



**Law
Commission**
Reforming the law

Matrimonial Property, Needs and Agreements

Executive Summary

Consultation Paper No 208 (Summary)

11 September 2012

THE LAW COMMISSION

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS: SUPPLEMENTARY CONSULTATION PAPER

EXECUTIVE SUMMARY

INTRODUCTION: THE LAW COMMISSION'S EXTENDED PROJECT

1. The Supplementary Consultation Paper *Matrimonial Property, Needs and Agreements* is the second consultation in a Law Commission project examining a number of different aspects of the law relating to the financial consequences of divorce and of the dissolution of civil partnership. The paper can be downloaded free of charge at www.lawcom.gov.uk. The Commission has also published two overviews of the paper, each around 30 pages long and downloadable from the same URL, one of which is aimed at legal practitioners and the other for a more general readership.
2. This is a supplemental consultation because it follows on from the Commission's January 2011 Consultation Paper *Marital Property Agreements*. That paper examined the legal status of financial agreements made by husbands, wives and civil partners – often known as “pre-nups” and “post-nups”. The most important question addressed in that consultation was the enforceability of such agreements, which was particularly topical after the decision of the Supreme Court in *Radmacher v Granatino* in October 2010.
3. Law Commission projects generally involve a Consultation Paper, followed by a three-month period of consultation and then an extended period during which responses to consultation are analysed and a Report and draft Bill prepared. The Report contains recommendations for reform; it is for Government to decide whether or not to accept those recommendations, and to consider whether or not to adopt the draft Bill for introduction into Parliament. However, following the close of the consultation on agreements in 2011 it was decided that the Commission would not begin work on a Report and draft Bill but would instead consider two other significant aspects of the financial consequences of divorce and dissolution. Government announced that decision in February 2012 as part of its response to the Family Justice Review.
4. The two aspects now under consideration, and the subject of this supplementary consultation, are:
 - (1) the law relating to financial needs on divorce and dissolution; and
 - (2) the legal status of “non-matrimonial property”.

THE LEGAL BACKGROUND TO THE EXTENDED PROJECT

5. Divorce and dissolution almost invariably mean significant financial upheaval for the couple and for the whole family. There are detailed statutory provisions about the orders that the court can make in these circumstances; but the statute does not say what the court is to achieve by making these orders. The judge in the family court has been compared to a bus driver, who has been told how to drive the bus and told that he must drive it, but has not been told where to go, nor why he is to go there. Couples who do not go to court have to make their own financial arrangements by agreement. In doing so they need to know what their rights and obligations are, and the fact that the law is incomplete and uninformative does not help them.
6. In the absence of statutory provisions the courts have stated that financial orders are concerned with needs, compensation and sharing. The significance of these three “strands” can be summarised as follows.
 - (1) It is clear law that former spouses have a responsibility to meet each other’s financial needs, although the law does not state to what extent or for how long. The courts have treated “needs” as a very broad concept, extending to both income and capital requirements (including provision of housing) and to both short-term and long-term needs, including pension provision. As a result, the financial re-arrangement that follows on the vast majority of divorces and dissolutions is concerned only with needs, as the couple struggles to make ends meet and to provide a home for themselves and their children (if any), out of the resources that formerly supported one household.
 - (2) Compensation may be payable when one of the parties has lost out as a result of choices made during the marriage, for example by giving up a lucrative career. It is unusual for a financial order to be based on compensation.
 - (3) “Sharing” refers to the principle – introduced following a decision of the House of Lords in 2000 – that the couple’s assets are to be divided between them, usually in equal shares, provided that the needs of both parties have been met. However, some property, known as “non-matrimonial”, is not generally shared.
7. Although the law relating to financial orders can be organised into these three categories, it cannot be said to be clear or accessible. There is also evidence of regional inconsistencies, with different outcomes favoured in different courts. The uncertainty in the law has given rise to dissatisfaction, as has its obscurity, and both those factors are increasingly causes for concern in an era when access to legal advice is going to be more limited following reform of legal aid.

THE LAW RELATING TO NEEDS: FUNDAMENTAL REFORM AND SHORT-TERM IMPROVEMENT

8. This consultation has two objectives in relation to financial needs.

9. First, it seeks to recommend a fundamental and principled reform of the law relating to needs. What is lacking in the law is an objective, to tell the courts and the parties what is to be achieved by provision for needs. An objective would explain what is to be paid and why. The Supplementary Consultation Paper discusses what would be an appropriate objective for the meeting of needs. The options discussed in the paper are the following.
 - (1) Compensation for needs generated by the relationship. The spouse left less well-off by the divorce or dissolution would be entitled to support until he or she was able to attain the level of earnings and the living standard that he or she would have achieved but for (for example) choices made about childcare and career options in the interests of the couple together and their family.
 - (2) Support to enable a transition to independence. Marriage and civil partnership both typically involve a merging of lives and a giving up of independence; the ending of the partnership might well therefore include a financial adjustment that equalises, or evens out, the standards of living of the couple for a transitional period. Like compensation, this could generate very long-term support; the level of support would vary with the length of the marriage and also with the length of time expected to be spent caring for children, for example. In contrast to a compensatory basis for payment, this approach does not require the court or the parties to work out what position the claimant would have been in, but for the marriage or civil partnership.
 - (3) Support for a limited time so as to create incentives for independence. There is a concern that in allowing dependency, the law may be encouraging dependency; it may be that to impose artificial limits on the support available from a former spouse may have the useful effect of incentivising the quest for employment and independence. However, the Commission is not attracted to policies such as that in Scotland, where a three-year limit is placed upon support following divorce.
10. The Supplementary Consultation Paper goes on to ask whether financial support should continue to be determined by the court, at the judge's discretion, or whether it should be calculated by reference to a formula, so substituting greater predictability for individualised discretion. A number of other jurisdictions have taken this route, notably Canada, and the paper gives some examples of the sort of calculation that have been successful elsewhere.
11. However, the Law Commission stresses in the paper that other jurisdictions that have achieved fundamental reform of the law relating to needs have done so after years of research and piloting. This is an important area of social policy where it is important not to generate hardship, and vital that the interests of children are not sacrificed to the convenience of adults. Accordingly, the Commission's final Report (expected in the autumn of 2013) will make recommendations for principled reform but will also recommend further work before the law is changed.

12. Provisions for fundamental reform will not therefore appear in the Commission's draft Bill. However, the Bill may contain provisions designed to achieve the second objective of the consultation about needs, namely to improve the current law in the short term, pending that fundamental reform. The Supplementary Consultation Paper asks a number of questions about what might be helpful in this respect, including introducing guidelines in the statute about the duration of liability for support and the desirability of a clean break. The paper also discusses non-statutory options, including the provision of guidance (possibly by the Family Justice Council) that would both assist couples themselves and encourage greater consistency between different courts.

NON-MATRIMONIAL PROPERTY

13. For most couples the only relevant area of the law on financial orders is the law relating to needs. Even if needs are met, there is nothing left over to share. However, for some wealthier families non-matrimonial property is important. The current law is that, once needs have been met, property received by either party by gift or inheritance at any time, or property generated by either party before the marriage, is less likely than other property to be shared on divorce or dissolution.
14. The Supplementary Consultation Paper asks questions about:
 - (1) the definition of non-matrimonial property;
 - (2) whether there should be a rule that it is not shared;
 - (3) whether that rule should be subject to the further rule that it must be shared if it is required to meet needs; and
 - (4) whether non-matrimonial property can ever become matrimonial, either by the passage of time or because it has been sold and replaced or has appreciated in value as a result of investment or management by either party.
15. These are complex issues; they are gradually coming before the courts on a case-by-case basis, and the Commission argues that it would be better for the various questions about non-matrimonial property to be resolved together in a principled way so as to ensure consistent law.

HOW TO RESPOND TO THIS CONSULTATION

16. This is a difficult area of the law. 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 Trust Law 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.