support for family relationships: the law should not do anything that tends to encourage divorce or relationship breakdown; equally it should not impose or penalise lifestyle choices made by couples.
 - (7) An expectation of independence: the law should not encourage dependence where that can be avoided.
- 42 Part 4 of the SCP also sets out three hypothetical scenarios – one very typical case and two that illustrate conundrums within the current law. Readers will wish to consider how the different options for principled reform might impact on these case studies.

CASE STUDY 1

Sarah and Ian are in their early thirties; they have been married for six years and have two young children aged three years and five years. Ian works as a deputy manager in the local building society and Sarah looks after the children full time, having given up her career as a speech therapist. They live in a home worth £250,000, with a mortgage debt of £200,000. Ian has accrued 10 years of pension benefits. The couple have no other assets. They have agreed to divorce, and that the children will live with Sarah.

CASE STUDY 2

Sophia and Michael have been married for six years and have no children. Sophia is a consultant orthopaedic surgeon who works with private patients and earns a six figure salary. Michael is a carer for the elderly and works part time. The couple live in a home in Central London worth £2 million, subject to a mortgage debt; the house was bought, and some of the mortgage debt paid off, using Sophia's earnings during the marriage. They enjoy a high standard of living with at least three overseas holidays per year and eat out at least five times a week. They have a housekeeper and team of domestic staff to run their home.

CASE STUDY 3

Pat and Chris entered into a civil partnership eight years ago and have no children. They are both secretaries and they met at work. They live in a rented flat. Whilst on holiday, Pat suffered a devastating cycling accident and was left paraplegic. After eight months in rehabilitation Pat returned to the couple's home and was cared for by Chris. Pat is now unable to work. Pat has no grounds to make a personal injury or insurance claim in relation to the accident.

- 43 Part 4 then explores the following available models for reform:
- (1) a compensatory basis;
 - (2) unravelling the “merger over time”;
 - (3) a formulaic calculation, as seen in the American Law Institute’s Principles of the Law of Family Dissolution;
 - (4) formulaic guidelines, such as the Canadian Spousal Support Advisory Guidelines; and
 - (5) a focus on independence.

(1) A compensatory basis

- 44 Conspicuous among the available theoretical models is the view that needs should be met only if they are generated by the relationship – hence the term “relationship-generated needs”. The academic pedigree of this view is long. The most important work is undoubtedly Ira Ellman’s 1989 article “The Theory of Alimony”.¹¹ He pointed out that in a typical “housewife marriage”, the wife puts in her major investment at the start of the marriage. She makes a huge economic sacrifice by giving up work; the pay-back comes much later when she is supported for life and into old age. The husband, by contrast, sacrifices very little at the start – he carries on earning, children are produced, and the childcare is done. He shares his earnings to support the family, but that is nowhere near the loss that his wife suffers.
- 45 In economic terms, therefore, if the marriage ends after the parties have had children, without financial adjustment, the traditional housewife suffers a huge financial loss whereas her partner does not. Ellman argued that the post-divorce financial settlement should compensate this loss, so as to incentivise, or at least make safe, economic sacrifice made for the common good. The ex-spouse should be compensated for earning capacity she has lost in the interests of the marriage; she should get what she would have had but for giving up work in reliance on continued support.
- 46 The argument that spousal support should be restricted to the meeting of relationship-generated needs is a powerful one. It supplies a clear answer to the question: why should a former spouse meet someone’s need, rather than the other members of the claimant’s family, or the state, or indeed no-one at all. If an ex-spouse is liable to meet these needs, that removes an economic incentive to divorce; perhaps more realistically, it is fair (because those who make economic sacrifices are not also left bearing a disproportionate cost of the sharing of responsibility); and it promotes equality between different working choices and between the genders. The compensatory basis can be seen as a logical and attractive basis for liability.

¹¹ I Ellman, “The Theory of Alimony” (1989) 77(1) *California Law Review* 1.

- 47 For some, however, this argument is unappealing because it appears to ignore the merging of lives and of expectations that marriage and civil partnership inevitably involve. It is a consequence of Ellman’s argument that if the claimant was in very low-paid employment before the marriage and had no prospects of betterment, and is able to return to that employment post-dissolution, then the claimant has no claim for spousal support even if the other party is a millionaire. Another consequence is that in our scenario 3, Pat gets nothing, because we cannot say that Pat’s disability was caused by the relationship.
- 48 Ellman’s arguments form part of the basis for the American Law Institute’s principles of spousal support,¹² and, less directly, for the Canadian Spousal Support Advisory Guidelines.¹³ Both are formulaic rather than evidence-based methods of assessing spousal support, and we have to look at the reasons why they are formulated on that basis.
- 49 Difficulties arise from the need to quantify loss, by working out what a claimant would have been earning had he or she not given up work, say, 25 years ago. In our first case study it may be difficult to assess what Sarah’s financial position would have been but for her childcare role. Equally, it is not usually possible to assess future loss precisely by working out when a claimant will get “back to normal” or “back up to speed”.
- 50 And it was that difficulty that led to the idea of adopting a formulaic approach. Different American states have adopted different schemes, but the major reference point here is the American Law Institute’s Principles of the Law of Family Dissolution, of which Ira Ellman was the principal reporter. However, the American Law Institute’s Principles also incorporate a different idea developed by other scholars, namely “merger over time”.

(2) Unravelling the “merger over time”

- 51 A very different approach is to be found in a group of theories which build on the idea of “merger over time” and make proposals that focus on the unravelling of that merger without an assessment of individual economic contributions to the marriage. These theories are also known as “income-sharing theories” because that is the mechanism they advocate for the calculation of spousal support.¹⁴
- 52 “Merger over time” is a description of what happens within a marriage:

¹² American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

¹³ C Rogerson and R Thompson, *Spousal Support Advisory Guidelines* (July 2008), available at <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html> (last visited 27 July 2012).

¹⁴ C Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December 2002) p 23, available at <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/ss-pae> (last visited 27 July 2012).

[An approach to spousal support] is to see the spouses as merging into each other over time. In this model, the longer they are married, the more their human capital should be seen as intertwined rather than affixed to the individual spouse in whose body it resides. ...After a while, one can less and less distinguish what was brought into the marriage and what was produced by the marriage.

One way to implement such a concept would be to give each spouse a percentage interest in the other's human capital/future earnings based upon the duration of the marriage.¹⁵

53 Thus although the term “merger over time” describes what happens, or can happen, during a relationship, it is also used as a shorthand for a basis of relief. Most versions of the merger over time theory propose income sharing over a period proportionate to the length of the marriage, in order to provide transitional support and, therefore, to facilitate a de-merger. Neither “merger over time” nor “transition” can tell us what measure of relief is expected. Instead, these ideas are powerful arguments for spousal support that does not seek to measure loss or to calculate what might have been, but seeks to equalise the spouses' position (thus reflecting merger) for a period proportionate to the length of the marriage. The longer the marriage, the greater the merger and the greater the support.

54 We note in the SCP that the French *prestation compensatoire*, or compensatory payment, is – despite its name – apparently calculated by a range of local formulae on this basis. The same outcome may be seen in other areas of Europe too, notably in Germany. The recently reformed German system for spousal support seems, as in the French system, to be based on an assessment of current disparity rather than of relationship-generated loss. Some regional courts have developed tables and formulae, dependent upon relative living standards, to express this.¹⁶

(3) A formulaic calculation: the American Law Institute's Principles of the Law of Family Dissolution

55 The American Law Institute's Principles of The Law of Family Dissolution (“the ALI Principles”) sought to create model principles for adoption in varying forms by the US states. They are a law reform proposal, but they reflect existing practice in the USA. The ALI Principles discuss the basis of support at length; although its starting point is the compensation of loss generated by the relationship, it has also included an element of compensation for loss in standard of living, thus drawing upon the merger over time theories. The harsh outcomes described at paragraph 48 above does not occur. Another way of describing the principles is to say that they address the different impact upon the parties of the ending of the relationship.

¹⁵ S Sugarman, “Dividing Financial Interests on Divorce” in S Sugarman and H Kay (eds), *Divorce Reform at the Crossroads* (1990) pp 159 to 160.

¹⁶ A Dutta, “Marital Agreements and Private Autonomy in Germany” in J M Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2012) pp 158 to 199, p 165.

56 Appendix A to the SCP sets out the formulaic scheme suggested by the ALI. It is based on disparity of earnings post-dissolution; it assumes that sharing of capital has already been effected, and that an effective system for child support payments is in place. The most important elements in the calculation are:

- (1) loss in standard of living experienced at dissolution by the less well-off spouse (paragraph 5.04); and
- (2) loss of earning capacity incurred during marriage and continuing afterwards as a result of taking on a disproportionate share of childcare (paragraph 5.05).

57 These are calculated¹⁷ as follows.

- (1) $0.01 \times$ the “earnings gap” between the parties, multiplied by the number of years of the marriage, to last for a period equal to 60% of the length of the relationship.
- (2) $0.015 \times$ that gap, per year of childcare, as a proxy for lost earnings as a result of childcare, payable for a period, again to last for a period equal to 60% of the length of the relationship.

58 The calculations are subject to a ceiling: payment cannot exceed 40% of income; and duration is subject to provisos so that where the age of the payee and/or length of the marriage exceed certain limits there is no maximum duration. The formula itself is not based upon any calculation of actual loss or of the actual cost of re-adjustment. Crucially important is the fact that levels of payment depend upon duration, both of marriage and of years of childcare undertaken during the marriage.¹⁸ Duration therefore becomes a proxy measure for loss, or for what is needed in order to adjust to the change of lifestyle. Predictability is preferred to attempts at individualised justice.

59 However, the scheme allows for departures in cases where there is substantial injustice. So whilst the result in our scenario 1, and indeed in scenario 2, will be predictable on the basis of the formula, there is potential for an individualised solution to scenario 3.

(4) Formulaic guidelines: the Canadian Spousal Support Advisory Guidelines

60 The Canadian system was overhauled by the production of Spousal Support Advisory Guidelines (“SSAG”) in 2008. The problem is familiar and resonates with what has happened in the USA and in this jurisdiction: the rationale for spousal support vanishes with no-fault divorce, no rationale is substituted and the law becomes uncertain and difficult either to explain or to predict.

¹⁷ These are the suggestions; the ALI Principles recommend that states choose their own figures.

¹⁸ Where childcare has been undertaken jointly, with both parties sacrificing earnings in order to do so, then a more complex calculation is required.

61 As Professor Carol Rogerson, one of the authors of the guidelines, put it:

Some now believe that life-long support (and at the most extreme – at the marital standard of living) can be claimed after the breakdown of any marriage, whatever its length or nature, if breakdown will leave the parties in significantly different financial positions. Such a model of spousal support is theoretically unjustifiable, absent fault, and will only serve in the long run to de-legitimize the spousal support obligation.¹⁹

62 Hence the SSAG project, which built on the ALI Principles but also upon extensive work researching local practice in the Canadian courts. The guidelines work on the basis that entitlement to maintenance arises from significant disparity in post-divorce income; the calculation of maintenance by formulae is intended to generate both compensatory and non-compensatory payments. The calculations are not dissimilar to those required by the ALI Principles, but more generous. The guidelines are indeed guidelines – their use is voluntary, but they are now widely used. And unlike the formulae in the ALI Principles, the SSAG give a range, not a final figure, within which the courts can decide and/or the parties can negotiate. A summary of the formulae is set out in Appendix B to the SCP. Again there is a range of exceptions which justify departure from the formula.

63 Putting the ALI Principles and the SSAG together we can see that both involve a formula, and that both are crucially dependent upon duration; in all cases the economically weaker party has an entitlement to spousal support because the loss of interdependence is recognised as compensable. Both formulae recognise the ongoing nature of loss where there is ongoing child support. The SSAG generates a range, rather than a single figure, and therefore there is rather more room to negotiate.

¹⁹ C Rogerson, “The Canadian Law of Spousal Support” (2004) 38(1) *Family Law Quarterly* 69, 95.

(5) A focus on independence

- 64 Some approaches to this area of the law impose a limit on either the level or the duration of spousal support in the interests of encouraging independence post-divorce. This approach can be traced back some decades. In the 1970s and 1980s some writers²⁰ questioned why “maintenance” was paid at all,²¹ save to the very old or to those who were looking after very small children. Their arguments were made from a feminist point of view and in opposition to a system that made women dependent upon men. Their argument was not simply that divorced wives should not be maintained; they also wanted women to be, and to expect and be expected to be, self-sufficient by remaining in employment and providing for themselves. So they did not see withdrawal of the expectation of maintenance as a stand-alone idea. More recently Baroness Deech has argued that the availability of spousal support jeopardises the development of equality in the workplace.²²
- 65 There is force in these arguments. To some extent, any system that provides support also enables, and perhaps encourages, dependence. And any imposition of a cut-off point, in either the level of support or its duration, can be said conversely to encourage independence and to discourage career sacrifice made in the interests of family life. That might be particularly important in our scenarios 1 and 2, whereas it would be ineffective in scenario 3.
- 66 The other side of the coin is that an arbitrary limit on the level or duration of spousal support available has some damaging side-effects, by limiting choice and – indirectly but inevitably – prejudicing women (who statistically, still, are far more likely than men to give up work to look after children). Sarah, in case study 1, is very vulnerable to any arbitrary limitation in her entitlement to support; the benefits (to her, as well as to Ian) of encouraging her to get back into work have to be set against the hardship that may arise if she is forced to do so.
- 67 The Scottish system makes for an interesting comparison here. The Family Law (Scotland) Act 1985 makes financial orders available for the fair sharing of matrimonial or partnership property, to take account of economic advantages and disadvantages (including the economic burden of looking after children), to enable a dependent partner to adjust to loss of support and to relieve serious financial hardship. Maintenance paid to enable a dependent partner to adjust to loss of support is payable for a maximum of three years; the Scots regard the clean break as a priority. The result is that where a spouse who has sacrificed earning capacity can be compensated from capital, that will be done; but that where there is no available capital, that spouse will remain uncompensated. The system is reputed to be harsh to women; it must certainly penalise the less well-off who have no capital available.

²⁰ R Deech, “The Principles of Maintenance” (1977) 7 *Family Law* 229; P Symes, “Indissolubility and the Clean Break” (1985) 48(1) *Modern Law Review* 44.

²¹ This was of course in the era when there was no entitlement to share the family property.

²² R Deech, “Divorce Law – A Disaster?” Gresham College Lecture, 15 September 2009.

Policy choices and their consequences

Consultation questions

- 68 Despite the fact that the available levels of spousal support are infinite, the policy choices may well boil down to two or perhaps three. The obvious two are as follows.
- (1) Should the law seek to compensate relationship-generated need or should it seek to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution?
 - (2) Should a formulaic calculation be adopted?
- 69 The third issue would be to decide to what extent either a reformed discretionary basis or a formula would embody incentives towards independence by placing limits on the extent of support that might be given.
- 70 We take the view that the current law, based as it is upon a mix of mutually inconsistent principles, is not a sustainable policy choice for the future. Beyond that, we express no view about the choices above at this stage, but ask consultees to consider them, in terms of their impact upon separating couples and their children, and upon society as a whole.
- 71 We would also ask consultees to consider the way in which change should be put into effect. Reform of the basis of discretion, re-shaping section 25 by adding an objective in terms of compensation, or of transitional support, could be achieved by statutory amendment. What would be the effect of that in practice on the practical issues: how much has to be paid, and for how long? And if a formula is favoured – potentially giving clear answers to both those questions – how would it then be devised?
- 72 The introduction of a formula is a complex matter and this project is not the context in which a formula could be devised. Experience in other jurisdictions indicates that considerable empirical work and piloting would be needed to devise a formula that yielded acceptable results, and in particular results that did not divert dramatically from the outcomes achieved under the current law, nor cause unexpected hardship to the parties or their children. Accordingly, those who favour that approach are also asked to consider how the further work required would be conducted, who should do that work, what methodology should be adopted, and what sort of timescale and investment would be required.

Consultation questions in Part 4

- 73 **Do consultees agree with our central argument that the current law requires reform to ensure that the payment of spousal support is founded on a principled basis that explains what has to be paid by way of spousal support, and for how long?**
- 74 **Should spousal support:**
- (1) **be restricted to the compensation of loss caused by the relationship; or**

- (2) seek to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution?
- 75 In answering the question at 74 above it would be helpful to hear consultees’ views on the relevance or otherwise of:
 - (1) the length of the marriage;
 - (2) the marital standard of living;
 - (3) the way that joint responsibilities (for example, provision of childcare or care for an elderly parent) have been shared during the marriage and will be shared after its ending; and
 - (4) the occupation of the former matrimonial home following divorce.
- 76 If consultees favour a principled reform of spousal support, should it take the form of:
 - (1) a reformed discretionary approach; or
 - (2) a formulaic calculation?
- 77 To what extent do consultees think that either a reformed discretionary basis or a formula should embody incentives towards independence by placing limits on the extent of support that might be given?
- 78 What preliminary work would be needed to research and pilot a new approach? In particular:
 - (1) who should do that work?
 - (2) what methodology should be adopted?
 - (3) what sort of timescale and investment would be required?

PART 5

- 79 Part 5 approaches the law relating to needs in a different way. Because it will take time to achieve principled reform, in Part 5 we consider ways in which it might be possible improve matters in the short term. The options that we identify could involve small-scale statutory reform, or non-statutory guidance (which cannot change the law), or both. We also discuss briefly the management of the concept of needs in the context of qualifying nuptial agreements.
- 80 We have found it useful to concentrate on three issues in this Part:
 - (1) the balance between support and independence;
 - (2) the provision of information; and
 - (3) the need for consistency between courts.

- 81 These issues are discussed under two headings, namely the balance between support and independence and the provision of information, because the problem of inconsistency is seen in the courts' response to those two issues.

The balance between support and independence

- 82 One of the difficulties that we identified in Part 3 was the uncertainty within the current law about the duration of spousal support. An award based on needs involves a detailed examination of the parties' means; it will often involve issues such as the effect of employment disadvantage caused by looking after children for years ahead, and where possible consideration should be given to long-term issues such as pension provision. It therefore involves a difficult judgement; at what point can the former spouses be financially independent of each other?
- 83 That judgement must then be reflected in the amount awarded. It will not necessarily be reflected in the duration of payment; provision for future years of support can be capitalised. Dissatisfaction may arise for two opposing reasons: the economically weaker party may feel that inadequate provision has been made, and the other party may feel that support is being ordered for far too long. The latter view may be stronger in cases where periodical payments are in fact awarded, because the requirement to keep making regular payments to a former spouse, perhaps over many years, may keep dissatisfaction alive.
- 84 We find within the current law evidence of the desire to encourage independence. The reality of divorce means that former spouses should not be tied to each other for life; the law gives them freedom to re-marry and take on new responsibilities, and this is hampered if the financial commitment of a former relationship is unnecessarily prolonged. For the economically weaker party, dependence means vulnerability to another's employment, health and willingness to pay.
- 85 Equally we find in the case law the recognition that independence is impracticable in circumstances where the financial commitment of the marriage has effects that reach a long way into the future. There have been clear statements from the higher courts that it is not appropriate for the possibility of support to be cut off²³ where the payee is looking after school-age children. Even where no substantive periodical payments have been ordered, a nominal order should be made so that it can be varied in future.
- 86 Accordingly, despite the importance of independence, the courts inevitably recognise that it may not be possible. The statute itself does not help the courts to weigh the desirability of independence against the need for support. The statute requires the court to consider a clean break or a deferred clean break; but where the road to independence cannot be seen clearly ahead, the courts are reluctant to cut off financial support.

²³ Whether by an immediate clean break – even if it embodies provision for the future – or by a term order without the possibility of extension.

- 87 So the courts have a genuine dilemma. For the ex-spouses themselves, that dilemma may not be understood, and the outcome may be perceived as unfair by one or both. Moreover, it seems that this is an area where there are significant regional variations in the practice of the courts.²⁴ Where financial issues are resolved outside the legal system, by negotiation or mediation, there may be further difficulties. A lack of understanding of the tension between the value of independence and the need for support, and a lack of information about the real extent of needs in the current law, may mean that negotiated or mediated solutions, even if they embody the real advantages of consensus, do not make adequate provision for former spouses or children.
- 88 Matters could be improved, we suggest, by the provision of better and more authoritative information for litigants, which we discuss below. There may also be a case for guidance for the judiciary. Is there also scope, and is there any need, for amendment to the statute?
- 89 One possibility would be to upgrade the current statutory direction to the court to consider whether the financial obligations of each party towards the other can be brought to an end,²⁵ and instead direct the court to bring it to an end where possible. That could send an important message to the courts and, perhaps more importantly, to litigants and those who are negotiating their own financial settlement.
- 90 Such a direction would be incomplete without a statutory statement of the opposing issue, namely the need to ensure the possibility of ongoing provision for parents who are looking after children. The message that the law should convey is that lifelong dependence is not what is wanted, and that self-sufficiency is expected but only where that is possible. What we have in mind here is a message and a consideration, rather than a rule or presumption. A rule that term orders will never be made where the payee has care of minor children, or at least that the term should not expire before the ending of the dependency of the youngest child, would in some senses strengthen the position of parents with whom children live; but it could send the wrong message for those who can achieve independence. It could also weaken the bargaining power of some who would prefer to receive a greater share of the equity in the home in return for an ending of the possibility of ongoing support.
- 91 An alternative would be the addition of both points to the “section 25 factors”. We ask consultees’ views on these possibilities below.²⁶ Three further possibilities either for minor statutory amendment or as the subject matter of authoritative guidance are worth consideration.

²⁴ E Hitchings, “Chaos or Consistency? Ancillary Relief in the ‘Everyday Case’” in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (2009) pp 198 to 204. We have also heard anecdotal evidence on this point.

²⁵ Matrimonial Causes Act 1973, s 25A(1).

²⁶ See para 108(1) below.

- (1) The court might be directed by the statute, or encouraged by guidance, to make a term order, capable of extension, in all but exceptional circumstances in preference to a joint lives order. That would place the onus on the payee to apply for an extension, rather than leaving payment for life as a default option.
 - (2) Another possibility would be to create – by statutory amendment, or in non-statutory guidance without legal effect – an expectation of independence within a stated period, in the absence of circumstances that make that inappropriate.
 - (3) The Centre for Social Justice in its 2009 “Every Family Matters” report recommended that parties to a marriage of less than three years without children should share marital assets equally but otherwise be returned to their pre-marital financial positions on divorce, unless this would cause “significant injustice”.²⁷ That would bring an element of certainty to a situation where long-term dependency is particularly inappropriate and at a point when irreversible losses are unlikely to have occurred.
- 92 We make these suggestions tentatively, being alive to their obvious disadvantages as well as to their possible merits. Readers with an interest in this aspect of the SCP are particularly urged to read the fuller discussion there. We bring these possibilities together in our questions to consultees at the end of this Part, since they are closely related to our thinking on the other topic that we now discuss, namely the need for better and more authoritative information.

Guidance and information

- 93 Although there is scope for statutory reform, the law might perhaps also be improved by non-statutory means. At the most basic level, greater information for litigants could help them to understand the extent of “needs” in the current law. Such information could assist litigants to find solutions by explaining the relative importance of different types of need. There may be scope for the provision of guidance that would also assist the judiciary, and therefore go some way towards eliminating inconsistencies.
- 94 We therefore consider the content of guidance, its source and authority, and the vehicle for publishing or communicating guidance. We appreciate that what we are suggesting here is a tentative exploration of measures that might assist; none is claimed as a complete solution, none is without disadvantages, and none is a substitute for the principled reform that we have advocated in Part 4.

²⁷ The Centre for Social Justice, *Every Family Matters: An In-Depth Review of Family Law in Britain* (2009) p 223, available at <http://www.centreforsocialjustice.org.uk/default.asp?pageRef=372> (last visited 27 July 2012).

The content of guidance

- 95 If asked for a definition of “financial needs”, a family lawyer is likely to respond not with a definition but instead with examples of tangible property types which may be involved in an order or agreement that meets needs. The examples are exclusively dictated by the financial resources available and the marital standard of living – a lawyer will rarely describe a party as “needing” something if it was not a financial choice already made by the couple during the marriage.
- 96 As “financial needs” are not described anywhere in statute, there is a concern that their scope may be underestimated by those with no access to legal advice. A party to a divorce may be resistant to providing for items which do not seem, to him or her, to be “needed”. We think that some of these concerns could be addressed by guidance that sets out a checklist of financial needs, accompanied by topics to consider and questions for the parties to ask themselves.
- 97 Guidance (and we stress that this would be guidance, not law) might also indicate the priority to be accorded, normally, to different types of need. It should reflect the priority currently given by the courts to housing for both parties, to a particular standard of housing (where possible) for children, and the importance of income levels, mortgage capacity, the costs of working and (where relevant) of retraining, of childcare, and of retirement provision.
- 98 A further way to communicate information might be the provision of case studies for commonly arising factual circumstances, exploring how needs could be prioritised. They could go beyond the checklist approach by including actual figures for salaries, house prices, rents and so on; they could be linked to a searchable database. Solicitors and mediators could be encouraged to submit anonymised case studies so that over time the database would provide a wide and representative range of examples. We appreciate that this might be an optimistic suggestion; it would depend upon the willingness of practitioners to participate in building up a bank of examples.

The source and authority of guidance

- 99 Clearly a great deal of information is available already, not only to the judiciary through conventional legal sources but also to the public. Increasingly, traditional providers of legal services are making information available on the internet; legal information provided by retail brands and insurance companies is becoming increasingly prevalent and is often hosted on a branded website. Some legal practitioners are now offering their services on websites which allow internet users to assemble their own court documents and submit them online to be checked.
- 100 What we have in mind, however, is a source of non-statutory guidance that will assist the courts and also benefit members of the public. A single source could, we think, play both roles, and thus would not only help to address regional inconsistencies in court orders but would also inform the public of the content of the law and of the matters that a court would take into consideration – which in turn would assist both in the negotiation of settlements and in the understanding of orders made.

- 101 But if guidance is to be of use both to the judiciary and to the public, it cannot be produced by a firm or commercial organisation, nor by a government department in view of the independence of the judiciary. One possibility is that the Family Justice Council might prepare Practice Guidance, after consultation.²⁸
- 102 Authoritative guidance produced in this way could also assist the judiciary and the public in resolving the tension between the need for independence and the need for support. We noted above three possibilities: an expectation that term orders would be the norm rather than joint lives orders, the production of starting points for periods within which independence should be expected to be achieved; and an expectation that the parties to a short childless marriage or civil partnership should receive – alongside their share of marital assets – only what they needed to return them to the economic position they held prior to the marriage.
- 103 Each of those suggestions amounts to an expectation or starting point rather than a rule; and each is quite specific and therefore vulnerable to external factors – such as, for example, a shortage of jobs caused by economic downturn. They might better be embodied in guidance – and therefore presented as a possibility to be considered and not as a rule or presumption – rather than in statute. They would thus be more easily amended; and they would be more accessible to the public (depending upon the vehicle chosen for their publication – see below).

The vehicle for guidance

- 104 The internet is becoming an increasingly important means of accessing legal advice and information.²⁹

²⁸ The Family Justice Council is an independent body, sponsored by the Judicial Office, whose members include experts from the legal, medical and social care fields. The Council is specifically charged with “providing guidance and direction to achieve consistency of practice throughout the family justice system and submitting proposals for new practice directions where appropriate”. See <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/fjc> (last visited 27 July 2012).

²⁹ We note the increasing prevalence of legal advice videos on video-sharing websites such as YouTube.

105 In November 2011 the Family Justice Review Final Report recommended the creation of an online information hub, providing a centralised source of information for family justice.³⁰ The Government has adopted that recommendation and is working to provide such a service.³¹ It seems to us that it would be the right internet resource to provide access to the checklist and accompanying information. It might be thought unusual for Practice Guidance to be made available in this way, but that would seem to be a sensible way to ensure that the guidance to be followed by the judiciary was also available to the public.

QUESTIONS FOR CONSULTEES

106 This Part has been exploratory, and we close with questions rather than provisional proposals, based on the possibilities that seem to us to be the most viable among many possible options.

107 Consultees are asked to give us their views about the following possibilities for statutory and non-statutory reform.

- (1) Statutory provision to the effect that the courts in making provision for spousal need must aim to ensure that a payee spouse is enabled to become independent within a reasonable period, while bearing in mind also that independence is unlikely to be practicable until the children of the marriage or civil partnership finish their education.**
- (2) An authoritative source of guidance for the courts and for members of the public about:**
 - (a) the considerations involved in an assessment of need;**
 - (b) the priority to be afforded to different elements of need.**
- (3) Provision about the following either by way of statutory amendment or in the form of authoritative guidance:**
 - (a) the time within which independence is to be expected;**
 - (b) the normal form of orders for periodical payments (term orders or joint lives); and**

³⁰ Family Justice Review Panel, *Family Justice Review: Final Report* (November 2011), pp 22 and 150 to 154, available at <http://www.justice.gov.uk/publications/policy/moj/2011/family-justice-review-final> (last visited 27 July 2012).

³¹ The Government Response to the Family Justice Review: A System with Children and Families at its Heart (2012) Cm 8273, pp 71 (recommendation 111), 81 (recommendation 130) and 82 (recommendation 131), available at <http://www.justice.gov.uk/publications/policy/moj/family-justice-review-response> (last visited 27 July 2012).

(c) **the financial arrangements to be made after short childless marriages.**

(4) **Who should provide that guidance? Would it be appropriate for it to be produced by the Family Justice Council in the form of Practice Guidance?**

(5) **Publication of that guidance on the information hub to be provided in response to the Family Justice Review.**

108 Consultees are asked to tell us about any other reform measures that would make the law relating to needs more consistent and accessible, short of the fundamental and principled reform envisaged in Part 4.

Needs in the context of qualifying nuptial agreements

109 We noted above that we have taken the view that it will not be appropriate to enable couples to use qualifying nuptial agreements to contract out of making provision for needs. We have to ask, therefore, what level of provision has to be made in order for a qualifying nuptial agreement not to be open to challenge on this ground. Should that level be set at a generous level corresponding to the meaning of “needs” in the current law, or at a lower level?

110 The 2011 CP asked consultees whether needs for this purpose should be set at the same level as needs in the general law, or at a lower level.³² There was very little enthusiasm for a lower level of needs and we are not pursuing that possibility any further. We intend to recommend that qualifying nuptial agreements will be open to challenge if they leave one of the parties without provision for needs, as understood in the general law. We have explained why it is not possible to find a simple definition of needs as it applies in the current law.

111 It would in theory be possible to provide a separate definition to clarify the meaning of needs, for the purposes of qualifying nuptial agreements only, which would approximate to the meaning of needs in the general law. For example, statute could specify that the qualifying nuptial agreement must not leave a party without housing and spending power for him or herself and any children of the marriage at a level commensurate with that enjoyed during the marriage, with guidance on duration and other issues such as pension provision. That could be more generous than needs provision under the current law, but might have the advantage of being slightly clearer for those contemplating the terms of a qualifying nuptial agreement.

³² Compare the comments in *Radmacher v Granatino* about “real need”: [2010] UKSC 42, [2011] 1 AC 534 at [81] by Lord Phillips (giving the judgment of the majority).

112 We are not convinced, however, that this would be beneficial. We envisage that parties will draft qualifying nuptial agreements either by including a general provision to meet needs, or by specifying a level of provision clearly in excess of needs. We do not see this as an onerous requirement. Many of those entering into qualifying nuptial agreements will not be motivated by a desire to squeeze need to a minimum. They will want, and be able, to make generous provision for their ex-partners.

113 We invite consultees' views as to whether, as well as stating that it shall not be possible to contract out of provision for needs by means of a qualifying nuptial agreement, statute should also specify the level of needs for that purpose.

PART 6

114 Part 6 of the SCP relates to non-matrimonial property. For many people, the concept of non-matrimonial property is irrelevant. Not everyone has any; and where it exists it can only be treated differently from matrimonial property insofar as it is not required to meet the other party's needs. But although non-matrimonial property is therefore something of a minority issue, it is important to take the opportunity to have the implications of its status resolved coherently rather than on a case by case basis.

115 The issues relating to non-matrimonial property are also relevant to qualifying nuptial agreements. If it becomes possible to contract out of sharing named items of property, agreements should specify what is to happen if the property is sold and replaced, or if the other spouse invests in it, and so on; but default rules are needed in case the parties do not make provision for this. We have to examine those issues in the context of qualifying nuptial agreements, and it therefore makes sense to resolve the same issues in the context of non-matrimonial property, where the same problems arise.

The current law

116 The current law has developed over the last 12 years since the House of Lords' decision in *White v White*.³³ Until then, the concept of non-matrimonial property had no place in ancillary relief because capital was not shared beyond what was needed to meet "reasonable requirements", even in the very wealthy cases.³⁴

³³ [2000] UKHL 54, [2001] 1 AC 596.

³⁴ See paras 21 and 22 above.

- 117 One of the consequences of the dramatic introduction of a sharing principle³⁵ in *White v White* was that litigants, and the courts, felt the need to explore its boundaries. To what property does the principle of equal sharing apply and when is such sharing not appropriate? Hence the development of the idea of non-matrimonial property. In *White v White*, the fact that the husband's parents had made a contribution to the original acquisition of the couple's home was used by the House of Lords as a justification for upholding the Court of Appeal's award to Mrs White, amounting to around 38% of the family's assets. The seed sown there has borne fruit; Lord Nicholls in *Miller v Miller, McFarlane v McFarlane* discussed non-matrimonial property explicitly, referring to "property ... the parties bring with them into the marriage or acquire by inheritance or gift during the marriage",³⁶ and in a number of cases property acquired or generated before the marriage, or inherited by either party, has not been shared.
- 118 It is clear that non-matrimonial property will be shared where it is required to meet needs; but as Mostyn J noted in *S v AG (Financial Orders: Lottery Prize)*³⁷ "we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs." There is considerable uncertainty surrounding property such as post-separation bonuses, where there is a conspicuous addition to one party's wealth after separation and before the divorce. A further suggestion is that the presence of business property that is owned by one party and entirely that party's concern, and has not been used to support the family, may justify a departure from equal division (subject to the length of the marriage).³⁸ It does not appear that this suggestion has been followed in the subsequent case law.

The issues for consultation

- 119 The importance of non-matrimonial property is now well-established in the case law but the detail is unclear. The issues appear to be as follows.
- (1) Is the source of property relevant at all?
 - (2) If it is, should there be a rule that non-matrimonial property should not be shared? Or should that question remain in the court's discretion?
 - (3) If there is to be such a rule, should it be subject to the proviso that it can be accessed to meet needs?
 - (4) What property is non-matrimonial?
 - (5) Can non-matrimonial property become matrimonial?

³⁵ Although their Lordships did not call it that.

³⁶ [2006] UKHL 24, [2006] 2 AC 618 at [23].

³⁷ [2011] EWHC 2637 (Fam), [2012] 1 FLR 651 at [7].

³⁸ See Lady Hale's discussion of "non-business-partnership, non-family asset cases" at [150] in *Miller v Miller; McFarlane v McFarlane*; compare Lord Mance at [170]: "where both parties are and remain financially active, and independently so".

(1) Is the source of property relevant at all?

- 120 For the sake of completeness we consider whether the concept of non-matrimonial property should disappear from the law, so that the courts would not distinguish between matrimonial or non-matrimonial property.
- 121 The reasoning that leads to the separate treatment of non-matrimonial property is persuasive. It recognises effort, emotional attachment, and family ties; the arguments are particularly strong in the case of second marriages (where each party may be concerned to keep the fruits of his or her own life's work, and may also wish to bequeath property acquired during the first marriage to the children of that marriage). The protection of non-matrimonial property feels important to the party who owns it not only in the obvious case of wealth, in whatever form, already gained through the owner's own efforts, or through inheritance, but also property that has financial and also emotional significance due to its age and its family associations. The problems presented by the family house or farm have been discussed in a number of cases. What these things have in common is that their source is unrelated to the marriage; in addition, in some cases although not all, the source gives the property an emotional importance as well.
- 122 The arguments for sharing property acquired during the marriage are considerably stronger than the arguments for sharing absolutely everything. If what is being honoured by the sharing principle is the marriage partnership and the joint efforts of the couple concerned it is difficult to bring pre-acquired property into that reasoning.
- 123 Accordingly, we do not propose that the source of property should cease to be relevant to whether or not it is shared. Moving on, then, we suggest that issues 2, 3 and 4 should be considered together.

(2) Should the treatment of non-matrimonial property be a matter for rules or for discretion?

- 124 This question is pivotal: it requires some balancing of couple-specific fairness and more general fairness. Rules will generate answers that are unfair, but so may discretion. Discretion is expensive; but the application of the rules may be disastrous to an individual (as may discretion). Rules may, however, have explicit exceptions; the protection of non-matrimonial property can be made subject to needs, as it is in the current case law. Discretion may be guided by principles, guidelines or presumptions of greater or lesser rigidity, as indeed we discussed in Part 4 in connection with the assessment of need.
- 125 Accordingly, there is a choice between:
- (1) an absolute rule that non-matrimonial property is not to be shared, and therefore is simply subtracted from the total family assets before the latter are shared;
 - (2) a rule subject to exceptions (in particular for needs);
 - (3) a discretion as in the current law, with added statutory guidelines, thus perhaps giving the greater security of a statutory presumption that non-matrimonial property will be shared only when required to meet needs; or

(4) no change – discretion as now.

126 However, it is difficult to answer this question without also having an answer to questions 3 and 4; it may be that a rule about non-matrimonial property would be unacceptable unless it could be overridden to meet needs, and conversely that a very broad definition of non-matrimonial property would have to be subject to some discretion.

127 We note that in the current case law there are two approaches to “not sharing”: the Court of Appeal’s approach in *Charman v Charman*³⁹ and in *Robson v Robson*⁴⁰ whereby despite the presence of non-matrimonial property the whole of the property is shared but in proportions other than 50/50, and its approach in *Jones v Jones*⁴¹ whereby the non-matrimonial property is taken out of the pool and the rest shared equally. The latter method has the merit of clarity and has been followed in recent High Court decisions, although not consistently. When we refer here to a rule that non-matrimonial property is not to be shared, we refer to the *Jones v Jones*⁴² approach, which leaves the treatment of non-matrimonial property as a matter of arithmetic: simply subtract it before sharing. The alternative generates unpredictable results; it cannot be known why a particular percentage is used in a given instance.

(3) If non-matrimonial property is not to be shared, should it nonetheless be able to be accessed to meet need?

128 It is clear in the current law that the court will readily order that non-matrimonial property be shared if it is required to meet need. If there is to be a rule that non-matrimonial property is not to be shared, should the rule be modified by an exception so that non-matrimonial property can be accessed to meet needs? Whilst it might be easier to answer this question if we had a definition of needs, we should nevertheless seek to do so on the basis of the current law, which measures needs generously with reference to the marital standard of living but is uncertain as to both how much should be paid and for how long.

129 We are committed to a policy of giving priority to needs; in particular, qualifying nuptial agreements will be subject to challenge if their effect is that needs are not met. So our preliminary view is that non-matrimonial property, while generally not shared, should be accessible to meet needs.

³⁹ [2007] EWCA Civ 503, [2007] 1 FLR 1246.

⁴⁰ [2010] EWCA Civ 1171, [2011] 1 FLR 751.

⁴¹ [2011] EWCA Civ 41, [2012] Fam 1.

⁴² [2011] EWCA Civ 41, [2012] Fam 1.

(4) What property is non-matrimonial?

- 130 If the law is to change at all with respect to non-matrimonial property there must first be a definition of that property. It seems clear that inherited, gifted and pre-acquired property⁴³ are currently regarded as non-matrimonial property. It is not clear what should be the status of property derived from non-matrimonial property, such as bonus shares issued during the marriage or civil partnership. Nor is it clear whether the definition should include the separate business property referred to in paragraph 119 above. And should it include post-separation bonuses?
- 131 There are strong arguments for and against regarding the family home as matrimonial property even if inherited, gifted or pre-acquired; we discuss this separately below. We also consider separately the status of property acquired by one party during cohabitation.

Issues 2, 3 and 4 together

- 132 Clearly these three issues are closely linked. Our views, and consultees' views, as to whether there should be a rule that non-matrimonial property is not to be shared must depend in part upon whether that rule is subject to provision for needs, and upon the breadth of the definition of non-matrimonial property. Broadly the choice comes down to two options. Either the statute provides that non-matrimonial property, defined as pre-acquired, gifted and inherited property, should not be shared, subject to provision for needs; or it is amended to provide for the continuation of the current discretionary approach alongside the introduction of a broader definition of non-matrimonial property, again subject to provision for needs.
- 133 Arguably a continued discretionary basis, even if hedged around with some extra guidance, will not provide any increased certainty. There is anecdotal evidence of dissatisfaction with the uncertainty about non-matrimonial property within the current law, and that it may amount to a disincentive to marriage. Particularly troubling are the indications we have had from some solicitors that they have to advise clients that the only way to protect pre-acquired property is not to marry.
- 134 With that view goes a relatively uncontentious definition of non-matrimonial property, comprising property owned by one party, acquired by gift or inheritance at any time, and property acquired before the marriage or civil partnership, and excluding the other possibilities mentioned above. Couples who want to protect further property from sharing could do so by agreement; absent an agreement, they would be a matter for the court's discretion.

⁴³ Acquired, that is, outright; property whose purchase was ongoing during the marriage, with the mortgage instalments still being paid, should perhaps be excluded from the definition.

135 In order to formulate a definition, a decision is also required about the status of property derived from non-matrimonial property; one example is a bonus issue of shares, or savings derived from the income from non-matrimonial property. The status of such property in the current law is unknown. As we are aiming for a narrow definition, a preliminary view might be that such property should not be included. A further inference from the preference for an uncontentious definition is that where the legal title to property is vested in joint names, neither party's entitlement to the property should be regarded as non-matrimonial. The decision to acquire the property as joint legal owners, or to transfer it from sole ownership to joint, manifests a decision which is inconsistent with either party's share being non-matrimonial.

136 We provisionally propose that non-matrimonial property, defined as property held in the sole name of one party to the marriage or civil partnership and:

(1) received as a gift or inheritance; or

(2) acquired before the marriage or civil partnership took place

should no longer be subject to the sharing principle on divorce or dissolution, save where it is required to meet the other party's needs.

Do consultees agree?

THE FAMILY HOME

137 The definition proposed above would mean that if the matrimonial home was solely owned by one spouse and had been acquired by gift or inheritance, or before the marriage or civil partnership, it would not be shared on divorce or dissolution.

138 The family home has a special position. It is a place to which both parties are, normally, emotionally attached. It "belongs", during the marriage or civil partnership, to both – each can say it is "my home". Importantly for the parties, and for the children of the marriage, neither can say "it is not your home". Even when it is owned outright by one spouse, the other can apply for recognition of their matrimonial property rights and seek exclusive occupation.

139 Does the emotional attachment to the family home inevitably lead to the conclusion that its value must be shared, since the home itself cannot, as a home, be shared any longer? Such a conclusion can feel very counterintuitive in the case of an inherited home. Consider also the case where, for example, the wife had a house before the marriage, and the husband had a house, and while they are married they live in his house and she rents out the other. Does it make sense in this case to say that the value of his house has to be shared because they have lived in it, while hers remains non-matrimonial property? To argue that the family home, because it has been the couple's home, must in such cases be sold and its value shared seems to run counter to all the arguments for treating it as matrimonial property. They are all reasons why both parties want it; but they are not arguments for destroying it by sharing its value.

- 140 However, leaving aside the unusual cases it may be that for the vast majority of families the central position of the matrimonial home in the parties' lives means that it is inappropriate to treat the family home as non-matrimonial property. It may also be impractical because of the inevitability that both parties will have contributed to it in some measure during the marriage. Whether through payment of bills, carrying out practical maintenance, or changing décor both spouses tend to contribute in a variety of ways, some of them difficult to quantify and some clearly substantial, to their matrimonial home. We consider the effects of mingling non-matrimonial property with matrimonial property below; the problems outlined there are likely to be at their most marked in relation to the family home.
- 141 It may be that the court's discretion would ensure – for those who can afford to access discretion – that inappropriate results can be avoided. In the unusual case where an inherited family home is of great antiquity or value, it is likely that the parties would have ready access to legal advice and would take it.
- 142 We ask for consultees' views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.**

PROPERTY ACQUIRED BY ONE PARTY DURING COHABITATION

- 143 Property acquired during cohabitation would, on the basis of the definition proposed above, be non-matrimonial. We have to consider if that is right.
- 144 It has long been the case that the courts will take account of periods of pre-marital cohabitation when making orders for financial provision on divorce. But in the context of non-matrimonial property, the implications of acquisition of property during cohabitation are unclear. In *Miller v Miller, McFarlane v McFarlane*, Lady Hale suggested that the period in which matrimonial property can be acquired "should probably include periods of pre-marital cohabitation and engagement".⁴⁴ Although there is no clear authority that property acquired by one party during cohabitation, in his or her sole name, is therefore matrimonial, there are cases that indicate that the law may be moving in that direction.
- 145 The treatment of periods of cohabitation is particularly significant for civil partners whose relationship began before the commencement of the Civil Partnership Act 2004. They were previously unable to formalise their relationship in such a way as to be entitled to financial orders at the end of the relationship, and so there can be no suggestion in cases of pre-2004 cohabitation that it was the parties' choice not to formalise their relationship.
- 146 It may be suggested that to regard property acquired during cohabitation as matrimonial detracts from the status of marriage and civil partnership; but it is the subsequent marriage or civil partnership that gives rise to the obligation to share; so the formal relationship or status is still the key.

⁴⁴ *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [149].

- 147 **We ask for consultees' views on whether property acquired by one party during cohabitation with the other party should be excluded from the definition proposed above.**

(5) Can non-matrimonial property ever become matrimonial?

- 148 Property is not static; it is used, it grows, it depreciates, and can be sold or exchanged; it can be changed by the financial contribution or by the efforts of another person. Once we start out upon the road to the evolution of rules for these situations it rapidly becomes apparent that difficult decisions have to be made. One option is to decline to make them as part of a law reform project, on the basis that the spouses can make their own arrangements for what happens over the long term, by marital property agreement, and the courts can resolve difficult points as they arise. But the introduction of the concept of non-matrimonial property in the case law means that these issues will arise; we have to consider how far it is worth anticipating them, and we take the view that they should be considered in the round. Default rules will in any event be needed in the context of qualifying nuptial agreements, in case the parties make contractual arrangements by reference to specific items of property but fail to set out what is to happen if that property changes over time.

- 149 Can non-matrimonial property ever become matrimonial? It can under the current law. Lord Nicholls put it this way in *Miller v Miller, McFarlane v McFarlane*:

After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom retained in specie.⁴⁵

- 150 However, under the current law it is not possible to say how long the transformation takes. That uncertainty is compounded by the less arithmetical approach to sharing found in *Robson v Robson*⁴⁶ and the cases that follow that approach. If we were to recommend a rule that non-matrimonial property is simply taken out of account before the rest is shared, it would be important to know precisely whether and when it becomes matrimonial, in whole or in part, and if the latter to what extent.

- 151 We also find a more narrow approach in the current law. As Wilson LJ said in *K v L*:

I believe that the true proposition is that the importance of the source of the assets may [not will] diminish over time. Three situations come to mind:

- (a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.

⁴⁵ [2006] UKHL 24, [2006] 2 AC 618 at [25].

(b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.

(c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property.

152 Thus in *K v L*⁴⁷ the wife's capital, primarily in shares she had inherited long before she met her husband and which were largely untouched during the marriage, was not shared. Time alone made no difference; nor did the fact that the income from the shares had been used to support the family and that parts of the shareholding had from time to time been sold for that purpose. Wilson LJ's comments may be useful starting points when we consider how the law might be clarified.

153 It may be helpful to break down the various questions into groups:

- (1) non-matrimonial property that has been spent and not replaced;
- (2) non-matrimonial property that has remained unsold but has been used for the family;
- (3) non-matrimonial property has been sold and substitute property bought; and
- (4) the consequences of investment in non-matrimonial property.

(1) NON-MATRIMONIAL PROPERTY THAT HAS BEEN SPENT AND NOT REPLACED

154 Where the non-matrimonial property has been spent on something other than replacement property, for example on holidays or school fees, there is no property left to retain the non-matrimonial status. That is the case whether the expenditure was on the family or otherwise.

⁴⁶ [2010] EWCA Civ 1171, [2011] 1 FLR 751; and see para 128 above.

⁴⁷ [2011] EWCA Civ 550, [2012] 1 WLR 306.

(2) NON-MATRIMONIAL PROPERTY THAT HAS REMAINED UNSOLD BUT HAS BEEN USED FOR THE FAMILY

- 155 What we have in mind here is, for example, a holiday property inherited by one party, but used for the family's holidays. Equally, an investment might remain unsold and its income be used to support the family. Should non-matrimonial property retain that status only if it has nothing to do with the marriage or civil partnership, remaining something uninvolved with the family members and never used for their benefit? That would seem to be a very restrictive view; it does not represent the current law. It would also be a difficult view to put into effect. What counts as involvement? A single visit? Regular use? Hanging a picture? And do we distinguish between the physical use made of a cottage or a car, and the use of income from an investment?
- 156 These are difficult distinctions to draw, and it may be impossible to do so without arbitrariness or indeed without undue evidential complexity. One option is to accept that the mingling of lives within normal married or civil partnered life means that non-matrimonial property inevitably loses its status over time, and avoid evidential difficulties inquiries by providing that it all becomes matrimonial on a gradual basis, perhaps by a percentage every five years.⁴⁸
- 157 Such an approach would negative the protection that was to be given to the source of the property. Involvement in, or enjoyment of, a non-matrimonial asset need not in itself give a right to share its value. We are not persuaded that a rule that non-matrimonial property automatically becomes matrimonial, on a sliding scale over time, is appropriate. The advantages of certainty are outweighed by the damage done to the underlying reasons for recognising non-matrimonial property. Nor do we feel that it is appropriate that mere use of the non-matrimonial property by the family makes it matrimonial.⁴⁹
- 158 We provisionally propose that non-matrimonial property should not lose its status as such merely by virtue of having been used by the family.**

Do consultees agree?

- 159 We noted above the relevance of these issues to the rules to be devised for qualifying nuptial agreements. Such an agreement might provide for specific property not to be shared in the event of divorce or dissolution; we would expect that the use of such property for the family would not change its contractual status.

⁴⁸ See: Centre for Social Justice, *Every Family Matters: An In-depth Review of Family Law in Britain* (2009) pp 213 and 250 to 251, available at <http://www.centreforsocialjustice.org.uk/default.asp?pageRef=372> (last visited 27 July 2012).

⁴⁹ There is a connection here with the question we have asked about the family home. If it is to be possible for the family home to be non-matrimonial, then in that case at least, for consistency, there would have to be a rule that use by the family did not make the property matrimonial.

(3) NON-MATRIMONIAL PROPERTY HAS BEEN SOLD AND SUBSTITUTE PROPERTY BOUGHT

- 160 Consider here an inherited holiday property. It might be sold and replaced with another (one property for another); it might be sold and the proceeds used to buy the family car and a caravan for family use; it might be sold and the proceeds either used to buy a family home in whole or in part, or to pay off the mortgage on the jointly-owned family home. If the marriage or civil partnership is dissolved, what is the status of the new property? And if sale proceeds have been invested in matrimonial property, does that property become partly non-matrimonial?
- 161 These are again difficult issues but we suggest that the fact of sale and the exercise of the owner's choice in reinvesting the proceeds is significant. It may be that the key to these instances is whether or not the owner in spending the proceeds has chosen to treat them as matrimonial property.
- 162 To prevent the owner of non-matrimonial property from managing it as an investment (including, for example, keeping a portfolio of shares which are sold and replaced from time to time) negates one of the primary purposes of recognising non-matrimonial property and treating it differently, namely to recognise and reward effort. On the other hand, where property is sold and the proceeds used for something different – a picture kept in the bank is sold to buy a holiday property, for example – then there is a deliberate choice to purchase a different kind of property, to invest in the family, and non-matrimonial status should be lost.
- 163 We have also said that use by the family does not in itself mean that non-matrimonial property becomes matrimonial. The word “different” in the preceding paragraph reflects the fact that where non-matrimonial property is used for the family, and then sold and replaced with something of the same kind (a holiday cottage in Wales is sold and a cottage in Cornwall purchased with the proceeds), it does not seem appropriate for that transaction to cause the property to change status.
- 164 But that choice can be said to be evident when non-matrimonial property is sold and the proceeds mingled with matrimonial property, perhaps by paying off some of the mortgage debt on the family home, or being pooled with jointly-held funds in order to buy something new.⁵⁰ Here the non-matrimonial status of the funds should be lost. A difficult tracing-like exercise is thereby avoided. This reflects the view expressed by Wilson LJ in *K v L*,⁵¹ above.
- 165 We provisionally propose that where non-matrimonial property has been sold and substitute property bought, that property should be matrimonial property if it has been bought for use by the family, save where the substitute property is of the same kind as the property sold.**

Do consultees agree?

⁵⁰ Compare the New Zealand provision, s 9A(3)(b) of the Property (Relationships) Act 1976.

⁵¹ [2010] EWHC 1234 (Fam), [2010] 2 FLR 1467.

- 166 We provisionally propose that where non-matrimonial property has been sold and the proceeds invested in matrimonial property, the property (following that investment) should be matrimonial property.**

Do consultees agree?

- 167 Again, we have to consider the relevance of these provisional proposals to property specified in a qualifying nuptial agreement. Where an agreement provided, for example, that an inherited shareholding was not to be shared in the event of divorce or dissolution, we would expect that the owner of those shares would be free to sell them and replace them with other shares without changing their contractual status. But where the owner sold them and used the proceeds to pay off the mortgage on the family home, we think that the position changes and that it should not be possible to trace those shares into the home. A choice has been made to end the contractual non-matrimonial status of that property.

(4) THE CONSEQUENCES OF INVESTMENT IN NON-MATRIMONIAL PROPERTY

- 168 We have to turn now to the even more difficult – but common – situation where non-matrimonial property changes in value over time because effort and/or money has been invested in it. This may be by the owner, or it may be by the couple together.
- 169 So at one end of the spectrum the owner manages his or her property, as the owner did before the marriage or civil partnership, albeit not as a full-time activity – for example, a portfolio of properties is managed, perhaps by the owner on a spare-time basis, perhaps by paying managing agents. At the other end, the non-matrimonial property represents the owner’s career and full-time occupation, as would naturally happen in the case of the family business. A further variation occurs when the other spouse joins in, perhaps by investing money, or by working full-time or part-time in the business but not formally as a partner.
- 170 Clearly where the spouses become business partners in the formal sense it is easy to see a justification for regarding the property as matrimonial; and as a starting point we would suggest that that should be the rule. Beyond that, the current law is unclear and it is, again, difficult to know where to draw a line. If non-matrimonial status is lost by any steps taken to manage or look after it during the marriage there is then a disincentive to look after property properly.⁵² Such a provision would, again, seem to run counter to the purposes of affording a different treatment to non-matrimonial property.

⁵² See *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496, and the criticisms expressed by Arden LJ in *Jones v Jones* [2011] EWCA Civ 41, [2011] 1 FLR 1723.

- 171 Equally difficult is the situation when the non-owner has invested money, or time and effort, into the other's non-matrimonial property – as would naturally be the case with a family business. Does that in itself make the property, or more likely a proportion of it, liable to sharing? If not, what level of investment by the other spouse, if any, should change the status of the property?
- 172 We ask consultees to tell us whether they think that it is possible to devise rules – or a guided discretion – for the treatment of cases where non-matrimonial property has grown due to the investment of one or both the spouses. What values should be expressed in those rules?**
- 173 We recognise that the project we have undertaken, even in its now extended form, is not the full-scale review of financial orders that some would like to see. Nevertheless we take the view that this examination some of the most difficult areas within that context has the potential to improve the law considerably both in the short and the long term. We have been struck by what practitioners have told us of the difficulties they face because the current state of the law makes it difficult to explain to clients what their liabilities and entitlements are; and we look forward particularly to practitioners' responses to this consultation with a view to setting that situation to rights.

HOW TO RESPOND TO THIS CONSULTATION

- 174 There are no “quick fix” solutions; but the Commission believes that the law can be improved and is keen to hear from as many respondents as possible. The consultation period is open until 11 December 2012. Responses can be sent by email to propertyandtrust@lawcommission.gsi.gov.uk or alternatively by post to Property, Family and Trusts team, Law Commission, Steel House, 11 Tothill Street, London, SW1H 9LJ. For more details about the consultation, including a full copy of the Supplementary Consultation Paper please see the Law Commission website, www.lawcom.gov.uk.