Dear Sirs

I wish to put forward my opinion on the current consultation on Matrimonial Property, Needs and Agreements. Most specifically with reference to the first part of the consultation:

"to what extent one spouse should be required to meet the other’s financial needs, and what exactly is meant by needs"

I would like to use my own experiences to explain why joint lives maintenance is grossly unfair on all parties, except the recipient. It is most notably unfair upon children, who become trapped in the animosity that is generated when parties are not forced to move on with their lives and gain independence. Joint lives maintenance creates a life-long dependence, which is very unfair when it is not referenced against the length of a marriage. The law as it is currently applied can potentially generate 30 or 40 years of dependence from a marriage lasting only a short time. This generates a lasting legacy of ill-feeling and unfairness that can emotionally destroy all parties involved and leaves children growing up in a strategic war zone, in which both parents continually plot their next financial move.

The Matrimonial Causes Act, clearly states that a clean break and independence should be the priority, but the current application of the law positively encourages life-long dependence, as it provides neither carrot nor stick for the recipient to proactively seek financial independence.

A joint-lives maintenance order effectively means that a marriage cannot end. It makes the maintenance payer entirely responsible for the financial needs of the recipient for life and absolves the recipient for any responsibility to provide for themselves. An ex-wife in receipt of maintenance is not likely to take any steps to improve her employment prospects, as she knows that she is not duty bound to do so. In fact, in most cases it would be to her detriment if the parties return to court. The less she earns, the more she needs and that is how the law courts will currently reward her. In the obiter of McFarlane v McFarlane, the law lords stated that the onus is on the maintenance payer to prove that he cannot pay, rather than the recipient to prove that she continues to need support; thereby absolving recipients of the responsibility to strive for independence.

People involved in joint-lives maintenance agreements are at the constant mercy of lawyers and the courts. There is no certainty and therefore any alterations to maintenance must be made via lengthy and costly legal process. The cost of seeking legal advice and returning to court is often tens of thousands of pounds, which is effectively prohibitive in most cases. All involved must weigh up if the financial and emotional costs of yet more legal fees and court appearances can be tolerated before any changes are possible. The only real winners in the uncertain world of joint lives maintenance divorces are the lawyers!
The current law allows for maintenance recipients to return to court to seek an increase in payments if their needs increase, or if the payer's income increases after the marriage has ended. In this case, the maintenance payer's new spouse may be forced to provide a financial summary in order to determine any sums payable to the first spouse. This is grossly unfair and I believe contravenes the 2nd spouse’s right to privacy and family life. All settlements should be based upon the earnings of the parties to the marriage, at the time the marriage ended and should in no way be based upon the financial contribution of 2nd spouses. Why should a second spouse have their privacy invaded in order to provide a ‘life of leisure’ for a stranger? It is so grossly unfair.

Being the second spouse of somebody involved in joint-lives maintenance is a position that knows no peace and no financial security or certainty. One must live under the constant threat of sharing the fruits of your own marriage and having your private financial information made available to a stranger you have never met. There is certain knowledge that you must sacrifice a significant amount of money at some point in the future to pay lawyer’s fees for your spouse’s return to court in order to try and buy a clean break, so that you may enjoy your retirement free from the burden of maintenance and the intrusion and stress it causes.

I live with the knowledge that when he retires, she will be entitled to a share of the income of the pension that we have provided for ourselves during our long marriage. She will not be expected to have provided for her old-age out of the considerable maintenance she has received. How much easier and fairer it would be for all, if maintenance were clearly defined at the outset so that everybody knew where they stood without further recourse to solicitors and the mercy of the uncertain court system. Why am I expected to provide for my husband’s first wife, but she is not expected to provide for her own future out of the considerable income she has been awarded?

If maintenance was clearly defined and time limited at the time of the divorce it would remove all of these injustices. The only cause for deviation should be the inability of the payer to pay. The recipient should not be allowed to argue for increased needs after the marriage has ended.

Maintenance of spouses must be time limited in order to create fairness and certainty. I note that the Law Commission does not advocate the 3-year time limit imposed in Scottish courts. However, it seems very clear that the only way to create fairness and certainty is to ensure that it is time-limited in some way. Limiting maintenance to ½ the number of years of a marriage, or until the youngest child is 16 – whichever is longest, is surely the only fair way to provide a transition period, in which the recipient does not unduly suffer hardship, is provided with the necessary incentive and support to gain independence and does not leave payers maintaining spouses decades after a marriage has ended. Allowing for exceptions or leaving it to the discretion of the courts, will inevitably leave the floodgates open for the ‘super lawyers’ to continue to argue to the paternalistic, ‘women-friendly’ courts that their client fulfils the exception criteria and must be maintained for life. Every maintenance payer and every child to a marriage has the right to know that at some point their duties are paid and they have the right to be able to move on and be free from their dissolved contract.

The concept that a one person must keep another for life in the manner they became accustomed to during a marriage, regardless of how long that marriage lasted, is grossly unfair. I hope the law commission will use this valuable opportunity to redress the balance away from lifelong, responsibility-free dependence to a fair, time-limited transition to independence. Any assessment of ‘needs’ must be purely based upon a strategy for independence, such as financial support for education and re-training. We must move away from the current situation where one party must provide for another for life.

I am very willing to be involved in any further consultations and should you need to contact me further my telephone number is [redacted]

Yours faithfully
MARRIAGE, NEEDS AND AGREEMENTS

RESPONSE TO CONSULTATION

Dear Sirs,

I am not an expert on matrimonial law but I thought I would tell you about my case in the hope that it might influence (or reinforce) your thinking in respect of the matter of financial arrangements on a divorce.

Apologies for keeping this letter anonymous but it contains very personal information.

I am from the EU and have been living in London for almost 15 years. I work as a professional (not a banker…) in the City and am fortunate enough to have received from my family substantial wealth which I have invested in property over the years.

I currently have a girlfriend whom I met about one year ago. She is from a non-EU country. She is a PhD student with a scholarship and is here on a study visa which will expire in about two years.

She does not own any assets because she comes from a very poor background and, understandably, she does not wish to return to her home country upon completion of her studies.

If we get married before her visa expires, she would be able to stay in the UK and work here, perhaps in the academic field. She is very bright and deserves such an opportunity.

Question 1: why can I not marry her with the absolute peace of mind that all the assets that I have received and may in the future receive from my family (which, by the way, have been accumulated as a result of hard work over many generations) would not be at risk of being transferred to her in the case of a divorce?

Question 2: why can I not marry her with the absolute peace of mind that if, for example, we never have children and she has a job that gives her financial independence at the time of a divorce I would owe her absolutely nothing in the case of a divorce?

Re: 1, if you wish to encourage marriages, please make pre-nuptial agreements clearly legally enforceable as a matter of law and do not give judges the ability to overrule such agreements.

Pre-nuptial agreements are a property matter between two consenting adults into which judges should not be able to interfere. Eventual support orders in favour of minor children are a different matter.

I am sure that there are many people like me who would like to marry if only they could do so with the peace of mind of knowing that an English judge would not have the authority to overrule a pre-nuptial agreement which has been entered voluntarily and willingly by both spouses.

Why should I put family assets (which, again, have been accumulated as a result of hard work over many generations and therefore I do not even deem to be my own) in the hands of an English judge?
Similar considerations apply in relation to the savings I have accumulated from years of hard work pre-marriage and the savings that I will accumulate from my work during the marriage which, clearly, will be the result of many years of hard work pre-marriage.

Once again, please make pre-nuptial agreements clearly legally enforceable as a matter of law and do not give judges the ability to overrule such agreements under any circumstances.

Both spouses (being adult individuals and especially if they are sophisticated enough to have entered into a pre-nuptial agreement with the help of professional advice) should enter a marriage with their eyes open and knowing what to expect in the case of a divorce.

Re: 2, please make sure that a rule of law is introduced in the legislation that provides that absolutely no support should be provided to a spouse who is independently earning, or is able to independently earn, a living.

By earn a living, I mean a "living" not a "lifestyle" because if I offer her the opportunity to enjoy a higher standard of living while we are together why on earth should she enjoy the same after we have divorced?

The law should encourage people to stay financial independent during a marriage if they can afford to do so, not encourage people to create dependency.

A rule such as that would also increase generosity among spouses because the wealthier spouse would be able to give generously to other spouse during the marriage in the knowledge and with the absolute peace of mind that he or she would not have to continue to give generously even after the marriage.

Three final thoughts:

(i) the fear of the unknown financial consequences of a divorce drives many people away from marriage in the first place – at least, it drives me away from marriage;

(ii) it really is time for the legislator to acknowledge that divorces are a common occurrence in many people's life and that gone are the days when marriage equalled dependence of one of the spouses on the other;

(iii) enforceability of pre-nuptial agreements equals social mobility and the ability to marry among different social classes. Please take note of that if all your British talk about social mobility is not just hypocrisy.

(iv) pre-nuptial agreements encourage marriage not divorce. It would be really perverse to think otherwise – look at my case.

Yours faithfully

EU Citizen in London
I would like to congratulate the Commission for the thoroughness and clarity of its analysis.

I would like to offer the following responses to the questions asked.

**PRINCIPLED REFORM**

7.2 Do consultees agree with our central argument that the current law requires reform (etc)?

Yes.

7.3 Should spousal support (1) be restricted to 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?

The award should not seek to achieve objective (1), but should seek objective (2), for all the reasons set out in the report. However, there is a terminological issue here. I consider that objective (2) can, and should, also appropriately be described as compensation. If I may quote from my paper, “Partners, Parents and Children: Grounds for Allocating Resources across Households” in Bea Verschraegen (ed), *Family Finances* (Jan Sramek Verlag, 2009) (attached):

‘The compensation is therefore for exposure to the differential risk between the parties of the consequences of the separation.’¹ This refers to the actual disparity *between them when the separation happens and not to possible losses incurred by either at an earlier stage*. Suppose a woman is earning more than a man when they separate, but she would have earned even more had she not entered the relationship *in the first place*. Surely the woman should not have a claim against the man for the cost of her lost opportunities. And if there is no disparity, so the risk has turned out even, there again seems no case for compensation. If compensation is justified, the extent to which the disadvantaged party should receive compensation should be proportionate to the disadvantage, and the length of time which the

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parties lived together. How this is achieved is a technical matter, and the American Law Institute provides one possible solution.\(^2\)

There are important consequences in conceptualising this as a compensatory award. Compensation is a well-established legal concept, albeit that its application can be difficult and complex; it avoids the subjectivity involved in the language of needs; it avoids implying into the institution of marriage obligations that persist when it dissolves which not all married persons might have intended; and, importantly, it carries a duty to mitigate the loss.

7.4
In answering the (above) question, it would be helpful to hear consultees’ views on the relevance or otherwise of (1) the length of the marriage; the marital standard of living; the way the joint responsibilities have been shared during the marriage and will be shared after its ending; and the occupation of the matrimonial home after divorce.

As stated in the answer to 7.3, the extent of the compensation should ‘be proportionate to the disadvantage, and the length of time which the parties lived together’. If there is no disadvantage, there is no award (leaving aside property sharing). Relating the quantum to the disadvantage will in most cases reflect the way ‘responsibilities’ have been shared, because the economic differential will usually (though not always) result from that sharing. Relating it to the length of time of the marriage will usually (though not always) reflect the degree of investment in the relationship, the value of contributions made to it which are not susceptible of straightforward economic measurement, and the scope for the disadvantaged person to recover his or her position. I believe a formula similar to the one proposed by the ALI should be developed. I set out one possibility under the heading ‘Ongoing Support’ in my article “Financial and Property Settlement: a Standard Deal?” (2010) 40 Family Law 360-367. I attach this article.

As regards occupation of the home, see my comments regarding ‘needs’ below.

7.5
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?

As stated above, I favour a formulaic calculation, with some scope for departure (see the comment regarding needs below).

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\(^2\) The following example is based on that methodology. (i) if there are no children, the award should amount to 20 per cent of the income gap at the time of separation after a 20 year marriage, scaled down proportionately for shorter marriages, to last for a period of time equal to 60% of the marriage duration, or longer (perhaps for joint lives) if the claimant is over 50 at separation; (ii) if there are children, the person who has taken on the majority of the child care responsibilities should receive an award equal to 30 per cent of the income gap at the time of separation after a 20 year marriage, scaled down proportionately for shorter marriages, also to last for a duration of 60% of the marriage duration (or longer in some cases) but subject to an override where a partner leaves the other with children after a short relationship to prevent a perverse incentive for a parent to leave the other early before liability increase.
7.6
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?

Since the basis of the award would be compensatory, the recipient would be under a duty to mitigate the loss, and would therefore be expected to take reasonable steps to do so. In addition, as also stated earlier, the extent of the provision should be related to the duration of the marriage, and (unless there were other factors, notably, the need to care for children of the marriage) that would place an automatic limit on duration of the period of support.

7.7
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?

If a formulaic approach was to be adopted, it would certainly be necessary to establish an empirical basis for it, so that the formula could be shown either to reflect that reality, or the extent of its departure from such reality could be understood and either justified or mitigated (for example, by permitting departure from the formula).

Perhaps the best method would be to ask family lawyers about the settlements they actually make, or are ordered by courts. There are a range of methodologies for doing this. One could be for researchers to request the lawyers, in advance of interview, to select a range of ‘typical’ relevant cases from their files and ‘talk through’ the files with the researcher, mentioning only matters relevant to the research. (This allows client confidentiality to be maintained because the researcher would not have sight of individual details). I would have thought that a small group of researchers could complete such a project on a sufficient scale in a little over a year.

If resources were available, such a study could be supplemented by a general population survey. However, I think that would be a very difficult and complex matter. It would need to be decided how a representative sample would be achieved, in particular, if it should be ‘weighted’ towards particular age-groups, or married people, separated people or never-married people. The nature of the questions posed would need to be very carefully considered.

NEEDS
7.8
Consultees are invited to give us their views about the following possibilities for statutory or 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 (joint orders or joint lives); and (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.

Meeting needs should not be a primary goal of post-divorce support because (a) the definition of ‘needs’ is too subjective; and (b) it is doubtful that people today believe that, given the availability of divorce, when they marry, they are making an open-ended commitment to meet, or contribute to, their partner’s ‘needs’, should the marriage end. (In contrast, it would be harder for people to refute the proposition that, should the termination of the marriage leave one partner better off than the other, the better-off partner should make some measure of compensation to the other).

However, ‘needs’ can play a subsidiary role. I have already stated in answer to questions 7.4-6 that the duration of maintenance should be related, through the formula, to the length of the marriage. However, the formula should be adapted, or overridden, to reflect the fact that a payee, or the payer, is caring for children. This will include any adjustment necessary to secure housing ‘needs’ for the children.

In addition, it should be possible to depart from the result indicated by the formula if that result would cause either party financial hardship and there are special circumstances which justify such departure, or that there are other special circumstances. I do not think one can spell out all such circumstances, but one could be where there was clear explicit or implicit reliance that the other partner would assume some such obligation; another could be a case of serious misconduct In such cases, an additional duty to meet needs could be imposed, or the duty to compensate reduced or removed. In determining these, suggestions made in paragraphs 5.43ff that factual guidance be provided on the content of ‘needs’ and (para 5.50) how they might be prioritized, seem to be very helpful.

As to who should provide such guidance, I think it would need democratic legitimacy, and should be set out in the amending legislation (but as guidance only: this is quite possible).

7.9  Consultees are asked to tell us about any other reform measures that would make the law relating to needs more consistent and accessible.

I think the above would be enough.

7.10 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.

I stated in my response to the Commission’s Consultation on Pre-Marital Agreements that courts should be able to set aside agreements in so far as they provided to make reasonable provision for compensation for losses or recognition for contributions made. I still believe that this is a better basis for allowing courts to depart from such agreements than one based on needs because, while it might be reasonable for people to agree that, after divorce, their
former spouse should not be liable to meet their needs (in some generalised way), it is less easy to see why people should agree not to be compensated for disadvantages arising as a result of the breakdown of the marriage. Of course, such compensation would usually encompass what are usually thought of as needs, but the juristic basis is different. That does not mean, however, that the parties could not agree to a form of compensation different from that reached by the formula. Provided it could be seen as a reasonable basis of compensation, the agreement should stand. I do not think that the details can be specified in advance: each case would need to be decided on its merits.

NON-MATRIMONIAL PROPERTY
7.11
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?

I disagree. While there is a case for treating non-matrimonial property, so defined, differently from ‘matrimonial’ property, I do not think such property should be completely excluded. There is good reason to think that, over time, the difference between these two types of property has less salience in a relationship. I also think that the so-called ‘sharing principle’ as applied to matrimonial assets should also be applied so as to reflect the passage of time.

I have set out a methodology which could be applied to the division of both classes of property in the attached article “Financial and Property Settlement: a Standard Deal?” (2010) 40 Family Law 360-367.

7.12
We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

I think that, if a scheme such as proposed in the ‘Family Law’ article referred to above were to be used, it would not be necessary to treat the family home any differently.

7.13
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.

I think the period of ‘immunity’ from claim for what is called ‘external’ property in my hypothetical ‘standard deal’ (set, for illustrative purposes, at four years) could be shortened according to any period of cohabitation prior to the marriage: for example, by six months for every year of pre-marital cohabitation. Apart from that, such pre-marital property would be treated as any other ‘external’ property.

7.14
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?
For reasons given in the Consultation Paper, mere use should not change the ‘status’ of the property. However, under the methodology of the ‘standard’ deal, an increasing portion of non-matrimonial property would become available for sharing on dissolution over time. The avoids the problems identified in the Paper, while at the same time recognising the usual fact that separate properties are increasingly treated as intermingled over time.

7.15
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?

This could give rise to many problems, as the discussion in the Consultation Paper recognises: eg, what is ‘use’ by the family? what is property of the same ‘kind’? I therefore do not agree with this proposal. But these problems would be considerably alleviated by the adoption of the methodology set out in the ‘standard deal’, not least because, if identification of property as ‘external’ property has become difficult, method 2 allows the claim to be made against all property after four years of marriage.

7.16
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?

No. If there is logic in having a class of non-matrimonial property, it should retain this character as long as it, or its value, can be identified. However, the problems would be overcome (except for the first four years of marriage) if the methodology in the ‘standard deal’ were to be adopted.

7.17
We ask consultees to tell us whether they think that it is possible to devise rules – or 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?

In ‘the standard deal’ I proposed that ‘in cases of jointly owned property, or of participation in or direct contribution to the acquisition of post-commencement assets and to increases in value of pre-commencement assets, the participant or contributor should acquire a half-share in the assets or increase in value unless the participation or contribution is clearly insubstantial’. This ‘joint property’ is treated as such, that is, as giving equal share in its value from the moment of acquisition. It is not subjected to the duration principle as the separate property of each spouse is. Hence, the increase in value of such property should be equally shared.

Additional comments

May I add, firstly, that it is important to the concept of the ‘standard deal’ that parties would be entitled to depart from it through a marital agreement, subject to any restrictions imposed
on such agreements. In fact, having such a standard deal as a ‘default position’ would allow parties to appreciate better what they were bargaining about in such agreements.

Secondly, any formulaic system needs to have provision for overriding the results produced by the formula, though the circumstances when this could happen need careful thought. However, I believe that departure from the formula could be allowed when the result would be unreasonable or produce substantial injustice. While quite broad, I do not think this would invite widespread subversion of the formula, at least if the formula has been well devised.

Thank-you for allowing me to make these responses.
PARTNERS, PARENTS AND CHILDREN: GROUNDS FOR ALLOCATING RESOURCES ACROSS HOUSEHOLDS

John Eekelaar

A core feature of being married is the duty of the partners to support each other. Continental family lawyers refer to it as the principle of family solidarity. When marriage was indissoluble, each party owed that duty to the other throughout their common lives. That was why, before judicial divorce was introduced in England in 1858, the ecclesiastical courts could order a husband to support his wife from whom he was separated under a decree of judicial separation.¹ The marriage still continued. But the ecclesiastical courts were not too hard on husbands. A wife could only obtain the decree (and therefore the support order) if the husband was guilty of adultery, cruelty or “unnatural offences”. And, rather than basing the husband’s obligation on anything like “family solidarity”, the courts preferred to justify orders against husbands on the ground that the husbands had profited by acquiring the wife’s property by marrying her. Essentially, they were only giving back to the wife what had been hers in the first place. And a “guilty” wife would get nothing at all, not even the property she had put into the marriage.² Still, at least you could say that it was legitimate for the courts to be involved in deciding what the obligations between married people were, even if they were living in different households.

But that could not be said when courts dissolved a marriage. Yet, when they acquired the power to do that in 1858, they were simultaneously permitted to order a husband to make monetary payments to his former wife secured on his property. This was still not a major threat to men. The courts could not make a direct order against their income until 1866, and had to wait until 1971 before they could order the transfer of any of their property to the wife. Even so, they could force a man make some material provision for a person to whom he was no longer related. So, on what basis should the court exercise that power? All the legislation said was that a court could make such order as “it shall think fit … having regard to (the husband’s) Fortune (if any), to the Ability of the Husband, and to the Conduct of the Parties it shall deem reasonable”.³ But what was “fit”? It was like putting two people in a boxing ring, without any rules, and asking the referee to do what he thinks best.

I will not describe in detail how the English courts responded to this task. Suffice it to say that they used a variety of justifications for making orders. Sometimes it was a punishment for abandoning the marriage. Sometimes it was to make some recompense to a wife for property she had lost to the husband. Sometimes it was to save a wife from having to resort to prostitution. Sometimes it was to prevent her from becoming a charge on the state. On the whole, if the wife could look after herself, she would probably get nothing. Until 1971 she could certainly not expect to get any of her husband’s property, even the home, even if she was looking after his children in it. If

¹ Called divorce a mensa et thoro.
² On all this see John Eekelaar and Mavis Maclean, Maintenance after Divorce (1986), 5-9.
³ Divorce and Matrimonial Causes Act 1857, s. 32.
she was lucky, she might return to her family’s home. Even after 1971 she seldom got any of his business property.  

Things are very different now, but change has been slow and generally disorganised, and it is still mired in uncertainty and controversy. So I want to stand back a bit and look at possible grounds which can confer legitimacy on the act of legally forcing one party to a broken partnership to make material provision for the other. Do not forget that the discussion is about the use of state force to require the transfer of material goods (property, income) from one household to another. We are not simply talking about the best way for people to distribute resources within their own household. So we have to remember that any forced transfer will usually compete against strong countervailing social and psychological forces which drive the holder of those resources to retain them to the benefit of the members of his or her existing household. The transaction costs in compelling transfers from one household to another can be formidable.

I. CHILDREN
If there are children, one obvious starting point, though surprisingly little used, is to view legal intervention as justified by their interests. It should be easy to accept that society can legitimately require parents to make provision for their children. This does not however tell us what that provision should be, and for many years English law studiously avoided answering that question. One part of the answer must surely be a secure place for the child to live, at least where this is possible. This has in fact been a significant strand in the way English courts have exercised their property allocation powers on divorce acquired in 1971. They can, and have, even done this when the parents are not married.

What the right financial provision should be has proved more difficult. Some solutions base this on the amount a parent spends on children in his present household. But that fails to take into account any difference in the living standards between the payer’s household and the one the child is in, which may be significant. I have found it very difficult to find satisfying principles here. For, while it seems that a parent should ensure that all his children enjoy an equal living standard, this principle demands too much if a parent has children in different households. He would have to maintain all

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6 This seems to have been less prominent in the US: see John Eekelaar, “Empowerment and Responsibility: The Balance Sheet Approach in the Principles and English Law” in Robin Fretwell Wilson (ed), Reconceiving the Family: Critique on the American Law Institute’s Principles of the Law of Family Dissolution (2006), p. 438. Frequently, however, it is not possible to achieve this result because resources are insufficient.
those households at the same level. But that could impose an excessive burden on the parent’s current household. Also, there will be other people in those households who would benefit by such support, and to whom the parent may not owe any obligation, or at least not the equivalent obligation.

Therefore, it seems that a solution must be a compromise between a number of factors. First, there is the importance of reinforcing the primary allocation of responsibility on those who generate children to support them (apart from recognized exceptions when the responsibility is transferred to someone else, such as in adoption). This has to be traded against other socially-based obligations a parent may have already incurred, or may do later, for example, by taking someone else’s child into their own household. Perhaps the best solution is to have a relatively simple form of assessment, say, in the form of a percentage of net income, which could be agreed to represent an indisputable minimum duty which a person responsible for the conception of the child owes towards its well-being.9

That does not exhaust the scope for legitimately forcing transfer of resources across households. The extent of further transfers will depend on other factors, to which I now turn.

II. PARTNERS

It is logically possible to find a former spouse’s obligation to provide material support for the other after the end of a marriage in the terms of the marriage itself. It could, for example, be a term in the marriage contract that, on dissolution, the property owned by each partner is to be divided between them in a certain way. Indeed, something like this is very common, especially in civil law jurisdictions. It makes sense in the case of well-informed, independent-minded, people, especially if they have the opportunity to make bespoke variations to the stipulated distribution prior to marrying. It works less well as a default mechanism for people who have given no thought to it, and of course it doesn’t cover situations where the couple don’t marry. As regards financial support, or the “family solidarity” principle, it could also be a written into the marriage contract that the parties should look after each other, at least to some extent, even after the marriage is dissolved. In fact, that can be the only basis upon which the English courts exercised their jurisdiction to make property and financial orders at least after 1971. They simply asserted that a former spouse could be compelled to meet the “reasonable requirements” of the other. They made very subjective evaluations of what they thought former spouses, especially wives, “deserved” after having been married for a certain time.10 But who would knowingly sign up to a clause saying: “if you divorce, you agree to provide such material support

9 The payment should be subject to a maximum amount. A parent who has resources to bring the child above that maximum should be encouraged to do that, but that should be, and be seen as being, a voluntary action undertaken for the well-being of the child. I have called the act of performing an act which exceeds one’s legal obligations the exercise of responsibility in a fuller, or heightened, sense. See John Eekelaar, note 5 above, pp. 121-122; 129-131.

10 Cross Currents (note 5 above) 418-419; John Eekelaar, note 5 above, p. 144.
for your partner as a judge may think is reasonably needed and deserved”. Yet many people, without knowing it, have done so.

Unless we are prepared to write express provisions like that into the marriage contract, it would be better not to rely on marriage as a basis for these actions. We must find something else. Here the contribution of the American Law Institute to the effort to find it must be acknowledged. Its most significant step was to propose changing the basis for awarding alimony from meeting need to making compensation. In its words, this re-cast the purpose of the award “from a plea for help to a claim of entitlement”. This included an entitlement to a share in property belonging to one another. This was established through a presumption that assets acquired by the labour of either during the relationship should be equally shared on separation, and that each should gain a share in the separate property of the other incrementally, over time. The Institute also proposed a compensatory award to offset loss of living standard after separation. I would summarize the rationale of this two-pronged approach as attempting to ensure a fair return on investment of both assets and effort when the partnership ends. Whether the return is “fair” is assessed by looking at what each put in (in terms of assets and effort), then looking at what each is left with at the end, and “if the difference between what the parties take out is greater than the difference between what they put in, then the worse off party should receive compensation for the shortfall.” It is rather like looking at a balance sheet.

This type of justification is very different from the principle of family solidarity. Family solidarity is a kind of insurance against future risks. The earned-share and compensation approach is based on what has already happened. In an age of low marriage, and relatively high divorce, I believe it is no longer feasible to see marriage as an instrument for providing insurance for the period after the marriage ends. Even if you tried, it would be capricious and unreliable. I do not think there is any realistic alternative to the earned-share and compensation approach. It has the additional advantage of drawing on established legal principles. The law is accustomed to deciding how individuals acquire interests in capital assets, and it is familiar with dealing with claims for compensation for losses. This is merely a new context for their application. Another advantage is that, since it is not conceptually linked to the status of the parties, it can apply whether the parties are married or not.

12 American Law Institute Principles, ch. 1.
13 John Eekelaar, note 6 above, p. 434.
14 This seems to be the position reached in English law after the decision in Miller v Miller; McFarlane v McFarlane ([2006] UKHL 24). Lord Nicholls and Baroness Hale saw three “strands” (Lord Nicholls) or “rationales” (Baroness Hale) underlying financial and property awards: need, compensation and “sharing”. But, as Baroness Hale points out (para. [140]), compensation includes meeting need (at least if the need is generated by events in the relationship, which Baroness Hale explicitly specifies ([138])), but goes beyond it. There therefore seem to be two primary principles: compensation and “sharing”, each of which is subject to the welfare of the children. See also Charman v Charman [2007] EWHC Civ 503, para [73].
But both rationales envisage a certain kind of social interaction. It would surely not be right to allow someone a legal right to a share in the fruits of a friend’s project on the ground that they had provided the friend encouragement and support in undertaking it, or to give them compensation because they had spent money in providing the help. It would devalue acts of friendship. So I have proposed that these principles should only apply where people have adopted a ‘life plan’ (in the sense of a plan for organizing the way we live) “as a basis upon which they followed their common life together for the long term”. Where people establish a common household, it can be presumed (rebuttably) at least after a certain time that they have such a plan. If they have a relationship while living apart, it would need to be proved. Frankly, I would not be concerned whether the persons concerned were of the same sex, or were even related to one another. The concern is with principles of justice, not making statements about family structure.

But that does not mean that applying the principles is easy. Far from it. I will briefly sketch where the difficulties lie.

1. The “earned share”
Central to the strategy is the “earned share” principle. This is based on the fact that the parties share their lives and “live and work together”. If they separate, they should share the goods they have between them. But what should the shares be? It is usually said that they must be equal, and for very good reasons. Respect for individuals and gender equality demand that what each party contributes to their life together should, at least outside exceptional circumstances, be regarded as having equal value. But we all know the difficult cases. One party may have entered the partnership already having much more property than the other. Or one party may have received it shortly after starting the partnership either without any effort (an inheritance is the standard example), or as a result of efforts mainly made before starting it (for example, the acquisition of business assets for which almost all the work was done before marrying). Is it really thought that the contributions the other made to the joint domestic life should be put as half the value of such assets, no matter how much it is? Most systems use a variety of techniques to avoid that, usually involving excluding certain categories of property from the sharing. I am not enthusiastic about that. Partners often regard all of the property belonging to each as for the potential benefit of both. I prefer the idea that there should be entitlement to a share in any property belonging to a partner, but that the extent of the share should be built up over time until its reaches equality. If, however, someone contributes directly to the wealth that is created, for example, by participating significantly in business activity or financially contributing to it, the share should normally be equal from the start. I call this the duration principle. The passage of time is an excellent proxy for measuring a number of factors which are important in achieving a “fair return on investment in the

15 See my discussion in John Eekelaar, note 6 above, ch. 2.
16 John Eekelaar, note 6 above, 49-50.
17 Miller v Miller; McFarlane v McFarlane ([2006] UKHL 24, para. 16 (Lord Nicholls).
18 The time taken to reach equality could be accelerated if the person claiming the share is caring for children.
partnership”. They include the degree of commitment to the relationship; the value of contributions made to it which are not susceptible of straightforward economic measurement; and the extent of disadvantage undergone on separation.19

2. Compensation

The other basis for transferring resources is compensation. A fundamental difference between this and the earned share principle is that only in the case of compensation is the claimant under a duty to mitigate the loss, that is, to use her own efforts to lessen the disadvantage and thereby reduce the amount of the compensatory award. This is important in an age when the earnings gap between men and women is narrowing. However, while the idea of compensation is relatively straightforward, it is harder to decide what is being compensated. Baroness Hale has described the compensation as being for “relationship-generated disadvantage”.20 Does this mean that any loss, or opportunity foregone, as a result of entering the relationship should be (fully?) compensated? There are strong arguments against that. In many cases the financial benefits of an “alternative life” are too speculative to provide an appropriate measure. But also, there must be a high possibility that, had the applicant not had a relationship with the respondent, (she) will have had one with another person. The “alternative life” may never have happened anyway.21

The compensation is therefore for exposure to the differential risk between the parties of the consequences of the separation.22 This refers to the actual disparity between them when the separation happens and not to possible losses incurred by either at an earlier stage. Suppose a woman is earning more than a man when they separate, but she would have earned even more had she not entered the relationship in the first place. Surely the woman should not have a claim against the man for the cost of her lost opportunities. And if there is no disparity, so the risk has turned out even.

19 Another issue is whether it could be correct to apply the sharing principle to a former partner’s earnings, and earning potential, after the separation.19 There are good reasons for grounding an award against income on a compensatory rather than an earned-share basis. One is that it is inappropriate to view a person as having a quasi-proprietorial interest in the products of another’s talents and effort. The scope for making claims could be endless. Worse still, such an entitlement, being of a proprietorial nature, would not be subject to a duty to mitigate. It would be unaffected by whether or not the recipient made efforts to realise her own earning potential, or indeed any other financial benefit she received. That cannot be good policy. For trenchant arguments against treating such matters as property, see Ira Mark Ellman, “O’Brien v O’Brien: A Failed Reform, Unlikely Reformers” (2007) 27 Pace Law Review 949. See also Ira Mark Ellman, “Do Americans Play Football?” (2005) 19 International Journal of Law, Policy & the Family 257 at 271-275.

20 Miller v Miller; McFarlane v McFarlane, at para. 140.
21 “(The wife) has not lost a career, for that is not what she had sought. She instead lost the opportunity to have her children with someone with whom she would enjoy an enduring relationship. The most direct measure of her financial loss would compare her situation at divorce to the hypothetical situation had she married a different man.” (American Law Institute, note 11 above, section 5.05, comment e).
22 John Eekelaar, note 6 above, p. 52. As Lord Nicholls has said, the compensation element would be “aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage:” Miller v Miller; McFarlane v McFarlane, at para. 13.
there again seems no case for compensation. If compensation is justified, the extent to which the disadvantaged party should receive compensation should be proportionate to the disadvantage, and the length of time which the parties lived together. How this is achieved is a technical matter, and the American Law Institute provides one possible solution.23

III. PARENTS
The duration principle has been criticized for applying only where a couple have lived together, or, in my version of it, have adopted a “life plan” together. It is said that a mother who cares for the father’s child should be seen as contributing indirectly to his continued acquisition of wealth, even if she is no longer living with him, or has never lived with him, and they never shared a “life plan”.24 But should she therefore be allowed to build up a share in his wealth during that period, or be compensated by him for any disparity in living standard? There are good reasons to hesitate over that. If a man has a number of children by different women, there could be multiple claims on his assets. I doubt if this could be easily handled in the legal system. The nexus between the carer’s activities and the accumulation of wealth also seems remote. Unlike the case of acquisition during a partnership under a life plan, there is unlikely to have been an expectation that the carer would benefit from the accumulated assets. It also misses the point that the earned share principle is a reflection of a commitment to a common life. As far as compensation is concerned, what is being compensated? Could it be the career opportunities the mother lost by exercising care? But we don’t know what she would have done if she had not mothered this child. She may well have borne another. It is too speculative. It is true that the child’s carer may be relieving the father of a burden. But that can be seen as an element of his duty to the child, and that has already been considered.

IV. CONCLUSION: SOCIAL OR INTER-PERSONAL OBLIGATIONS?
It has been said the obligations between the couple are personal obligations, and that the approach I advocate wrongly requires one individual to pay another compensation for disadvantages that have their origin in society, and are outside the individual’s control.25 It is of course true that the greater disadvantages to which a woman may be exposed compared to those to which men may be exposed on the termination of the marriage.

23 The following example is based on that methodology. (i) if there are no children, the award should amount to 20 per cent of the income gap at the time of separation after a 20 year marriage, scaled down proportionately for shorter marriages, to last for a period of time equal to 60% of the marriage duration, or longer (perhaps for joint lives) if the claimant is over 50 at separation; (ii) if there are children, the person who has taken on the majority of the child care responsibilities should receive an award equal to 30 per cent of the income gap at the time of separation after a 20 year marriage, scaled down proportionately for shorter marriages, also to last for a duration of 60% of the marriage duration (or longer in some cases) but subject to an override where a partner leaves the other with children after a short relationship to prevent a perverse incentive for a parent to leave the other early before liability increase.
25 Lucinda Ferguson, “Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation” (2008) 22 International Journal of Law, Policy & the Family 61, at p. 82. “Being inter-personal in nature means that, not only is the obligation justified by reference to the nature of the parties’ relationship, but it is also limited by it.” (emphasis in original).
partnership are mostly socially caused. To that extent, the compensation places some of the consequences of social inequalities on an individual man. But the issue should not turn on conceptual purity about the nature of the obligation, but whether it is fair and just to require the better-off person to alleviate these disparate consequences to some degree. I think it is. First, evaluation of any compensable loss cannot be made in a vacuum. The very reason for imposing the requirement is that the social consequences of the separation bear more harshly on one person rather than the other. If the disadvantaged party were able to overcome them by her own efforts, there would be nothing to compensate. The obligation remains personal, because it does not attempt to make the obligor contribute towards improving the lot of the disadvantaged group generally. That is done through other kinds of obligations, for example, taxation, which are truly social. In the city of opera, may I end with an operatic allusion? In Puccini’s Madama Butterfly, Lieutenant Pinkerton’s betrayal of Butterfly is all the greater because of the exceptional shame it incurred for her because of her cultural background. His personal duty to her was enhanced because of the particularly acute social consequences of his breach. But that is not to make Pinkerton responsible for the cultural setting from which Butterfly came. It is not to impose a social duty on him. Butterfly could find a remedy only in her death. It must be our hope that the fulfilment of personal obligations provides a better way.

**FINANCIAL AND PROPERTY SETTLEMENT – A STANDARD DEAL?**

**John Eekelaar**

One reason for wanting binding ante-nuptial contracts is that the way courts exercise their discretion under s. 25 of the Matrimonial Causes Act 1973 is unpredictable. There are, of course, other reasons, the most significant being that adults should be able to decide on the consequences of their actions. This is a good principle. But it has its limits, as Antonio discovered in *The Merchant of Venice*. But apart from the (not insignificant) problems of intent, interpretation and changes of circumstance, contracting parties could find it difficult to evaluate the significance of their agreement without some idea about what would happen if they failed to agree. It is true that practitioners are reported as saying, understandably, that there is no point in having a contract if it reflects simply what would happen in any event (Emma Hitchings “From Pre-nups to Post-nups: Dealing with Marital Property Agreements (2009) 39 *Family Law* 1056). But it seems essential to responsible negotiation for both sides to know how far they are accepting a deviation from the default outcome.

But that can presently be very difficult to know. So how can the problem be, if not overcome, then at least reduced? The courts have been very reluctant to adopt anything that might look like a “formula” for financial and property allocation, unless the “presumption of equality” can be said to be such. The reasons may lie in the wording of section 25, which requires a global assessment of all the circumstances of the case. As Charles J recently said in *McFarlane v McFarlane* [2009] EWHC 891 (Fam):

47. As with assessments of what the wife might have earned and be earning in my view generally a percentage or formulaic approach to the post marriage product of the husband's earning capacity, and thus his earnings, based on his earning capacity, the spade work for which was done during the marriage, should be avoided, as should argument based on a percentage calculated from earlier cases (e.g. *H v H*). This is because the assessment of what is a fair award (applying the guidance on the principled approach to be taken given by the authorities) having regard to the consequences of the choices made during the marriage is fact sensitive.
48. Rather, it seems to me that the overall assessment should be informed by the points mentioned in *H v H* that there are a number of factors that have gone to make up the husband's earning capacity (a number of which will have been factors in the choice made during the marriage to rely on his abilities as the breadwinner e.g. his talents, energy and dedication to hard work) and that the effects of the platform created (and the spade work done) during the marriage will be likely to reduce as time passes and be replaced by other factors (for example the contribution of a second wife).

49. To my mind these quantification points relating to the earnings the wife would have been likely to have made, and the continuing effects on the husband's earning capacity of the marriage partnership after it has ended are truisms that comprise relevant factors in the discretionary exercise required by the MCA 1973 and, by their nature, create problems for the courts (and advisers) because they do not lend them themselves to a formulaic approach.

It may well be that the factors relevant to the discretionary exercise are just too open-ended to permit the construction of any “default” position. And it is also true that in probably the majority of cases, the problem is just finding enough to go round to cater for the basic requirements of running a home with children. (See Emma Hitchings, ‘Everyday Cases in the Post-White Era’ (2008) 38 *Family Law* 873). But the system must cater for all types of family circumstances, and there is sufficient anecdotal evidence of instability to warrant considering whether improvement might be possible.

What follows, therefore, is an attempt to explore whether it might be conceptually, and practically, possible to construct a “standard” deal for financial and property provision around which settlements or agreements tailored to specific cases might be made. In order to do this, it is first necessary to settle the general principle to be applied. The principle adopted here is to base the award on what the parties have put into the relationship, at least while married, and on compensation payable when it finished: in short, a *fair return on investment of both assets and effort when the partnership ends*. This involves assessment of the share in assets each has earned, and the disadvantage either may be under relative to the other at separation. It is different from insuring against *future* risks. It is based on *what has already happened*. In an age of low marriage, and relatively high divorce, it is questionable whether it is any longer feasible to see marriage as an instrument for providing insurance for the period after the marriage ends. It would operate in a capricious and unreliable way. In order to guard against moral hazard, it would be necessary to re-introduce assessments of fault.
That does not have a happy history. In contrast, the earned-share and compensation approach, to which English law is arguably moving, draws on established legal principles. The law is accustomed to deciding how individuals acquire interests in capital assets, and it is familiar with dealing with claims for compensation for losses. This is merely a new context for doing this. Another advantage is that, since it is not conceptually linked to the status of the parties, it can apply whether the parties are married or not, for the concern is with principles of justice, not making statements about family structure.

However, it could be said that the earned share and compensation principle does not resolve the fundamental problem, because we come back to the question: what is a “fair” return on investment of assets and effort, and how do you calculate the disadvantage to be compensated? In order to attempt a resolution, it is necessary to consider the two approaches in more detail.

The “earned share”

The “earned share” approach is based on the view that, if the parties share their lives and, in Lord Nicholls’ words, “live and work together” (Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, para. 16), then, if they separate, their efforts should be recognised through a share in the assets they have between them. It is usually said that the shares must be equal because what each party contributes, albeit in different ways, to their life together should, at least outside exceptional circumstances, be regarded as having equal value. But valuing contributions equally does not always translate into equal contribution entitling equal sharing. Each hour put in may be valued equally to each pound contributed, but one party may simply have put in more hours or pounds than the other. For example, if one party puts in more assets as a result of efforts made mainly before the marriage (perhaps through the acquisition after the marriage of business assets for which almost all the work was done before marrying), is it really thought that the time spent by the other contributing to the joint domestic life should be set at half the value of such assets, no matter how short the marriage or how large the value of the assets?
Most systems use a variety of techniques to avoid such outcomes. They usually involve excluding certain categories of property (such as assets acquired before the marriage) from the sharing. This has advantages for short-term marriages: the origin of assets would be relatively easily identifiable, and excluded property could simply remain where it was. But in longer-term relationships this could carry quite high administrative costs, because it is necessary to maintain, or establish, a detailed record of transactions, including substitutions of assets and changes in their value. It could also result in a rather “legalistic” distribution, where entitlement to considerable sums might turn on technical factors, such as the exact dates of acquisition of property. Furthermore, the longer partners are together the more likely it is that they will come to regard all of the property belonging to each as being for the potential benefit of both. An alternative therefore is to treat any property belonging to either partner as eligible for sharing, but to build up the extent of the share of the non-owner over time (the “duration” principle) unless the non-owner has participated significantly in or made a significant direct contribution to the acquisition of the property (in which case the shares should normally be equal for the time of the acquisition). The passage of time is an excellent proxy for measuring a number of factors which are important in achieving a fair return on investment in the partnership. They include the degree of commitment to the relationship; the value of contributions made to it which are not susceptible to straightforward economic measurement; and the extent of disadvantage undergone on separation. The time taken to reach equality could be accelerated if the person claiming the share is caring for children. It might even be possible to combine the two methods, and a model doing that is outlined below.

The earned share principle should apply to capital, not earned income or earning capacity. It is inappropriate to view a person as having a quasi-proprietorial interest in the products of another’s talents and effort. Worse still, earned shares, being of a proprietorial nature, would not be subject to a duty to mitigate. They are acquired whether or not the recipient made efforts to realise his or her own earning potential, or indeed any other financial benefit received. While that is entirely correct with respect to acquisition of shares in assets, it cannot be good policy to with respect to claims on another’s earnings.
This is important in an age when the earnings gap between men and women is narrowing.

Compensation
Baroness Hale has described compensation as being for “relationship-generated disadvantage” (Miller v Miller; McFarlane v McFarlane, at para. 140). But it cannot be right that any loss, or opportunity foregone, as a result of entering the relationship should be compensated. The financial benefits of an “alternative life” are too speculative to provide an appropriate measure. There must also be a high possibility that, had the applicant not had a relationship with the respondent, he or she will have had one with another person. The “alternative life” may never have happened anyway. Nor is compensation some kind of pay-back for improving the position of the other.

The compensation is for exposure to the differential risk between the parties of the consequences of the separation. This refers to the actual disparity between them when the separation happens and not to possible losses incurred by either at an earlier stage. Surely a woman who is earning more than a man when they separate, but who would have earned even more had she not entered the relationship in the first place, should not have a claim against the man for the cost of those lost opportunities. And if there is no disparity, so the risk has turned out even, there again seems no case for compensation. If compensation is justified, the extent to which the disadvantaged party should receive compensation should be proportionate to the disadvantage, and the length of time which the parties lived together.

Non-cohabiting parents
The duration principle has been criticised on the grounds that it applies only where a couple have actually lived together whereas a mother who cares for the father’s child should be seen as contributing indirectly to his continued acquisition of wealth, even if she is no longer living with him, or has never lived with him (Lisa Glennon, “Obligations between Adult Partners: Moving from Form to Function?” (2008) 22 International Journal of Law, Policy & the Family 22). But there are good
reasons to be reluctant to allow the mother to build up a share in a father’s wealth when they are not living together, or be compensated in such circumstances for any disparity in living standard. A man who has a number of children by different women could face multiple claims on the assets he builds up, which some might view as deserved, but could be oppressive. The nexus between the carer’s activities and the accumulation of wealth also seems remote. Unlike the case of acquisition while parties are living together, there is unlikely to have been an expectation that the carer would benefit from the accumulated assets. It also misses the point that the duration principle is a reflection of a commitment to a common life. As far as compensation is concerned, what is being compensated? Could it be the career opportunities the mother lost by exercising care? But we don’t know what the mother would have done if she had not had this child. She may well have borne another. It is too speculative. It is true that the child’s carer may be relieving the father of a burden. But that can be seen as an element of his duty to the child, which is a separate matter.

A Standard Deal

Even if one were to accept the points made above, a formidable problem remains. How is all this to be translated into practice? There is no alternative to using an agreed method of calculation. But any such method should be seen only as guidance, not to be applied in a mechanical way. It would be subject to the interests of any relevant children. But if there are no relevant children, or their interests have been dealt with, the position between the adults must be resolved. What follows attempts to set out, in skeletal form, what a “standard deal” for financial and property settlement on divorce might look like, based on the principles and approaches discussed above. The purpose is not to advocate this particular model, but merely to show that it might be possible to create a usable model as a guide, or “starting off point”, not only for reaching settlements but also for negotiating ante-nuptial contracts.

It is of interest to note that Advisory Guidelines on Spousal Support have been developed in Canada. These are also intended to assist in the application of the law, and do not have binding effect. They can be seen at:
ALLOCATION OF PROPERTY

The Model involves the application of two Methods.

METHOD ONE

This applies only to assets acquired by either party after commencement date and before dissolution date (“post-commencement assets”)

Commencement date would be either the date of the marriage (or, more adventurously, commencement of cohabitation under a life plan which involves living common life together for longer term future). Dissolution date would be date of termination of the cohabitation or the marriage.

Assets acquired before commencement (“pre-commencement assets”) and property acquired by way of inheritance are excluded, as are substitutions and increases in value of such assets, unless the non-owner has directly contributed to the increase in value. These are referred to as “external” assets.

A. Post-commencement assets to be shared

Each partner should acquire a share in post-commencement assets acquired by the other, either by participation in or contribution to their acquisition or by “domestic” support of the other during the time of their acquisition.

Rationale: The justification is the contribution made to the acquisition by the activity in question, founded on the “expenditure of labour” ground for acquiring property interests.

B. Mode of sharing

1. ASSETS ACQUIRED BY JOINT CONTRIBUTION/PARTICIPATION

In cases of jointly owned property, or of participation in or direct contribution to the acquisition of post-commencement assets and to increases in value of pre-commencement assets, the participant or contributor should acquire a half-share in
the assets or increase in value unless the participation or contribution is clearly insubstantial.

Rationale: Recognition of contributions of this kind is demanded in justice. The equality principle recognizes that, unless it is clearly insubstantial, the fact of joint contribution/participation implies that the assets acquired are treated as joint or common assets, and assessment of the value of the contributions or participation can be difficult likely to exacerbate conflict.

2. ASSETS ACQUIRED INDEPENDENTLY BY EITHER PARTY

A. Where a partner has not significantly participated in or directly contributed to the acquisition or increase in value of post-commencement assets, that partner’s share should be related to the contribution to the common life. The nature of that contribution should be deemed to be of equal value to the direct contribution to assets unless it is clearly insubstantial However the extent of the contribution should be calculated according to the duration principle.

Rationale: Contribution to the common life creates an environment for the activities of each partner, and thereby assists the acquisition of assets by each. Outside exceptional circumstances, each contribution type of contribution by each should be deemed to be of equal value.

B. Calculation of the extent of each share

Suppose A & B acquire assets separately during marriage (or cohabitation) lasting one year. A acquires 50 units, B 500 units (Total 550). Here are three modes of calculating the extent of each share. Each contributes to the common life (“domestic” contributions).

1. The domestic contributions of each are deemed to “cancel out” one another:

   Outcome: A keeps 50; B keeps 500.

2. The domestic contributions are deemed automatically to entitle A and B to have acquired an equal share in each other’s assets:

   Outcome: Each gets 275

3. A and B are each deemed to acquire 2.5% in each other’s assets.

   Outcome: A gets \((500 \times 0.025) = 12.5\) + \((50 – 1.25) = 48.75\) = 61.25
   B gets \((50 \times 0.025) = 1.25\) + \((500 – 12.5) = 487.5\) = 488.75

(3) seems the most reasonable for the following reasons:

(a) Unlike (1), it allows the domestic activities of each to influence the share

(b) Unlike (2), it does not over-reward the domestic efforts of one, when both made equal domestic efforts
(c) It treats the domestic efforts of each as being of equal value.

(d) The 2.5% is a conventional figure. This is preferable to attempting to evaluate the costs of purchasing alternatives to the domestic activities, or to assess the drop in income which one partner would need to experience to perform the domestic activities because

(i) it is very difficult to evaluate the costs and losses involved;

(ii) it excludes a full range of domestic activities, which extend to the intimate sphere. One is surely not to evaluate the support of a sexual relationship by assessing the cost of buying sex, or the support of emotional support by costing alternatives in counselling.

(iii) it may be built on over time to reflect the increasing stake partners commonly have in one another’s asset base as time passes (the “duration principle”).

(e) it provides a basis for allocation of inheritance and pre-commencement assets (“external” assets).

C. The Duration Principle

Following option 3, suppose the percentage is increased by 2.5 % points each year. After 6 years, solution (3) yields the following:

Outcome: A gets \((500 \times 0.15) = 75\) + \(((50 - 7.5) = 42.5) = 117.5\)
B gets \((50 \times 0.15) = 7.5\) + \(((500 - 75) = 425) = 432.5\)

After 20 years they share 275/275.

Rationale: This maintains equal treatment of contributions consistently over time, and rewards sustained input into the common life.

METHOD TWO

This applies to ALL assets, both post-commencement and external (pre-commencement and others, such as inheritance) EXCEPT ASSETS ACQUIRED BY SIGNIFICANT JOINT CONTRIBUTION OR PARTICIPATION, which are treated as described in B.1 above.

A. Application of the two Methods
Assume that in the first four years from commencement, assets can be claimed only by Method One, which is confined to post-commencement assets. External assets are not shared, but return whence they came.

However, from the fifth year from commencement, each party may claim against all assets owned by the other. The claimant may choose to claim against post-commencement assets only according to Method One, or to claim against all assets (except those covered by B.1) according to Method Two. Unless the parties agree otherwise, the outcome most favourable to the claimant should be applied.

**B. Structure of Method Two**

The structure of Method Two in this example is such that, in the first year of its application (Year 5 from commencement), it will only yield a higher award than an award under Method One if the combined assets are at least 20 times larger than the post-commencement assets. In the second year of its application (Year 6 from commencement), it will only yield a higher award than an award under Method One if the combined assets are at least 18 times larger than the post-commencement assets, and so on. The purpose is to keep “external” assets relatively secure from claims early in the marriage (relationship), but making them more available with the passage of time. Of course, different proportions and time periods may be chosen.

Thus at Year 5 the percentage the claimant gets from the combined assets is one-twentieth of the percentage from post-commencement assets alone; in year 6 it is one-eighteenth of the percentage that would be obtained from post-commencement assets alone, and so on until, at year 14 from commencement it will yield a higher award than an award under Method One if the combined assets are double those of the post-commencement assets. After year 15 there would be no point seeking an award under Method One, because that would always lead to a lower award than Method Two, unless there were no “external” assets at all, when the methods would merge.
At year 20, Method Two would yield to an equal split of all assets. Method One would remain irrelevant.

Table 1 shows how this applies where one party owns post-commencement assets which increase over time and holds “external” assets of 10,000 throughout.

<table>
<thead>
<tr>
<th>Year</th>
<th>Method One</th>
<th>Post-Com Assets</th>
<th>External Assets</th>
<th>Total Assets</th>
<th>Method Two</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>Total award</td>
<td></td>
<td></td>
<td>%</td>
</tr>
<tr>
<td>1</td>
<td>2.5</td>
<td>2.5</td>
<td>100</td>
<td>10,000</td>
<td>10,100</td>
</tr>
<tr>
<td>2</td>
<td>5.0</td>
<td>10</td>
<td>200</td>
<td>10,000</td>
<td>10,200</td>
</tr>
<tr>
<td>3</td>
<td>7.5</td>
<td>22.5</td>
<td>300</td>
<td>10,000</td>
<td>10,300</td>
</tr>
<tr>
<td>4</td>
<td>10.0</td>
<td>40</td>
<td>400</td>
<td>10,000</td>
<td>10,400</td>
</tr>
<tr>
<td>5</td>
<td>12.5</td>
<td>62.5</td>
<td>500</td>
<td>10,000</td>
<td>10,500</td>
</tr>
<tr>
<td>6</td>
<td>15.0</td>
<td>90</td>
<td>600</td>
<td>10,000</td>
<td>10,600</td>
</tr>
<tr>
<td>7</td>
<td>17.5</td>
<td>122.5</td>
<td>700</td>
<td>10,000</td>
<td>10,700</td>
</tr>
<tr>
<td>8</td>
<td>20.0</td>
<td>160</td>
<td>800</td>
<td>10,000</td>
<td>10,800</td>
</tr>
<tr>
<td>9</td>
<td>22.5</td>
<td>202.5</td>
<td>900</td>
<td>10,000</td>
<td>10,900</td>
</tr>
<tr>
<td>10</td>
<td>25.0</td>
<td>250</td>
<td>1,000</td>
<td>10,000</td>
<td>11,000</td>
</tr>
<tr>
<td>11</td>
<td>27.5</td>
<td>302</td>
<td>1,100</td>
<td>10,000</td>
<td>11,100</td>
</tr>
<tr>
<td>12</td>
<td>30.0</td>
<td>360</td>
<td>1,200</td>
<td>10,000</td>
<td>11,200</td>
</tr>
<tr>
<td>13</td>
<td>32.5</td>
<td>422.5</td>
<td>1,300</td>
<td>10,000</td>
<td>11,300</td>
</tr>
<tr>
<td>14</td>
<td>35.0</td>
<td>490</td>
<td>1,400</td>
<td>10,000</td>
<td>11,400</td>
</tr>
<tr>
<td>15</td>
<td>37.5</td>
<td>562.5</td>
<td>1,500</td>
<td>10,000</td>
<td>11,500</td>
</tr>
<tr>
<td>20</td>
<td>50.0</td>
<td>1,000</td>
<td>2,000</td>
<td>10,000</td>
<td>12,000</td>
</tr>
</tbody>
</table>

It will be observed that, on this configuration of assets, from years 1 to 4 the claimant is confined to post-commencement assets. This is reasonable because at that stage it is likely to be relatively easy to identify them from “external” assets, and it could be felt that the expectation to a share in “external” assets has not been established.

From Years 5 to 9, there is little difference between the results flowing from the application of Methods One and Two. In those years, therefore, the choice (by the parties or the court) between them might well depend on evidential matters: it may be easier (and cheaper) to take all present assets into account. But if the difference between the post-
commencement assets and the total assets is smaller, it will be better for the claimant to claim only against the post-commencement assets.

On these figures, the claimant will benefit by choosing Method Two from Year 10 onwards. If the difference between the pre-commencement assets and the total was smaller (eg if the “external” assets were only 5,000), then this point would be reached later (at year 13). If the split between pre-commencement and “external” assets were reversed, it would always be better to go for post-commencement assets until year 15. Whatever the difference between them, an equal split of all assets will be achieved at Year 20.

Table 2 shows the position if the values of post-commencement and “external” assets were the reverse of the position in Table 1.

Table 2

<table>
<thead>
<tr>
<th>Year</th>
<th>Method One</th>
<th>Post-Com assets</th>
<th>External assets</th>
<th>Total assets</th>
<th>Method Two</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>Total award</td>
<td></td>
<td></td>
<td>%</td>
</tr>
<tr>
<td>1</td>
<td>2.5</td>
<td>250</td>
<td>10,000</td>
<td>10,100</td>
<td>N/A</td>
</tr>
<tr>
<td>2</td>
<td>5.0</td>
<td>500</td>
<td>10,000</td>
<td>200</td>
<td>10,200</td>
</tr>
<tr>
<td>3</td>
<td>7.5</td>
<td>750</td>
<td>10,000</td>
<td>300</td>
<td>10,300</td>
</tr>
<tr>
<td>4</td>
<td>10.0</td>
<td>1000</td>
<td>10,000</td>
<td>400</td>
<td>10,400</td>
</tr>
<tr>
<td>5</td>
<td>12.5</td>
<td>1250</td>
<td>10,000</td>
<td>500</td>
<td>10,500</td>
</tr>
<tr>
<td>6</td>
<td>15.0</td>
<td>1500</td>
<td>10,000</td>
<td>600</td>
<td>10,600</td>
</tr>
<tr>
<td>7</td>
<td>17.5</td>
<td>1750</td>
<td>10,000</td>
<td>700</td>
<td>10,700</td>
</tr>
<tr>
<td>8</td>
<td>20.0</td>
<td>2000</td>
<td>10,000</td>
<td>800</td>
<td>10,800</td>
</tr>
<tr>
<td>9</td>
<td>22.5</td>
<td>2250</td>
<td>10,000</td>
<td>900</td>
<td>10,900</td>
</tr>
<tr>
<td>10</td>
<td>25.0</td>
<td>2500</td>
<td>10,000</td>
<td>1000</td>
<td>11,000</td>
</tr>
<tr>
<td>11</td>
<td>27.5</td>
<td>2750</td>
<td>10,000</td>
<td>1100</td>
<td>11,100</td>
</tr>
<tr>
<td>12</td>
<td>30.0</td>
<td>3000</td>
<td>10,000</td>
<td>1200</td>
<td>11,200</td>
</tr>
<tr>
<td>13</td>
<td>32.5</td>
<td>3250</td>
<td>10,000</td>
<td>1300</td>
<td>11,300</td>
</tr>
<tr>
<td>14</td>
<td>35.0</td>
<td>3500</td>
<td>10,000</td>
<td>1400</td>
<td>11,400</td>
</tr>
<tr>
<td>15</td>
<td>37.5</td>
<td>3750</td>
<td>10,000</td>
<td>1500</td>
<td>11,500</td>
</tr>
<tr>
<td>20</td>
<td>50.0</td>
<td>5000</td>
<td>10,000</td>
<td>2,000</td>
<td>12,000</td>
</tr>
</tbody>
</table>
It will be seen that it is much better to claim against post-commencement assets until year 15. If it is not possible to identify assets as post-commencement (which is unlikely because most are post-commencement), then the award will remain relatively low until that year.

If both parties own assets separately, exactly the same procedures would be applied against any assets of each of them.

The system avoids the rigid distinction between marital and separate property which requires each class to be identified and separately treated. A party may well have an interest to claim against post-commencement assets only, and will therefore have an incentive to identify them. If they cannot be so identified, the claim will lie against all the assets, but will result in a lower award. This seems reasonable, as the claimant has not established the stronger element of identification needed to justify a higher percentage claim. However, in longer cohabitations, the distinction between post and pre-commencement property becomes irrelevant, as the claim will be against all assets, which further simplifies matters at this distance from the beginning of the cohabitation.

**ONGOING SUPPORT**

Ongoing support can take a number of forms. It may be a straightforward income order, or its capital equivalent (in which case it will affect any asset distribution made under the methods discussed above) or be in kind, such as a right to occupy premises.

The basis for making ongoing provision (or capital equivalent) in favour of one former partner should be the claim in justice to a measure of compensation for the removal of the opportunity to share the benefit of such ongoing provision with the other partner. It should not be for speculative lost opportunities. The lost opportunity is assessed by reference to the actual relativities at time of separation.
As is other cases of compensation, such as loss of amenity, awards have to be set in accordance with some convention. The model below is based on one produced by the American Law Institute. It sets the amount of the award as a proportion of the income gap between the partners at the end of the cohabitation, and its level and duration by reference to the extent of the cohabitation. The extent to which one partner has devoted significantly more time to child-caring or other forms of caring than the other could affect the values. Once again, these are guidelines only. It is possible to imagine circumstances, for example, where a party made significant sacrifices on entering a short cohabitation late in life leaving a significant income gap at its conclusion, where a higher or longer-term provision would be necessary to provide adequate compensation.

Here is an example:

**Duration of award:**

- **Cohabitation 0 - 48 months**
  - 3
- **Cohabitation 49 - 108 months**
  - 2.5
- **Cohabitation 109 - 168 months**
  - 2.0
- **Cohabitation 169 - 228 months**
  - 1.5
- **Cohabitation over 229 months**
  - 1

Hence cohabitation of 40 months qualifies for an award of 13.3 months; of 120 months for an award lasting 60 months and of 240 months for an award lasting 240 months (or for life). Adjustments could be made to reflect periods of child care.

**Level of award**
It would be necessary to set a maximum of the percentage of the income difference which could be taken in an award: say 40%. This could be reached when the cohabitation has lasted 20 years, so the formula would be:

\[ \text{Income difference} \times \text{years of cohabitation} \times 0.02 \]

For a cohabitation of 12 years, with an income difference of 30,000 the result would be: 7,200. Its duration would be six years.

Had the cohabitation been 20 years, the award would be 12,000, lasting for 20 years or indefinitely. Had the cohabitation been for three years, the award would be 1,800, lasting for one year.

*Duty to mitigate*

Since the award is compensatory, it would be subject to a duty to mitigate. Failure to mitigate would be grounds for reduction or discontinuance.

*Conclusion*

In conclusion, two points need to be re-stated. The first is that my intention is not to propose any specific models, not even the ones set out above. It is just to suggest that models of some kind *could* be established, and to stimulate thought about what they might be. The second is that the models would provide guidance only, and should be departed from where there was good reason to do so.
Dear Members of the Law Commission,

Matrimonial Property, Needs and Agreements Consultation Paper No. 208

I enclose:

a) My booklet on *The Case for Divorce Reform* for background information and ask an indication of some basic considerations.

b) A first draft of ‘A Divorce Reform Bill’; Part 2 is relevant to the Consultation.

Some conclusions:
The aim of reform in general should be to encourage agreement. To do this the parties need guidance on:


b) How to reach an agreement. Clause 4(2)(a).

c) The basic principles on which to reach agreement. Clause 4(2)(b).

d) The factors which they should consider if Clause 4(1) and (2) are an insufficient basis for agreement and these are also the factors on which the Court will adjudicate if necessary.

Yours sincerely,

Enclosures.
FIRST DRAFT OF A DIVORCE REFORM BILL
(A Bill to amend certain provisions of the Matrimonial Causes Act 1973)

For the attention of Parliamentary Counsel

References

Part 1 – Divorce, Nullity and Other Matrimonial Suits

Clause 1 – General Principles

(1) A Court and any person exercising jurisdiction under the Matrimonial Causes Act 1973 shall have regard to the following general principles

(a) That the institution of marriage is to be supported.

(b) That the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage.

(c) That a marriage which has irretrievably broken down and is being brought to an end should be brought to an end

(i) with minimum distress to the parties and to the children affected;

(ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and

(iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end.

(d) That any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as is reasonably practicable, be removed or diminished.

(e) The aim: That the parties should be encouraged to reach agreement, but when that is not possible justice should be done.

Every Family Matters,
The Centre for Social Justice
The Alternative Clause 2 - Divorce on Breakdown of Marriage

(1) In Section 1 (2), insert (1)(a) and renumber Section 1 (2)(b) to (f):

The Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say:

(a) That an order as defined in the Matrimonial Proceedings Rules has been made in the Family Proceedings Court and subsequently the parties have lived apart for a continuous period of six, nine or 12(?) months immediately preceding presentation of the petition.

(b) That the respondent has committed adultery. Etc.

Note: The above provisions (Clause 2) should cause a gradual change in the divorce system. The Family Proceedings Court should thereby have time to develop its procedures and welfare support. It should aim to encourage the parties to reach agreement and give time for them to reflect. Work could gradually be transferred to that Court until it is ready for Clause (2)(1)(a) and (b) to come into operation in its entirety and to be the sole grounds for divorce. (The current Section 1 (2) of the M.C. Act 1973 would then be repealed). In the interim, parties might be encouraged to use the family Proceedings Court rather than the Divorce County Court by preferential legal assistance. They might also be discouraged from using the Divorce County Court if the practice of giving oral evidence on oath was resumed.

Clause 3 - Supplemental Provision as to Facts Raising Presumption of Breakdown

(1) For the purposes of Section (1) a husband and wife shall be treated as living apart, unless they are living with each other in the same household and references in this section to the parties living with each other shall be construed as reference to their living with each other in the same household.

(2) In considering for the purposes of Section (1)(b) above whether the period for which the parties have lived apart has been continuous, no account shall be taken of any one period (not exceeding six months or of any two or more periods not exceeding six months in all) during which the parties lived with each other but no period for which the parties lived with each other shall count as the period for which the parties have lived apart.
Part 2 - Ancillary Relief for Parties to Marriage, etc.

Clause 4 - Matters to which the Court is to have regard in deciding how to exercise its powers under Sections 23, 24 and 24A

(1) Substitute for S25: It shall be the duty of the Court in deciding whether to exercise its powers under Sections 23, 24, 24A and 248 above, and if so, in what manner to have regard to all the circumstances of the case with the aim of balancing the hardship for the parties, first consideration being given to the welfare while minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the power of the Court under Sections 23(1)(a), (b) or (c), 24, 24A or 24B above in relation to the party to the marriage, the Court shall in particular have regard to the following matters:

(a) Any agreement in writing made between the parties either before or during the marriage shall be binding if and only if:

(i) the agreement is signed by all parties; and

(ii) the agreement contains, in relation to each spouse party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:

(a) the effect of the agreement on the rights of that party;

(b) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and

(iii) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and

(iv) the agreement has not been terminated and has not been set aside by a Court; and

(v) after the agreement is signed, the original agreement is given to one of the spouse parties and
(b) In default of a binding agreement:
   (i) Assets acquired during the marriage shall be divided equally.
   (ii) Pre marital, post separation and inherited assets should be retained by the relevant party.

(3) It shall be the duty of the Court when considering all the circumstances of the case to establish if the above provisions would result in significant injustice between the parties and if so to vary the aforesaid provisions. In particular, in default of agreement. In the exercise of this duty the Court shall have regard to the following matters:

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in the capacity which it would in the opinion of the Court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;
and it shall be the duty of the Court to have regard to the cause or causes of the breakdown of the marriage and to the conduct of each of the parties whatever the nature of the conduct and whether it occurred during the marriage or after the separation of the parties (or as may be the case the dissolution or annulment of the marriage) and shall take it into account if that conduct is such that it would in the opinion of the Court be inequitable to disregard it.

(4) As in 825(3) and (4) of the MC Act 1973

(5) As in 825(3) and (4) of the MC Act 1973

A Clean Break

Clause 5 - Amend S25A.

After the words ‘Exercise of Courts’ powers in favour of party to marriage on decree of divorce or nullity of marriage’, insert: ‘when there are no relevant children of the family’.

Clause 6 - Miscellaneous and Supplemental

Consequential amendments and repeals as necessary.

George G. Brown
2 Kings Bench Walk
Temple
London EC4Y 7DE

1 The Court would have extensive guidance and welfare for support services.
2 Clause 2 could be enacted in two stages, with Clause 2(1)(a) being enacted initially as an additional ground to those in the 1973 Act.
The Alternative Clause 2 - Divorce on Breakdown of Marriage

(1) In Section 1 (2), insert (1)(a) and renumber Section 1 (2)(b) to (f):

The Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say:

(a) That an order as defined in the Matrimonial Proceedings Rules has been made in the Family Proceedings Court and subsequently the parties have lived apart for a continuous period of six, nine or 12(? months immediately preceding presentation of the petition.

(b) That the respondent has committed adultery. Etc.

Note: The above provisions (Clause 2) should cause a gradual change in the divorce system. The Family Proceedings Court should thereby have time to develop its procedures and welfare support. It should aim to encourage the parties to reach agreement and give time for them to reflect. Work could gradually be transferred to that Court until it is ready for Clause (2)(1)(a) and (b) to come into operation in its entirety and to be the sole grounds for divorce. (The current Section 1 (2) of the M.C. Act 1973 would then be repealed). In the interim, parties might be encouraged to use the family Proceedings Court rather than the Divorce County Court by preferential legal assistance. They might also be discouraged from using the Divorce County Court if the practice of giving oral evidence on oath was resumed.

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(2) In considering for the purposes of Section (1)(b) above whether the period for which the parties have lived apart has been continuous, no account shall be taken of any one period (not exceeding six months or of any two or more periods not exceeding six months in all) during which the parties lived with each other but no period for which the parties lived with each other shall count as the period for which the parties have lived apart.
THE CASE FOR DIVORCE REFORM

A Consultation Paper for
The Society of Conservative Lawyers

by

George G Brown, Barrister

The UK has the highest divorce rate in the Western world. Children who have suffered family breakdown are 75% more likely to suffer educational failure.

Breakdown Britain
PREFACE

"Breakdown Britain"(1), the interim report of the Social Policy Group, is an excellent piece of work with which, in general, I find myself in profound agreement. Nevertheless, it should provoke general discussion. Apart from "the UK has the highest divorce rate in the Western world", very little is said about divorce, and the words "divorce reform" are not mentioned at all. This prompts me to write, in the hope that I may contribute to that discussion.

In 1978 a research committee (of which I was Chairman) of the Society of Conservative Lawyers reported on "The Case for Family Courts"(2), in which we drew attention to the rising tide of divorce.

In 1981, after the Conservative victory at the election, the same committee reported on "The Future of Marriage"(3), in which we called for reform of the divorce laws and for a pro-marriage policy, and recommended the establishment of a Royal Commission. That report received some publicity but there was no response from the Government.

Since then, we have seen a social revolution. In one generation, the numbers marrying have halved and the numbers divorcing have trebled, while the proportion of children born outside marriage has quadrupled. This, I believe, has resulted in a "Fragile Society"(4).

A central feature of this fragile society has been the rise in divorce which was most pronounced after the Divorce Reform Act of 1969 came into operation in 1971. At the same time, we face an increasingly hostile world for which we will need a cohesive society with high morale.

The recent creation of Her Majesty's Court Services (HMCS) has provided the opportunity not only to unify the administration that supports the divorce courts but also to rationalise the laws administered therein.

It is therefore time for another Divorce Reform Act and my AIM is to promote discussion on the form it should take.

G G B.

The Inner Temple
January 2007

CHAPTER 2  THE BACKGROUND HISTORY

To give people a right to divorce themselves would be to foster a change in the attitude to marriage.  
Royal Commission 1956

In 1956 the divorce law was based on a finding of misconduct: adultery, cruelty or desertion. A guilty spouse was not only divorced but had a much weakened case for maintenance and custody of the children. There were about 29,000 divorce petitions annually.

The Royal Commission of 1956(1), the last Royal Commission to report in this field, stated:

It is obvious that life long marriage is the basis of a secure and stable family life and to ensure their well being children must have that background ... to give people a right to divorce themselves would be to foster a change in the attitude to marriage which would be disastrous for the nation ... marriage in the end would come to be regarded as a temporary relationship with divorce as a normal incident of life.

In 1966, that report was followed by one sponsored by the Church of England - "Putting Asunder"(2) - which recommended that divorce should be granted on the ground that the marriage had broken down as proved by an inquisitorial inquiry; issues of conduct should be considered in Chambers. The Law Commission then issued a report, "Reform of the Grounds of Divorce, The Field of Choice"(3). They rejected an inquisitorial inquiry and recommended a modified breakdown principle. "Fault could be recognised as relevant only at the stage when maintenance comes to be determined in Chambers."

In 1969, these reports resulted in the Divorce Reform Act of 1969, later consolidated in the Matrimonial Causes Act 1973, the current divorce statute. (For summary of the Main Provisions, see Appendix B.) Thereafter, the ground of divorce is that "the marriage has broken down irretrievably" as proved by one or more factual situations: adultery, behaviour, desertion, two years separation with consent, or five years separation. In effect, this did give people the right to divorce themselves and the results have indeed been disastrous.

In 1971 the Act of 1969 came into operation and led to an immediate increase in divorce, with 110,000 petitions in 1972. Since then, the annual divorce rate has risen to about 150,000, said to be "the highest in the Western world".

In 1974 the Finer Report(4) on One Parent Families was presented to Parliament. This recommended the establishment of a unified Family Court:

The Family Court will be a unified institution in a system of family law which applies a uniform set of legal rules derived from a single moral standard and applicable to all citizens.

In 1977, Special Procedures were extended to the trial of all undefended divorces, whereby petitioners filed an affidavit in support of their petitions. This was then considered by the Registrar and a list of decree nisi read out in Court. The parties were no longer required to attend a hearing and the procedure thereby changed from a judicial to a largely administrative act.

By 1978 it was clear that the Finer report was not going to be implemented and a committee of the Society of Conservative Lawyers reported on "The Case for Family Courts"(5). We recommended that the jurisdiction in the Magistrates Courts should gradually be transferred to the Divorce County Court, where the Registrar would have an enlarged role. Issues of conduct should be considered when awarding financial provision in Chambers.

In 1981 after the General Election, the same committee, reporting on "The Future of Marriage"(6), drew the attention of the Conservative Government to the continuing need for divorce reform - but there was no response.

In 1982, a committee of the Order of Christian Unity (of which I was Chairman) reported on "Reconciliation and Conciliation in the Context of Divorce"(7), recommending that there should be a two-tier Family Court. Proceedings, it was said, should start in the Magistrates Court, where the litigants would have access to supporting agencies. After a finding in the Magistrates Court and a subsequent period of separation, a divorce petition could then be filed in the Divorce County Court, the main ground of divorce being a finding the lower court followed by the period of separation. Issues of conduct should be considered in Chambers when awarding financial provision.

In 1984, the Matrimonial and Family Proceedings Act amended the 1973 Act to require the Court to consider whether there should be a financial "clean break" between the parties.

In 1996, the Family Law Act 1996 (Appendix C) was enacted to introduce
CHAPTER 3 THE FAMILY COURT AND PROOF OF BREACH

...
Lawyers(4) and the Order of Christian Unity(5).

Proof of Breakdown

It would seem logical that a unified system should administer a unified code of law. There has been no suggestion that the ground for divorce should be other than that the marriage has broken down irretrievably, but the question is: How best do we prove "irretrievable breakdown"? It is proposed therefore that the Matrimonial Causes Act 1973 should be amended as follows:

1-2 The court hearing a petition shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say -
(a) That an order as defined in the Matrimonial Proceedings Rules has been made in the Family Proceedings Court and subsequently the parties have lived apart for a continuous period of at least six months immediately preceding the presentation of the petition.
(b) That the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

Conclusions

The above proposed reform of the divorce law should encourage litigants to use the Family Proceedings Court, as is clearly the intention of the President of the Family Division, and will give litigants the opportunity to use the welfare and mediation services therein and should reduce the divorce rate. The reform should also remove all allegations of misconduct from the face of the divorce petition and thus make it easier for the support services to assist the parties to effect reconciliation or conciliation.

CHAPTER 4 THE HISTORY OF 'CONDUCT'

People have good and bad impulses and we conceive it as the function of the law to strengthen the good and control the bad.

The Royal Commission of 1956

Reports

In Putting Asunder, the report sponsored by the Church of England, it was anticipated that the conduct of the parties would be a factor in the award of financial provision.

The Law Commission then reported and said:
Admittedly the determination of fault cannot be wholly eliminated. As the Archbishop's Group recognises, it must remain an important element in the courts' decisions about financial matters ... if the question of fault could be recognised as relevant only at the stage when maintenance comes to be determined in chambers ... much distress could be avoided.

The Finer Report in 1974 referred to a "system of family law which applies a uniform set of legal rules, derived from a single moral standard".

Statutes

The Matrimonial Causes Act 1973 was a consolidation of the Divorce Reform Act 1969 and the Matrimonial Proceedings Act 1970. The latter required the Court to exercise those powers as to place the parties, as far as it is practicable, and having regard to their conduct just to do so, in the financial position in which they would have been if the marriage had not broken down ...

and that provision was reproduced in S25 of the 1973 Act.

In 1984 the Matrimonial and Family Proceedings Act amended the previous reference to "conduct" to a specific duty under S25(2) of the Act to have regard to "the conduct of each of the parties if that conduct is such that it could in the opinion of the Court be inequitable to disregard it". That remains the law today.

in 1996, Para9(3)(b) of Part 1 of S8 of the Family Law Act amended the above to

the conduct of each of the parties whatever the nature of the conduct
The reasons for these are examined in Chapter 5.

Why?

When awarding financial provision, the judges have consistently decided to do so. Parental roles are expected to be shared, the rights and obligations of conduct

Conclusions

The judgment of the court is based on the general premise, which, despite the law society's wishes, a former President of the Law Society's decision, [name] Grant, a former President of

While the issue of financial provision is more likely to be heard as a point of law, the decision that awards financial provision is small. Court does not have such a

Certainly, the financial provision for the benefit of the children is entitled.

To award the costs from the proceeds of the sale of the property, is a striking point of one of the claims. The financial provision of the property is as

Cases


The amount of financial provision is brought to the notice of the court by the judge(s) of the cases may be the decision of amount

and whether it occurs during the marriage or after the separation.

Parental responsibilities allocated to do so.
CHAPTER 5  CONDUCT

The State could strengthen the institution of marriage by ending ‘no fault’... divorce settlements.

Rebecca O’Neill(1)

The reality is that, in most cases, one person or the other is principally to blame... pretending this is not the case can result in the person who feels most aggrieved harbouring long resentment.

Martin Bentham(2)

The tortuous variations in the statute law requiring the Courts to consider the conduct of the parties in hearings for financial provision, and the way in which the judges have interpreted those provisions, were set out in detail in the previous chapter.

It suffices to say that the current statute law is set out in S25 of the Matrimonial Causes Act 1973 and this section has been amended by Para9(3)(b) of Part 1 of Schedule 8 of the Family Law Act 1996 but has not yet been brought into operation.

In Practice

At present only conduct which is “gross and obvious” influences the size of any financial award and in the vast majority of cases the Court makes no examination of the parties’ conduct to establish the true situation. Moreover, the onus is placed on the parties to raise issues of conduct whereas the onus should be on the Court. The parties are loath to raise the issue for fear of having to pay the costs. Form E, the Financial Statement of Means which applicants for financial relief are required to complete, says:

Bad behaviour or conduct by the other party will only be taken into account in very exceptional circumstances when deciding how the assets should be divided after divorce. If you feel it would be taken into account in your case, identify the nature of the behaviour or conduct.

A typical situation is that of the District Judge who, in deciding a contested application for financial relief, has before him the divorce pleadings. For example, the husband has left the wife for another woman. He is anxious for a divorce so files a petition that his wife has behaved in such a way that he cannot be reasonably expected to live with her. She will have none of that and counter-pleads on the ground of his admitted adultery. The District Judge thinks this is a case of “six of one, half a dozen

of the other” and that it is clearly not a case of “gross and obvious” conduct, the parties do not necessarily think so but are reluctant to say so. However, the case proceeds without even the most cursory examination of conduct and there is little opportunity for the parties to “let off steam”. Justice has certainly not been seen to be done and in some cases it may not actually have been done; consequently, in many cases the husband refuses to pay child maintenance and the wife refuses the husband access to the children. Moreover, there is no moral base, no sense of ‘right’ and ‘wrong’ upon which the law and the cohesion of society depend.

Consequences

Patricia Morgan quotes(3) extensive research which shows that “No fault divorce settlements reduce maintenance for women and children by about a third compared to where fault is a criterion” and that “Mothers are seriously disadvantaged by clean break settlements”.

Conclusions

There has been a great reluctance by the Courts to consider the conduct of the parties because:

(a) Lord Denning decided that only conduct which is “gross and obvious” will actually influence the size of the award.

(b) If conduct is an issue, in many cases the dispute may spread to the divorce suit, with both parties trying to strengthen their case. Thus, the situation would then be similar to that before the Reform Act of 1969.

(c) It is said that issues of conduct increase the bitterness between the parties, although it is now clear that at present in many cases the bitterness festers beneath the surface.

A persistent aim of the reformers was to remove issues of conduct from the divorce suit and have them heard in Chambers. To the contrary, at present we have a quasi-conduct divorce suit and, in the majority of cases, no hearing of conduct in Chambers.

If, as I propose, the divorce suit is founded on a simple period of separation, the objection in para (b) above vanishes. Moreover, the Judge trying the financial dispute will be faced with no knowledge of why or how the marriage broke down. In order to
very wide discretion, so wide that this is commonly something and that very

must consider in exercising financial provision, in effect, the decision, and the court

of the matrimonial cause Act 1977, sects. 1 and 2(6) and chapter 8(1). 5

Chapter 6

FURTHER RESEARCH

A sposorship on financial

We are going to try with a lot of effort in this

Recommendation

which, if it would be necessary to discharge

court of the parties, or under the (1) in the (1) on

about the conduct of the parties. This investigation, there seem to be some

have a lot for the case, we will need to know something about the case, something

In meaningful to discharge.

If the court is to discharge, it shall be

section 54(2) and 54(3) or section 54(6) and 54(7).

and recommendation 1973 should be amended as follows:

Subject to section 52(3) and section 52(6) and section 52(8), the

Assistant
This makes it difficult for the parties to predict the outcome and to reach an amicable settlement. It also leads to prohibitive costs. As Martin Mears writes:

The costs of matrimonial litigation are wholly disproportionate and occasionally, as even the courts admit, outrageous. These costs are largely the consequence of the uncertainty in the law, an uncertainty begotten by the almost unlimited discretion the judges claim for themselves in dealing with cases.

For example, in White v White [2002] FLR281, the estimated costs of the appeals were stated to be £530,000 and it is not clear that this figure included the costs of the earlier proceedings. Lord Nicholls described the amount as "appalling".

Even the recent cases of Miller and McFarlane in the House of Lords, [2006]UKH224, appear to have ramifications which are not yet known. Although there seem to be three factors in quantifying an award - needs, compensation and sharing - the inter-relationship of the three factors is not entirely clear. Justin Warshaw writes:

The scope for continued argument and divergent opinion on the current law is perhaps best demonstrated by the salacious press coverage of the breakdown of Sir Paul and Lady McCartney's marriage and the possibility of Heather Mills' settlement.

What is to be done? Justin Warshaw also observes that most other common law countries have adopted an approach usually referred to a 'quasi community property' where marital assets, defined by statute, are divided equally on dissolution of marriage. In the most simply structured regimes, such as in the Province of Ontario, so long as the assets at the date of marriage and separation and the identity of post marriage inherited/gifted assets are agreed their correct division can be determined by a simple computer program.

Conclusions

The principle of "equitable division" which governs financial provision in our courts, has given the courts such wide discretion that there is much uncertainty in the application of the law and this often leads to an unacceptable level of costs. It is time to consider alternative systems. The Law Commission could make a valuable contribution to the debate by reporting on the desirability and practicality of amending our law on financial provision to an approach based on "quasi community property" or as may be. There would still be a duty on the court to examine the conduct of the parties, if there is no agreement between them.

The Law Commission should also report on the increased powers of enforcement by the CSA, after they have been in operation for a period, and on whether they are suitable to be used in the Divorce Courts.
and emphasize that bills

Appendix A into a First Draft of a Divorce Reform Bill and would welcome comments

in the previous chapter I have set out my conclusions and recommendations
dedication to amending financial provision.
with the help of Mrs April facility

Another weakness is the need

issue of financial provision in Chambers.

inevitably that the court will consider the nature of the marriage when considering

The strategy developed by the President of the Family Division gives the
counsel.

grounds of divorce are great counsel - i.e. on the face of it they involve issues of

Married:...confused. (As) far as I am aware...by the President of the Family Division was developed

Any proposals have proposed the approach to broadening of a marriage

illegitimacy. The strategy that the court is to be used, so also should the law they

Proceedings Costs

the case, The strategy is designed to move family work to family

Court Judges should be the right level to deal with the complications of

Family Proceedings Court Judges. District Judges, Registrars and

designed to ensure fair share of a family case, the more judiciary

The President of the Family Division was developed Family Strategy

there is now an opportunity to shift form because

mentioned - and to similar proposals.

new or of the divorce laws? (Is) quite clear it is time to repeal that reform.

summarized in Table 6.2. A more likely

Considerations for Policy for Reform of the Divorce Law should be

CHAPTER 7 CONCLUSIONS
APPENDIX A
FIRST DRAFT OF A DIVORCE REFORM BILL
(A Bill to amend certain provisions of the Matrimonial Causes Act 1973)

Part I - Divorce

For Section 1(2), substitute:
The Court hearing a petition for divorce shall not hold the marriage to have broken
down irretrievably unless the petitioner satisfies the court of one or more of the following
facts, that is to say -
(a) That an order as defined in the Matrimonial Proceedings Rules has
been made in the Family Proceedings Court and subsequently the parties
have lived apart for a continuous period of six months immediately
preceding the presentation of the petition.
(b) That the parties have lived apart for a continuous period of at least two
years immediately preceding the presentation of the petition.

Part II - Ancillary Relief for Parties to Marriage, etc.

Matters to which the Court is to have regard in deciding how to exercise its
powers under Sections 23, 24 and 24A:
Delete S25(2)(g) and renumber S25(2)(h) as S25(2)(g).
Insert new Section 25(3):
And the Court shall inquire into the cause or causes of the breakdown of
the marriage and shall have regard to the conduct of each of the parties
whatever the nature of the conduct and whether it occurred during
the marriage or after the separation of the parties (or as may be the case the
dissolution or annulment of the marriage) and shall take it into account if
that conduct is such that it would in the opinion of the court be inequitable
to disregard it.
After S25A “Exercise of court’s powers in favour of party to marriage on
decree of divorce or nullity of marriage”, insert “where there are no
relevant children of the family”.

Part IV - Miscellaneous and Supplemental

Consequential amendments and repeals, as necessary.
[Note: Additional provisions on enforcement and financial provision may be made, as
advised by the Law Commission.]

APPENDIX B
A SUMMARY OF THE MAIN PROVISIONS OF
THE MATRIMONIAL CAUSES ACT 1973

DIVORCE

Divorce on breakdown of marriage
1.- (1) Subject to section 3 below a petition for divorce may be presented to the
Court by either party to a marriage on the ground that the marriage has broken
down irretrievably.
(2) The Court hearing a petition for divorce shall not hold the marriage to have
broken down irretrievably unless the petitioner satisfies the Court of one or more
of the following facts, that is to say -
(a) That the respondent has committed adultery and the petitioner finds
it intolerable to live with the respondent.
(b) That the respondent has behaved in such a way that the petitioner
cannot reasonably be expected to live with the respondent.
(c) That the respondent has deserted the petitioner for a continuous
period of at least two years immediately preceding the presentation of the
petition.
(d) That the parties to the marriage have lived apart for a continuous
period of at least two years immediately preceding the presentation of the
petition ... and the respondent consents to a decree being granted.
(e) That the parties to the marriage have lived apart for a continuous
period of at least five years immediately preceding the presentation of the
petition ...
(3) On a petition for divorce it shall be the duty of the Court to inquire so far as
it reasonably can into the facts alleged by the petitioner and into any facts
alleged by the respondent.

Ban on petitions for divorce within one year of marriage
3.- (1) No petition for divorce shall be presented to the Court before the expiration
of the period of one year from the date of the marriage.
Appendix D - References
CHAPTER 5 - CONDUCT
(1) Rebecca O'Neill, "The facts behind cohabitation", CIVITAS 2004
(2) Martin Bentham, ibid
(3) Patricia Morgan, Family Structure and Economic Outcomes, p.18, Economic Research Council, 2004

CHAPTER 6 - FURTHER RESEARCH
(1) Sir David Henshaw’s Report, July 2006 Cmd 6894
(2) Martin Mears, ibid
(3) Justin Warshaw, Family Matters, COUNSEL, Oct 2006

CHAPTER 7 - CONCLUSIONS
(1) The Future of Marriage, ibid
(2) Executive Summary, HMCS London Region Proposals for a Network of Family Courts Centres, ibid
(3) The Sunday Times, Jan 14 2007

The Long War - Society and Morale
By George Brown

With reference to the Strategic Defence and Security Review.

We are faced with a Long War and it seems certain that the political, economic and cultural assumptions of the West will now be contested.

The United Kingdom presents itself as a target, as a fragmenting post-Christian society, with low morale. The debt blow-out has hastened a shift that has sapped the West’s ability to impose its will on the rest of the world.

The marriage rate is the lowest since records began in 1862 and in The Long War – Society and Morale, George Brown calls for:
- The creation of a cohesive society with a healthy economy, high morale and reform of the divorce laws;
- Defence and security to be restored as the first duty of Government.

With a foreword by General the Lord Guthrie of Craigiebank, GCB LVO OBE DL
Former Chief of the Defence Staff

Published by the UK National Defence Association
www.uknda.org
30 September 2012

Property, Family & Trusts Team
Law Commission
Steel House
11 Tothill Street
LONDON SW1H 9LJ

Dear Sirs,

Consultation on Matrimonial Law

I am writing in response to the above consultation.

My response is more based on my own experience than on the document.

I note that the document refers to solicitors advising wealthy clients not to marry in order to protect their assets. I suggest that as a general principal any proposals should be based around the principal that as far as it is possible no one should be able to obtain a significant financial advantage from divorce, which was what happened in my case.

I agree with para 130 of the comprehensive summary. In my own case, I sold my home to buy a new house with my ex wife. Clearly in this case there was no 'non matrimonial property' however it seems to me that where there are assets that one party brings to the relationship - and for this I am looking at the point where the couple become 'financially joined' rather than when they marry, assuming they have not been spent, they should be as far as is possible revalued at the point of divorce.
As I put up 50% of the purchase price of the matrimonial home, with the balance on a mortgage it would seem as a starting point that 50% of the proceedings on sale should be treated as my personal property on divorce and excluded from any settlement.

As a matter of principal it seems wrong that unless there is an issue over needs, simply by marrying a spouse should be able to lay claim to assets owned or inherited by their partner, which they have not contributed to.

I am rather disappointed that Child Support has not been considered. There are a number of obvious reasons for this.

Firstly if you are an owner occupier there is a relatively straightforward trade off between mortgage costs and capital.

Secondly there may well be cases where a spouse may wish to choose this to assist their planning on divorce.

Thirdly there may be cases where a ‘parent with care’ may have either doubts about the ability of the other spouse to pay, or cooperation with an order.

In my own case I believe that this led to a significant injustice. My ex wife obtained a substantial capital settlement, then promptly moved a new partner in. Although I was able to get her award reduced, although her new partner was reasonably paid, he was not ‘creditworthy’ so could not raise a mortgage for their new home. As a result of this my ex wife not only obtained a house for herself but her new partner as well and £200 pcm in Child Support. Given that her partner would otherwise have had to pay rent or a mortgage were he not to be living with her, it seems reasonable that he should at least have been assumed to make a contribution towards the household and my ex wives Child Support should be adjusted to take this into account.

I look forward to your final proposal

Sincerely,
LAW COMMISSION
CONSULTATION PAPER No 208
MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS
RESPONSE FORM

This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

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<tr>
<th>Your details</th>
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<tbody>
<tr>
<td>Name: Valentine Le Grice QC</td>
</tr>
<tr>
<td>Email address:</td>
</tr>
</tbody>
</table>
| Postal address: 1 Hare Court  
Temple  
London EC4Y 7BE |
| Telephone number: |
| Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above): |
| If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential: |
| As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances. |
### PRINCIPLED REFORM

<table>
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<tr>
<th>7.2 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?</th>
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<td>Supplementary Consultation Paper, Part 4, paragraph 4.113</td>
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I respect the aim of the argument, but see considerable problems with anything which is prescriptive. For most of the 35 years I have been at the Bar it has been relatively easy to advise on the quantum of periodical payments and capital provision. There was considerable uncertainty in the early years of this century, but that is now receding.

Many civilian jurisdictions eg France and Catalonia are introducing more discretion in areas spousal support.

The infinite variety of marital experience means discretion should be preserved.

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<th>7.3 Should spousal support:</th>
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<td>(1) be restricted to the compensation of loss caused by the relationship; or</td>
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<tr>
<td>(2) seek to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution?</td>
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<td>Supplementary Consultation Paper, Part 4, paragraph 4.114</td>
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</tbody>
</table>
(1) Compensation is a useless concept in assessing spousal support. It were a
good concept it would need to be properly quantified. The arguments over the
quantification would be expensive, protracted and difficult to resolve. Since
the concept was introduced by the House of Lords it has been politely and
rightly ignored by Judges at first instance.

(2) This should be a factor to be taken into account.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

All these factors are relevant.

The length of the marriage is less important if the marriage is more than say five
years. If it is shorter than that the standard of living is of reduced significance.
7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

A reformed discretionary approach.

The problems of a formula are:

A simple formula will create injustice, whilst a complex formula will be difficult to apply. This can be illustrated by remembering that the cost of housing varies widely across England and Wales. If H has to move to rented accommodation in Surrey should his liability for spousal support be lower than a husband who has to find rented accommodation in Sheffield? A simple formula would ignore this sort of factor. A more complex formula would have to designate different geographical areas for applying a rent allowance. I could make the same point about the cost of travel to work. And that is before one comes to the way in which a second family is factored in. Formulae are seductive, but best left to abstract though and kept away from the non-formulaic experience of living a life.

To apply a precise formula it is necessary to have precise data. In order to have précises data assets must be valued and, where appropriate notional income applied to non-income producing assets. These factors drive up costs.
7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

There should be a limit on the duration of maintenance. One limit might be until the youngest child is 11 (the start of secondary education) or a period equivalent to the length of the marriage, whichever is the longer. Any limit is arbitrary, but a limit is required so that both parties have an opportunity to put their failed marriage behind them.

7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

It would be quite wrong to have a pilot scheme. There cannot be one form of divorce law in one court and another form of divorce law in another court.
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments

A. Michael should have a graduated transition to independence. Unless the mortgage is very high, it is likely that his half share of the house will enable him to achieve that transition without further provision. If his half share is £750k he could but a flat for £500k and use the other £250k to manage the decline in his standard of living. It is quite wrong to see either party’s share of the resources as some form of ring fenced entitlement.

With respect to the case study the options are anything other than practical. They appear to be driven by principle. Does the second option mean that Michael gives
some of his share of the house to Sophia because, in principle, he should have no
more than he needs?

B. N/A
C. The concept of in sickness and in health has some significance. If one spouse or
civil partner suffers an accident during their relationship then during the relationship
the other spouse or civil partner will maintain the disabled spouse or civil partner.
Why should it be otherwise if the relationship breaks down?

Needs restricted to needs arising as a result of a relationship is similar to
compensation.

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the
difficulties in calculating levels of support on any basis; even if you feel that Sarah should be
compensated for her past and ongoing losses as a result of the marriage, you may also feel
that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal
advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s
claim (as, of course, they can for child support). Would they find that helpful because it gave
them an answer? Or frustrating because that answer cannot be flexible or responsive to their
individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a
limit on the length of time for which Sarah can be supported by Ian and, if so, how strict
should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. The answer to the first question is no because the answer would almost certainly
fail to be practical. I simply cannot see how there could be a satisfactory formula.
Would a formula divide the house equally, which would leave the children homeless?
Or would it give 75% to Sarah and if so how would the formula work? Would it be a
12.5% accretion to the parent with care for each child with the balance divided
equally? And if it was would W still receive the accretion if the house were worth £1m net? If not when does the balance tip? Should there be tapering of its removal? I could repeat a similar exercise with 60/40 or 80/20 or 100/0. And that’s before one factors in cases of shared care and differing costs of accommodation in different parts of the country. The only certainty in a formula is absurdity of outcome.

The reference to child support is telling. The current legislation is OK, but it took about 20 years to sort out an easy area of financial provision. Seeing that capital and spousal maintenance are about four times as complex formulae would probably cause about 80 years of mayhem and injustice. I say formulae as unintended consequences would require repeated review of the formula in place. The less well-off would suffer more than the rich. Dividing £20m in two is an easy exercise. Housing Sarah and Ian is either impossible or at least difficult.

The answer to the second question is yes, but there is not much flexibility in smaller money cases. This is illustrated by the relatively small swing between the outcomes contemplated by the case study.

E. Sarah will not be maintained by Ian. He probably earns about £25k pa net. By the time he has paid child support, his rent and his other necessary expenses he will not have any money left. Spousal maintenance kicks in when the higher earner has a gross income of about £75k pa. It may be uncomfortable for the professional middle class payers, but it is not a problem of general application. In the cases where spousal maintenance does arise it should be limited in duration (see above).

Michael will not receive spousal maintenance because he does not need it (see above).
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

F. On the facts as given changing the length of the marriage would make no difference.

G. Sarah and Pat will not be able to maintain the same standard of living because that is patently unaffordable. Michael might be able to do so if Sophia were ordered to pay spousal maintenance, but with a capital. cushion and a childless marriage I cannot see why she should.

H. Yes in principle, but where is the money going to come from? If Michael had responsibility for looking after children that might well make a difference.

I. Sophia might be able to buy out Michael’s interest.
7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62
1. A statutory provision to that effect would be incomprehensible. The Court would be asked to provide for need on the one hand and deny provision for need on the other. The current S25A with its reference to adjusting without undue hardship makes more sense.

2. I fail to see how guidance can be authoritative unless it is law. Judges judge cases. Abandon that principle and there is no rule of law. In the area of immigration the judges regularly reject home office guidance and that is part of the judicial function. Judicial independence must not be eroded simply because divorce raises some socio-legal concepts.

3. (a) See above

(b) I would like to see a burden placed on an applicant to justify a joint lives order with a term order being the normal form of order.

(c) Short childless marriages are not a problem in practice.

4. See above.
7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

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7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70
NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

Yes.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50
7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

No

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

Yes

7.15 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?
Not so as to be within the sharing principle.

7.16 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?

Not so as to be within the sharing principle.

7.17 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?
This probably an impossible task.
Dear Sir/Madam

I would just like to make a point about the role of the FDR and litigants in person.

Recently when sitting as a Recorder but doing the District Judge's list I had before an FDR where both parties had been in person from the outset. They had both filed their Form E's but neither had served the document on the other side without the intervention of the court. They had both filed statements that set a catalogue of complaints that they had against their former partner. The husband phoned into the hearing and the wife was at court. The assets were not great but nor were they insignificant. There was a house with equity and he earned in excess of £100,000, but there were lots of debts.

There was obviously no negotiation but there wouldn't have been even if both had been at court. They didn't know what they wanted nor did they know what they might be entitled to. The husband wanted the children to be privately educated, which he was prepared to pay for, but didn't want to pay p.p. He wanted the court to order that she should be responsible for half the debts. She wanted some financial support to look after herself and the children. She didn't want private education. They argued with each other in front of me raising old disputes including issues over contact. It was hopeless. There was no prospect of reaching common ground.

It is not the role of the court to give definitive advice at an FDR, indeed I don't see how it can without hearing the case, and so it cannot advice litigants in person on what would be a reasonable settlement. Nothing less is likely to shift them from their polarised positions.

It just turned into a directions hearing where I tried to isolate the issues that needed to be heard and I told them what the court could and could not do. I set it out in a recital to the order which hopefully will assist the DJ who hears the case. It had a time estimate of a day rather than the 1/2 day it would otherwise have taken.

With the removal of public finding in financial cases this is going to become a common occurrence. It seems to me that there is no role for the FDR with unrepresented parties. A far more useful hearing may be something like the issue resolution hearing they have in care cases. It may serve to reduce the issues that need to be resolved.

Yours faithfully
Hi, Humble Research Assistants!

Here are my responses to 'Matrimonial Property, Needs and Agreements'

1. Non-matrimonial property

Regrettably, circumstances have made the Law Com's interest in this judge-made concept inevitable. If Parliament had intended that such items might not figure in financial orders, it would have said so in Part II MCA 1973 as amended. (Mutatis mutandis, the same goes for such expressions as 'compensation' and 'sharing'.) Rather than allow this unnecessary excrescence to grow yet further in size, posing the problems of definition, scope and the other issues described in the CP, I would recommend its express statutory extinction before it absorbs any more family judge-time that would be better spent on more important matters involving more, and more needy, people. Those rich enough to have the sort of stuff involved can, if properly advised, clearly pre-nup the matter effectively by ring-fencing it, if they so wish: while there remain enough other resources to divide in the manner required by law, such exclusion would surely stick. If they haven't made pre-emptive arrangements and can't or won't settle the matter between them on divorce, then let the owner argue that the court should find what it thinks right from elsewhere in the pot.

As for the claim that the rich won't wed if they can't be guaranteed that Downton Abbey, or what have you, would remain theirs on divorce - so what? We should all make informed choices about family form, not just the rich.

2' 'Needs'

Here, I would again by-pass the need to choose a principle (and the inevitable unpredictability of amount that any such choice would entail), this time by formula (even an as yet unspecified one!). Whilst the post-1991 travails of child support might seem to make that an unpopular choice -particularly to a Government whose backbenchers' post-bags are still full of the issue - the sheer certainty, from the very outset, of such an approach would give it a moral force. It would also remove the alleged regional discrepancies of which some disapprove. The trick would be to make the matter so well known in society - the existence of a formula, if not its actual terms - that the claimant would have the high moral ground should the couple divorce. Once again, government policy should be to encourage would-be domestic partners to find out what they're letting themselves in for (if only potentially) at the outset.

The Commission may attribute this to me if it so wishes.

I would be grateful if you would kindly acknowledge receipt,

With best wishes,
Chris

(Prof) Chris Barton

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28/05/2013
Dear Sirs

I am grateful for the opportunity to provide input into the consultation on needs in divorce. I am a payer in a joint-lives maintenance order and wish to put forward how unfair these orders are and also how they have a significant impact on emotional well-being for the rest of your life.

My first marriage failed whilst we still had dependent children. Upon divorce, I was ordered to hand over a very significant portion of my salary for life to my first wife. This means that many years after that marriage failed, my second wife and I continue to be fully financially responsible for my first wife who has chosen not to pursue training and a proper career.

The enormous cost to my second marriage is not only the financial burden of my maintenance, but more damagingly, the emotional burden and the uncertainty that it has created. It is the uncertainty that is cruelest of all and I feel bad that my second wife has had to forego financial certainty and peace of mind as a result of the open-endedness of the current structure of joint-lives maintenance.

I have been informed by solicitors that my first wife is entitled to a share of all of my income for life. This means that when I retire, despite being awarded half of a very good pension accrued during our marriage, she will be entitled to a share of the income generated by the pension that I have accrued with my second wife. My first wife will not be expected to have saved and provided for her old age with her portion of my income. Instead she will simply be entitled to share in the money we have put aside. My first wife is also entitled to share in any financial gains or success that my second wife and I have, despite having no tangible role to play. Each and every day, we live with financial uncertainty and we feel helpless that our future financial security will be determined by the courts, despite the fact that by the time I retire I will have paid hundreds of thousands of pounds of maintenance. The stress and anxiety that it causes is immeasurable.

My wife and I live in the certain knowledge that each pound we save, may end up being shared with my first wife at some point in the future. We know that pensions and savings accounts are not a safe place for our money. We are therefore perversely disincentivised to save and provide a certain future for ourselves. I have been informed that ‘the more I have, the more I will pay’, so it’s a constant juggling act to ensure that I have enough, whilst not working too hard to give it all away. Even more perversely, I am informed that in order to retire, I will need to capitalise my wife’s needs for the rest of her life. So, I must find the money to pay her, but she has no responsibility at all to save or work for her own future.
It creates a feeling of overwhelming injustice that I am ordered to keep my first wife for life and that I will have provided everything for her financially for many years more than we were married. There is no onus at all on her to seek to provide anything for herself and I am entirely responsible for every financial decision she makes. There is no need for her to seek a career, as the courts have ordered that I must provide for her for life. She may drink coffee with her friends at lunchtime, whilst I endure the stress of long hours in order to meet both our financial needs. She may make an application for further money if my second wife and I enjoy financial success.

Joint –lives maintenance has a significant detrimental impact on children, as it maintains conflict between parents who remain tied financially. Clean breaks and even financial dependence with defined and certain outcomes ultimately allow people to move on with their lives. I am saddened at the manner in which my children have been caught up in several rounds of legal action regarding money. All legal action leads to heightened emotions which inevitably has a very significant detrimental impact on them. They have all articulated to me that they just want us all to be able to move on. Unfortunately I can offer them no comfort as this maintenance agreement is ‘for life’ and it likely that they will witness the effects for many years to come.

Child maintenance is formulaic. Everybody knows where they stand. There are no avenues to argue that a child needs grossly inflated sums to meet their ‘needs’. Spousal maintenance must be similarly certain in order to create fairness for all parties. Where spousal maintenance is required, it must always be time-limited and biased towards needs generated to gain independence, rather than a need that they be maintained for life, without responsibility. It is grossly unfair that a person can be financially dependent upon another for life from a marriage lasting 5, 10 or 15 years. It is also unfair that a person can remain dependent upon another when there are no dependent children. Every person who can work, should work, and they should be entirely responsible for the consequences of their choices regarding work.

In the aftermath of a divorce, there will be occasions in which maintenance must be awarded in order to create fairness and allow a disadvantaged person to retrain and get back to work. However, allowing a person to be maintained for life creates gross unfairness. Imagine a marriage lasting 5 years. In the first few years, the fairness of maintenance is tangible and relevant, but 30 years later, how can it still be fair? No marriage can create obligations or disadvantages that last for that amount of time. No contract should be allowed to be broken by law and yet create obligations for life.

Nobody’s financial position is more important than the emotional wellbeing of an entire family. When maintenance is awarded it should be very clearly time limited in a manner that is proportional, even formulaic, with regards to the length of the marriage. The maintenance recipient should be entirely responsible for their financial needs with that money. They should be responsible for their pension provision and all other financial needs. They should not be able to seek further money in the future if the payer is earning more as a result of decisions or work done after the marriage has ended, or they perceive that their needs have increased. There must be a defined end without further recourse to the Courts and the attendant emotional and financial costs. It is very unfair that every time I need to make a financial decision, I have to consult lawyers and professionals at a very high financial cost. This further drains my financial and emotional resources.

I hope the law commission will take this opportunity to redress this unfairness and ensure that all divorce settlements are time-limited and defined in order to allow people to move on with their lives. There must always be a transition to independence and the length of time taken to do this must be directly proportional to the length of the marriage.
Your faithfully
NOTES ON FINANCIAL AWARDS ON RELATIONSHIP BREAKDOWN
(HOUSE OF LORDS (OCTOBER 24 2012))

1. Unrealism about Relationship Breakdown
   • Few couples on their wedding day or civil partnership day contemplate the stark reality that at some time in the future, they may become part of the relationship breakdown statistics because for most people marriage or civil partnership are an optimistic undertaking.
   • Relationship breakdown is, however, not only very common but for the majority of people, who wish to exit legal relationships, fairly easy even though divorce, or dissolution of a civil partnership, on demand is, theoretically, unavailable in England and Wales.

2. The Problematic Nature of the Current Law Relating to Financial Awards on Relationship Breakdown
   • Whilst legally ending relationships might be comparatively easy, what is complicated is the law’s approach to the redistribution of the couple’s financial and other assets when their relationship comes to an end. Unless they have no resources (many do not and must rely on state benefits) or reach agreements with each other, they will be thrown back to the vagaries of the current law relating to financial awards on relationship breakdown. The current law is a throwback to a time when marriage was regarded as a lifetime institution, with some exceptions, divorce was not common or easy and civil partnerships did not exist.

   • We have been left with a law which is not only inappropriate but which is also unpredictable and confusing confusing. Lord Justice Thorpe in Cowan v Cowan (2001) commented that

‘Litigants seeking advice from solicitors often received no better answer than that all would depend on the judge before whom the case might be listed. If that was the state of the law how were sensible litigants to plan for the future or to settle their responsibilities by compromise?’
• This unpredictability leads to appeals against financial awards made by a lower court and an escalation of costs which reduces the total amount available for the couple to each begin their new life apart.

• Litigants are confused and the judiciary is faced with an impossible task. During marriage, or a civil partnership, each spouse, or civil partner, owns his or her own property unless it was purchased jointly. There is no concept of community of property in English law. However, on divorce, or dissolution of a civil partnership, unless the couple reach an agreement, the law, in effect, puts everything into one pot and the court may distribute it as it thinks fit and in accordance with the guidelines in s.25 of the Matrimonial Causes Act or the almost identical provisions of Schedule 5 of the Civil Partnership Act 2004.

• These guidelines demand the impossible. They ask the court to take into account all the circumstances of the case and first consideration must be given to the welfare of any child of the family under the age of eighteen. It must also try to achieve a clean break so that each of the couple may go his or her own separate way with no further claim against each other.

• In determining an appropriate award, the court must also take into account

(a) the income, earning capacity, and assets of the couple, regardless of ownership, including any assets which they may acquire in the foreseeable future and any potential increase in earning capacity which the court believes it might be reasonable to expect either partner to acquire.

(b) the couple’s financial needs, obligations and responsibilities now and in the foreseeable future;

(c) the standard of living enjoyed by the family during the relationship;

(d) the age of the partners and the duration of the marriage or civil partnership;
(e) any physical or mental disability of either of the couple;

(f) the contributions which either party has made or is likely in the foreseeable future to make to the welfare of the family, including looking after the home or caring for the family;

(g) the conduct of each of the parties if the court thinks that it would be unfair to disregard it.

(h) the value of any future benefit which a partner would lose the chance of acquiring because of the ending of the relationship.

- The court will rarely take into account conduct unless it is truly exceptional. So an innocent partner (if such exists) who does not wish to be divorced or have a civil partnership dissolved can be made to share the assets and possibly pay maintenance to a partner who has had multiple affairs and who may now be cohabiting with a new partner. This approach reflects the fact that financial awards are intended to compensate partners for their contribution to the relationship as well as providing for their future needs – apart. However, it leads to feelings of unfairness by the abandoned partner.

- Nowhere in the Act is advice given to the judiciary as to how they should balance out all these requirements and come up with a concrete financial order; everything will depend on the specific facts of the situation and the judges’ subjective views (see e.g Lawrence v Gallagher (2012)). This means that in advance of the court’s decision, the warring couple will have little idea of what they are likely to receive or retain. They are unable to plan their future.

3. Judicial Law Making
- In the absence of any enthusiasm for reform by the Government, the judges have resorted to judicial law making. They have tried to find an overarching objective or objectives to achieve a fair solution in making an appropriate financial award.
- In the leading decision of Miller v Miller; McFarlane v McFarlane (2006), Mrs Miller’s husband had significant capital and after a very short childless marriage of 3 years, she
received £5 million, 1/6 of her husband’s capital although the award represented almost fifty per cent of the increase in this capital during the relationship Mrs McFarlane, by contrast, had given up her career as a solicitor to care for the family and enable her husband to engage in a successful career but there was insufficient available capital to do her justice. She was, therefore given both a capital and an income award. Little was made of the fact that maintenance ceases on the payee entering into a new legal relationship and he or she is also at risk of the payer returning to court to have the income payments reduced.

- The House of Lords based its decision on the concept of fairness which it viewed as the main aim of the legislation. According to their Lordships, fairness has three elements: provision for future needs; sharing of the couple’s assets; compensation for contribution to the relationship.

4 The aftermath of Miller and MacFarlane,

- Debate has raged about the decision in Miller and MacFarlane, and in particular two of the three elements of fairness: needs and sharing. As expected, the decision opened up a Pandora’s box rather than resolving the problem.
- How does one determine needs? Basic needs are fairly easy to assess but if they are to relate to the standard of living during the relationship, the task is more difficult. If a wealthy partner was mean during the relationship, does that allow him or her to be equally mean when the relationship ends?
- The House of Lords invented a previously unknown concept of matrimonial property—property which should be shared. Much legal time is now taken up with what percentage should be shared (there has been an attempt to suggest that fifty-fifty is what the House of Lords intended), how to avoid sharing, and determining what property should be shared? Pre-relationship acquired property? Property acquired after the breakdown of the relationship but prior to its legal ending? Inherited assets? Presents? Business assets? Damages for personal injury? Lottery wins?
- In Lawrence v Gallagher (2012), the Court of Appeal criticised the obsession with refining notion of fairness,
'There is a prevalent practice of coining ever more sophisticated phrases which are intended by practitioners to highlight particular aspects of the notion of 'fairness'. That practice has created an expectation that the judge will consider the same in judgment. That expectation is inappropriate not least because the linguistic devices employed are not terms of art: they are no more than tools to assist in the interpretation of fact which should not be elevated to the status of factors that have to be considered alongside the section 25 criteria. Not only does such a misconception risk inappropriate weight being given to an analysis born out of a linguistic device, it carries with it the real danger of miscalculation highlighted by Bodey J in CR v CR (2008)'.

- The Law Commission has been asked to look at the two concepts of needs and sharing and is expected to report in 2013.

5. Relationship Agreements
- Many couples would like to be able to make an agreement prior to formalising their relationship. They wish to decide how their assets should be divided in the event that their relationship ends. This is particularly so for partners who have already acquires substantial assets prior to the relationship or have obligations to a previous family. In England and Wales, such agreements are problematic. No one may make an agreement which purports to oust the court's jurisdiction.
- In Radmacher v Granatino (2010), a wealthy German woman had drawn up an agreement with her husband prior to their marriage. The Supreme Court held that these agreements may be taken into account by the courts but they will not be automatically enforced. The popular press and even some legal commentators have made the claim that marital agreements are now enforceable. This is by no means correct. Yet again, uncertainty prevails.

6. Reform
- Reform is clearly essential but it must not be on a piecemeal basis which English law reform seems to favour. Before any reform of financial awards is undertaken, what is required is a
formulation of the nature of marriage or civil partnerships today which clarifies the undertaking which couples make when they enter into such legal relationships.

- I would like to suggest proposals for reform which flow from the modern concept of marriage or civil partnership as a relationship which may be of limited duration. I would hope that they might make couples face the responsibilities inherent in legal domestic relationships and the consequences of their breakdown. The reforms would not be retrospective.

- If marriage or civil partnerships are a joint enterprise, a partnership which may be legally terminated on breakdown, the couple should be able to make enforceable agreements with each other, prior to, or during, the partnership, which would determine what should happen in the event of termination. The law encourages people to make wills to determine property issues on death; a similar approach should be taken to those entering into legal relationships. Such agreements would have to be legally drawn up and would be enforceable as contracts.

- The expected objection that one party might have greater power than the other in drawing up such an agreement could readily be dealt with under the current law relating to contracts and the concept of duress or unfair terms. It is assumed that it is women who are the weaker party in the making of these agreements; this assumption denigrates women. We should rather encourage them to take responsibility for their own lives before they enter into a relationship and seek to educate themselves about what they are entering into and preferably seek legal advice. Many couples spend a great deal of money and time on planning their wedding, or civil partnership, ceremony and celebration. They should be encouraged to give the same level of attention to the nature of the contract into which they are entering.

- It is also argued that circumstances can change dramatically during the course of a relationship. These circumstances primarily relate to the effect the birth of children, to relocation
necessitated by one partner’s career at the expense of the other’s career, or to illness. Partners should be able to build such eventualities into a contract. In any event, I propose that no relationship agreement should allow one of the partners, in the event of relationship breakdown, to refuse to support children, or the partner who cares for those children, until they reach the age of majority.

- In the absence of any agreement, the law would provide a default solution. All partnership assets, defined as assets acquired during the relationship or brought into the relationship for the use of both partners, and pensions, would be divisible equally on relationship termination. If there are no children, support of the dependent partner would continue for two years to allow for a period of rehabilitation and adaptation. Both partners would then be free to go their separate ways without any further call on each other’s resources. If there are children, support of them and the partner who is left caring for them would continue until the children reach the age of majority.

- A problem may be seen as arising in circumstances where there is little or no capital, but one of the partners has substantial income. However hard it seems, if there are no children, I can see no reason to demand that the partner with income should continue to maintain the other beyond the rehabilitation period of two years. Once the relationship is over, the maintenance obligation should eventually cease. Arguments will be made that this might place a burden on the state to support the partner without an income but this reflects the reality of relationship breakdown.

- An appropriate model to consider is the Ontario legislation, Family Law Act R.S.O. 1990, CHAPTER F.3.

7. Conclusion

- My proposals would encourage those entering into marriage, or a civil partnership, to consider what they are entering into and make realistic plans about their responsibilities towards each other in the form of legal agreements. Such matters as sharing and what should be shared; compensation for one party giving up a career in order to care for the home and
children and/or to allow a partner to further a career; levels of future maintenance, should all be part of the agreement and should be decided on by the partners themselves.

- I would hope that the proposals would make all partners, but particularly women, to decide, prior to entering into a relationship, whether they wish to give up working or pursuing a career, and how they envisage the nature of their relationship and their financial future.

- The proposals may make couples decide not to enter into a formal relationship if they disagree on these fundamental matters, in which case the relationship breakdown rate might be lowered.

- If we do not reach a decision on a more sound law relating to financial awards, we will continue to rely on the discretion of the judiciary even if the Law Commission determines what level of needs should be satisfied or what type of assets should be shared. Discretion leads to uncertainty; it does not lead to fairness and it does not empower either partner to take responsibility for themselves and their relationships.

© Mary Welstead
CAP Fellow and Graduate Program Coordinator Harvard Law School
Visiting Professor University of Buckingham
This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

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### Your details

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<th>Name:</th>
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<td>Email address:</td>
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## PRINCIPLED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

The current law is urgently in need of reform but not in a piecemeal fashion. The obligations of marriage or civil partnerships require clarification before one can decide that spousal or civil partnership support obligations continue after the relationship has ended.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

Spousal/ civil partner support should be based on the principle that the relationship is a partnership and the financial gains and losses should be born equally and not on compensation which relies too much on discretion and I think the time has come for some ‘bright line’ rules rather than judicial discretion which leaves partners in the dark until the court rules, unless of course they reach agreement. No legislation should be retrospective.
7.4 In answering the question at paragraph 7.3 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.

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7.5 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?

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<td>Neither. 50/50 sharing of a clearly defined concept of relationship property and pension rights and either maintenance for partner caring for the children in addition to child support or if no children 2 years support for partner who requires it to allow for adaptation to a new life</td>
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7.6 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?

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7.7 What preliminary work would be needed to research and pilot a new approach? In particular:

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(2) what methodology should be adopted;
(3) what sort of timescale and investment would be required?

Supplementary Consultation Paper, Part 4, paragraph 4.118

2. It should be a study of current financial settlements. I would hazard a guess that the population divides into three groups:

- few resources, may be forced into work where the partner has been caring for children and staying at home or will have to claim state benefits the majority of couples have small resources-many of these will be forced onto state benefits. The costs of benefits would need to be assessed;
- medium resources, these couples probably reach agreement and if not 50/50 sharing plus limited maintenance to child dependency or two years might allow them to adapt to a new life;
- wealthy, these couples will not be harmed by 50/50 sharing and limited maintenance as above. They would gain by having reduced legal costs. If nuptial/ civil partnership agreements become legally enforceable and not left in the state of present confusion, they would be likely to make them.

3. One-two years-it is difficult to estimate costs- but time is important. The current state of uncertainty cannot continue.
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
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   - to as much as he needs to relocate and to start again as a single person?
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B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments

A. Two years
B. It should be in addition to a sharing of all relationship resources once these have been defined
C. Should be identical to marriage

Now that divorce is easy even if not strictly legally speaking on demand, partners cannot be expected to take responsibility for a long period of time once the relationship has ended. The current law is more appropriate to a world where divorce was difficult and rare.
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. Certainty will be better once couples realise when they marry or enter into a civil partnership what will be the consequences if the relationship should end. Flexibility is not acceptable, it is uncertain and depends on the judge of the day

E. See my comments above—support for child caring parent and children until children reach age of majority or two years
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

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H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

I would prefer the same rule for all. I might be prepared to be convinced that a formula based on length of marriage might alter my two year proposal but it should be strictly applied.
7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

   (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

   (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

   (c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

1. See my comments above

2. This guidance would be simple if my proposals were to take legal effect
3. A piecemeal approach should be eschewed at all costs; the time has come for a major overhaul of both the law relating to the end of domestic relationships and financial provision. Tinkering with the current law simply allows the current appalling situation to continue. The time has come for individuals to take responsibility for their relationships and not rely on judicial discretion. Until the law is reformed properly, I believe guidelines will have to be developed re sharing and short-term maintenance. I do not believe that compensation is an appropriate way forward. The guidance could come from the Family Justice Council and should be widely made available via the popular media as well as online.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

Once a relationship ends, needs can no longer relate to what was enjoyed or suffered during the relationship. Everyone has a right to be housed, fed and clothed and this must be achieved either via 50/50 sharing and short-term maintenance or state benefits. At present, a partner who does not want the relationship to end can be made to share, compensate and maintain the partner who wishes to leave; conduct is rarely considered to be a relevant factor. This leads to a serious criticism of unfairness.

Relationship agreements should be allowed and honoured in their entirety in accordance with contract principles.

MCA 1973 s.25 must be rewritten to reflect any intermediate reform in the absence of my recommendations for a complete overhaul of the law.

I would suggest that the law Commission look at the Family Law Act R.S.O. 1990, CHAPTER F.3.
7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

Yes, see comments above

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**NON-MATRIMONIAL PROPERTY**

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

No. Pre-acquired property which becomes the family home should be available for
division.

Similarly with gifts and inheritance if they are used for partnership needs and not kept separate

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7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

*Supplementary Consultation Paper, Part 6, paragraph 6.50*

See above

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7.13 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.

*Supplementary Consultation Paper, Part 6, paragraph 6.59*

No, it should be included in the property for division
7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

No-see above

Until we have community of property during marriage, it is very difficult to define what it is on relationship breakdown.

I am very concerned about piecemeal reform which does not look at the obligations of a relationship, property ownership during the relationship and property division on breakdown as all part of one problem

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Yes
7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Yes

<table>
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<tr>
<th>7.17 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?</th>
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If it is non-relationship property, it should not be an issue; if it or its profits become used as subsequently becomes relationship property, any return on the investments
should be subject to 50% division

NB Until we have same-sex marriage, it is important to use inclusive language to make sense to those in civil partnerships. The terms spouses and matrimonial are not inclusive terms.
An elegant family law essay – but one wonders whether there is a case for law reform and involvement of the Law Commission. Lawyers can so easily put up aunt sallies and then proceed to knock them down. So-called law reform may create confusion and difficulty and litigation, and in the event not constitute a benefit.

What is the evidence for dissatisfaction with the current law and practice? Of course the loser often feels unhappy, but he would, whatever the law and practice. What is the evidence for inconsistency? A huge variety of different decisions in a multiplicity of different cases does not mean inconsistency.

The bus driver analogy is singularly inappropriate. The judge may find the case difficult and challenging, but he reaches a decision and he knows what he has to do and what he is doing.

Judicial discretion

If ever there are cases which are fact-specific and unique, and human, calling for decision by judicial discretion it must be those needs cases. The idea that there is some universal golden principle which can be waved as a magic wand to resolve all the needs case is completely misconceived para 27. Furthermore, if there is a conflict or potential theoretical or jurisprudential or
social policy conflict between equality and needs then that conflict had better be resolved first. More probably the conflict in reality is limited to the rich. “Cart before the horse” springs to mind. It is not that the law is uncertain, it is that the outcome of a needs problem is uncertain until it is determined or resolved by the judge.

Inaccessible

The law and practice is readily accessible by the lawyers. Lawyers have a fairly good idea of how the judge will decide a particular case. Many cases are settled by negotiation. Information certainly needs to be provided for the parties and laymen generally para 28.

LIPs

LIPs are indeed a real problem. The provision of information and advice is manifestly necessary and desirable paras 80-82.

107(2) yes, non-statutory.

Mediation

The drive towards mediation is stronger and stronger, a process not based on law, and hopefully this drive will greatly reduce the number of contested cases.
The so-called principles

41(1) the law is clear. Transparency would be a better word, and better transparency could be improved by information.

(2) Rationality. The law is intellectually defensible. The Law Commission approach is at risk of being intellectually indefensible.

(3) Fairness. Yes indeed, but otiose to spell out in statute.

(4) Equality. Yes, but equality of approach does not necessarily predicate equality of outcome. As a matter of social and legal policy the law should seek to protect the vulnerable divorced woman, especially where she has dependent children.

(5) Realism. Yes indeed.

(6) Support for the institution, yes indeed. Freedom of choice so far as possible, yes indeed.

(7) Expectation of independence. Certainly unjustified dependence is negative and should be discouraged. The use of the word independence is misleading. To encourage or coerce a woman (it is usually the woman) is not the function of family law. To ease the transition from married to divorced, to demerge or unravel the parties, in a socially acceptable manner, is the function of family law. The reality dictates that the parties henceforth will be going their separate ways. But circumstances may require indefinite dependence, or dependence subject to future review.
If the parties, or one of them, wish for a “clean break” the judge can go along with that if satisfied that it is the best solution in the circumstances.

**Compensation**

There is no case for “compensation”, the marriage is ended, water under the bridge, a closed chapter. The Law Commission effectively refutes and rejects the concept.

**Duration of marriage, age of the parties**

These factors are already potentially relevant and significant, and are well understood by the judges, and no change is called for. In many cases the financial needs may well need to be reviewed from time to time in the future, a useful safeguard, for both parties.

**Basis for need**

73 No.

74(1) No.

(2) Disparity in lifestyle following divorce may well be a factor relevant for the judge; but there is no call for any “principle” here, it is unwise and indeed impossible to be dogmatic. Perhaps to be added as a section 25 factor.

75(1) A possible factor, as now

(2) A possible factor, as now
(3) A possible factor, as now

(4) A possible factor, as now

76 Not favoured

77 No

78 None, though family research is useful

Formulae in family law, and rules, are anathema, counter-productive, inflexible, and potentially damaging.

**Short term**

111 (1) A possible factor to be taken into account, but “may”, not “must”.

(2) Yes.

(3) No change needed.

(4) Any responsible source, provided not prescriptive.

(5) Yes, seems sensible and reasonable.

112 Leave well alone

**Welfare system**

Presumably the welfare system should be considered by the judge, and so far as possible dependence upon the welfare system should be avoided. For example, the withdrawal of child benefit for some women may be quite significant in the divorce situation.
Child care

The cost of child care can be a very significant factor in the bringing up of children, and this factor could and should be brought to the attention of the judge by the parties, and anyway is likely to be present in the mind of the judge where relevant.

Enforcement

None of the Law Commission proposals, even if enacted, would amount to much if they were not effectively enforceable and enforced. Short of imprisonment every conceivable remedy should be readily available, e.g. injunction, freeze, sequestration, attachment, charging, trading disqualification, driving disqualification, what is necessary and practicable.

Non-matrimonial property

This whole proposal is misconceived.

The sharing principle should be the basic principle and the starting point, for rich and poor. It accords with the spirit of the times and the expectation of the parties. It is important for the stability and quality of the institution of marriage. “With all my earthly goods I thee endow”. The distinction between matrimonial and non-matrimonial property is artificial, divisive, and very difficult to define and identify. Tracing the source can be very difficult. The judge should not have to delve into distant history. What happened before the marriage, or during any previous cohabitation, is water under the bridge, history. If the parties wish they
can enter into a pre-nup. During the marriage they can make specific special arrangements or agreements, which the judge can take into account in his discretion if he thinks just and equitable.

120 (1) Only so far as the judge thinks so
120 (2) Discretion

124 (3) This question is based on a false premiss. All the property of both parties should be potentially available for needs

125 (4) No change required

130 No. The sharing principle should not be changed

136 The family home should always be considered as family or matrimonial property. Anything else is inconceivable and would be absurd.

140 As the parties are now married all their property has become matrimonial, or at least susceptible to disposal by the judge.

149 This question shows the difficult and unacceptable consequences of the artificial distinction between matrimonial and non-matrimonial property, the hopelessly blurred line, and the complications that could arise as a result of normal family life.

155 Another impossible question arising from a false premiss.

156 A logical consequence, though based upon an unusual premiss.

161 Another question based on an unsound premiss.
Comment

The talk I heard from Professor Cooke was well-informed, rational, seemingly open-minded, engaging and good-humoured. The idea that the judges need more statutory control or rules or guidance seems misguided to me. It is not the function of the Law Commission to create legal problems where none existed before.

This response is only a response to the Overview. I may be able to find time to read and respond to the full paper.

1331 words

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LAW COMMISSION
CONSULTATION PAPER No 208

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from **11 September 2012** to **11 December 2012**.

Please send your completed form:

- **by email to**: propertyandtrust@lawcommission.gsi.gov.uk or
- **by post to**: Law Commission
  Steel House, 11 Tothill Street, London SW1H 9LJ
  Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

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Comments

IMPROVING THE CURRENT LAW RELATING TO NEEDS

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(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

   (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

   (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and
(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70
NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

Introduction

Essentially, it seems to me that consultees are required to consider two issues here:

a) Whether the community of assets subject to sharing, ie matrimonial property, should, as a default position, be limited to acquests?

b) Whether non-matrimonial assets should be subject to sharing on the basis of needs?

Despite the apparent popularity of the community of acquests approach (or as it is also known, an excluded assets approach), I believe there are a number of problems with such regimes.\(^1\) I will first explain the practical and theoretical difficulties with this approach. Then I will outline the approach adopted in British Columbia under the Family Relations Act 1996 as currently applied in relation to the characterisation of the community of assets, before turning to outline the new approach which is soon to be introduced pursuant to the Family Relations Act 2011. This new approach is based on an almost identical excluded assets model to that suggested in this Consultation Paper (CP). I will then put forward an alternative proposal for defining the category of assets drawing from both regimes. Finally, I will turn to the second issue, namely the relevance of need in the sharing of non-matrimonial assets.

Practical & Theoretical Difficulties

The CP notes the aim of the Commission is ‘to move the law in the direction of clarity and predictability’.\(^2\) However, at what cost is this to be achieved? Pursuant to the community of acquests model suggested, it is certainly simple to identify the assets

\(^1\) Although, as noted below, the origin of assets ought in certain circumstances to be taken into consideration.

\(^2\) At 90.
This is discussed further in response to 7.12 below.

At 90. Indeed this point is reiterated throughout Chapter 6.

At 92.

While it is not to suggest the non-owning spouse should share in the value of the entire asset, they should at least be able to share in the increase in value. This is discussed further below in response to 7.17.

The proposal delivered below deals with these possibilities on an arguably sounder theoretically footing.

Excluding the issue of need which I will deal with below.

As this is not the focus of the consultation, minimal reference will be made to the overall scheme applied in BC and the possibility of reapportionment. However, it is a very interesting model which incorporates fixed rules and limited judicial discretion. For further information, see my thesis (2012) as submitted to the Commission as part of its consultation.


Ibid 79.


Although analogous to the system of acquests in France, the proposals were in fact influenced by the Alberta Matrimonial Property Act. The White Paper refers to the fact that opinion was divided on this approach to categorisation, see British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 10) 80. While the report notes that some felt such a change in the law ‘might result in women leaving marriages with fewer assets than they do now’, this argument did not garner support.

Another factor which was arguably more important in the introduction of such reform was that it would bring British Columbia in line with ‘most other provinces in this increasingly mobile age’. More arguments in support of this change in the law are set out at 81.

If the property was excluded, only the increase in the value of the asset during the relationship would be divisible. Whether an asset was ordinarily used for a family purpose would be irrelevant in deciding if it is family property.

For more, see British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 10) 81. It also states that where there is a dispute about whether an asset is excluded property, the person claiming the exclusion will bear the burden of proof.

In this regard the proposal is akin to the German system. Note, however, that no determination was made on whether negative equity should be shared between the spouses. This was described as an ‘outstanding policy issue’, ibid 81. It seems not to be shared pursuant to the 2011 Act. Whether the equity in non-matrimonial assets would be shared under the CP’s proposals under discussion here is not clear.

Ibid 81.

S 84 provides that post-separation property can constitute family property where it is derived from property held at the date of separation or the disposal of such property.

The British Columbia Ministry of the Attorney General, White Paper on Family Relations Act Reform (n 10) 79.

This theoretical basis is especially important in justifying a departure from equal sharing.

Recent studies have shown that how money is held and under whose name is not necessarily determinative of the intentions of the parties. See Caroline Vogler, ‘Managing Money in Intimate Relationships: Similarities and Differences between Cohabiting and Married Couples’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009); Carole Burgoyne and Stefanie Sonnenberg, ‘Financial Practices in Cohabiting Heterosexual Couples: A Perspective from Economic Psychology’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009); Gillian Douglas, Julia Pearce and Hilary Woodward, ‘Money, Property, Cohabitation and Separation: Patterns and Intentions’ in Jo Miles and Rebecca Probert (eds), Sharing Lives, Dividing Assets (Hart Publishing 2009). Burgoyne and Sonnenberg note at 103 that joint accounts may not always mean equal sharing in practice, and that individual accounts may not necessarily signify separate financial entities or a lack of commitment. In this regard, a functional analysis akin to that
subject to sharing, but from a practical perspective it fails to provide adequate protection for those most in need. This is most pronounced in the possible exclusion of the family home from the community for sharing where it constitutes non-matrimonial property.\(^3\) Nevertheless, the Commission may decide to make special provision for the family home, thereby overcoming this weakness. Unfortunately, further difficulties remain.

Let us consider the proposal from a theoretical standpoint. The CP notes, ‘the

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23 This is an irrebuttable presumption based on the reality of the use.
24 This is discussed further below in response to 7.12.
25 It has been noted: ‘On its face, this test would appear to be a fairly straightforward method of determining whether any particular asset qualifies as a family asset ... A number of reported cases, however, demonstrate that it is not always clear whether an asset is “ordinarily used for a family purpose”.’ See The British Columbia Law Reform Commission, *Property Rights on Marriage Breakdown* (Working Paper No. 63–1989) 11(B). The ‘mystifying nature’ of the concept of ‘ordinary use for a family purpose’ as a category of family asset was also noted by Professor Farquhar, see Keith B. Farquhar, ‘Family Assets in British Columbia’ [1995] 12 CJFL 229. See also Farquhar, ‘Matrimonial Property and the British Columbia Court of Appeal’ (n 117) 31.
26 This was a central concern in the British Columbia Ministry of the Attorney General, *White Paper on Family Relations Act Reform* (n 10).
27 A number of criticisms of a functional test are outlined in the CP and these are dealt with here in response to 7.14 and 7.15.
28 This aspect of the proposal is discussed in more detail below in response to 7.17. Note, it also incorporates elements of the excluded assets model where the business asset was inherited gifted or pre-acquired as only the increase in value would be shared, see below.
29 In any event, in many cases equal sharing will meet both compensation (discussed above) and, indirectly, need. Miles notes: ‘Where certain needs were not met because they did not correspond with whatever measure for compensation the courts adopted (for example, deriving from disability rather than childcare obligations, or because the claimant had limited earning capacity regardless of the marriage), that might be felt to be the right result.’ See Jo Miles, ‘Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions’ (2005) 19 Int’l JL Pol & Fam 242, 256.
30 These would be needs above and beyond the day-to-day expenses associated with child care and may include perhaps the need to house them in the family home and remain in an area they are familiar with.
32 As Bailey-Harris notes, ‘formal equality of division may not represent equality of outcome for the party economically disadvantaged at the moment of divorce and thereafter ... Such disadvantage may be rectified by means of an increased capital award (as under the Family Law Act in Australia), or by recognizing maintenance orders as an entitlement deriving from contributions rather than as a badge of undesirable continuing dependency’. See ‘The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales’ (2005) 19 Int’l JL Pol & Fam 229, 235 (emphasis added). In particular, it is submitted the objective-based approach to spousal support under s 161 of the Family Law Act 2011 has a lot to recommend it.
33 Perhaps, due to the lack of financial resources as compared to property resources or the possibility of non-compliance.
reasoning that leads to the separate treatment of non-matrimonial property’ is that it
‘recognises effort, emotional attachment, and family ties’. While this may be true in
certain cases, it cannot be a foregone conclusion that the source of an asset is
determinative of all or, indeed, any of these characteristics. First, assets such as the
family home (or, perhaps, framed more broadly, assets used for a family purpose)
may have been acquired prior to the marriage or derived by gift or by inheritance,
however, that is not to say that the monopoly on emotional attachment lies with the
owning spouse.

Second, the link which the CP draws between the exclusion of non-matrimonial
property and the recognition of the efforts made by the owning spouse seems
untenable. The CP reiterates again: ‘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.’ If the contributions or
‘efforts’ of the owning spouse are to be the real justification for excluding pre-
acquired property, surely contributions by the non-owning spouse to the property
during the marriage should be able to bring it into the community of sharing? Although
admittedly less common, it is equally possible there may be situations
where there are no ‘joint efforts’ between the married couple to which recognition
should be given yet valuable post-marriage business assets may fall into the
community.

Therefore, adopting a ‘pure’ excluded assets model without the necessary
modifications, particularly in relation to the home and business assets where
contributions are made, seems overly simplistic and theoretically weak. Conscious of
these weaknesses, let us now turn to the alternative regime applied in British
Columbia and the recent reform initiatives delivered in the province.

**British Columbia, Canada**

Currently, pursuant to the Family Relations Act 1996, British Columbia operates a
delayed community of property. On the occurrence of a triggering event, both
spouses equally share in family assets as tenants in common pursuant to the Family
Relations Act 1996. Family assets include both assets and savings in an account
‘used for a family purpose’. Family assets can also include business assets where
direct or indirect contributions are made. Indirect contributions are specifically stated
to include savings made in the home. Moreover, although there is a presumption of
equal sharing, a reapportionment may be ordered where equal sharing would be
Although the 1996 Act continues to apply in British Columbia, the Family Law Act 2011 is due to be commenced in the province on March 18th, 2013. While the 2011 Act retains the deferred community of property approach, it introduces considerable reform of the matrimonial property regime. In particular, it introduces an ‘excluded assets model’ to the province akin to the proposal made by the Law Commission in the CP under discussion.

The over-riding theme in the Attorney General’s 2010 White Paper on Family Relations Act Reform, which ultimately led to the new legislation, was a desire to reduce judicial discretion. It noted that under the Family Relations Act 1996, British Columbia relied ‘heavily’ on judicial discretion to resolve property division disputes. As a result, the Ministry of Justice commented: ‘British Columbia historically had a higher than average level of property division disputes in court; the broad flexibility and discretion in this area created uncertainty and promoted litigation.’ To this end, the White Paper proposed a multi-faceted assault on discretion.

Central to the proposals in the White Paper was a move from the family purpose and contributions-based model of identifying family property to an excluded assets model. It was argued that this reform would make the characterisation of assets ‘simpler, clearer and easier for the average person to understand’, thereby reducing litigation, and would accord better with ‘most people’s intuitive sense of fairness’. The system proposed dictated that family property subject to division would include all real and personal property owned by one or both spouses at the date of separation unless the asset in question was excluded. Excluded property would include property acquired gratuitously, such as gifts and inheritances to one spouse, as well as pre-and post-relationship property. Spouses would, nevertheless, share in the increased equity of excluded assets. Putting forward the argument in favour of such reform, the White Paper noted:

‘Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage. This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement’

The overall effect of this change would be to reduce recourse to the courts in determining what constitutes the community fund. These recommendations are implemented by sections 84 and 85 of the Family Law Act 2011.
Proposal for Reform

While there are a range of different approaches to determining what constitutes the community fund or marital/family assets, it is submitted that an approach which replicates that currently applied in British Columbia pursuant to the Family Relations Act 1996 but incorporates more detailed provisions and certain aspects of the 2011 reforms represents the best combination. It may seem counter-intuitive to draw on a regime which has proven to be unsatisfactory in placing too much discretion in the hands of the judiciary. However, in my view, less drastic reforms of the law than those made by the Family Law Act 2011 could have achieved the desired reduction in discretion and, under the new legislation, British Columbia risks throwing the baby out with the bathwater! The 2010 White Paper noted, "The existing statute provides a general framework for dividing property but relatively few detailed rules." This, it was submitted, gave rise to considerable litigation and recourse to judicial discretion and the legislature reacted by completely overhauling the system of categorisation. Such extreme action may have been unwarranted. Instead, the reliance on discretion which had emerged in British Columbia could have been cured by more detailed rules.

Essentially, my proposal presents two independent rationales for sharing. On one hand, the division of 'family assets', arises as a consequence of marriage; on the other hand, the rationale for the division of 'quasi-family assets' is contribution-based. Two other categories, ‘business assets’ and ‘other assets’ would not be subject to sharing.

What constitutes a family asset would be determined by a functional test based on whether it was ‘ordinarily used for a family purpose’. Consequently, bank accounts used for a family purpose would be shared. The date or method of acquisition of the asset would be irrelevant as it is submitted that ordinarily using property for a family purpose reflects a settled intention to share the property. To avoid any confusion, a legislative statement to the effect that the family home would automatically fall within this category is required.

Admittedly, the deferred sharing of family assets would require the introduction into law of a family purpose test which has not been a feature of the law of England and Wales heretofore. Moreover, it has been noted that difficulties have arisen in British Columbia in the application of a functional test for characterising such assets.
adoption of such an approach without any adjustments would, therefore, continue to place much discretion in the hands of the judiciary. However, it is contended that many of these difficulties are due to the absence of detail to provide guidance in the relevant provisions of the Family Relations Act 1996 which need not be replicated by the proposals for reform.

First, the 1996 Act does not specify the date on which an asset ought to be characterised or when the asset should be valued. Drawing from the approach adopted in the 2011 Act, however, it is proposed that assets would be characterised on the occurrence of the triggering event (i.e., the event which gives rise to presumption of equal sharing, e.g., the entering into of a separation agreement or the initiation of legal proceedings to obtain a divorce) while the valuation of the assets would take place on the date of the hearing.

Second, the proposed legislation would provide that where there is more than one function of the property, its predominant purpose should be definitive for characterisation purposes; where part of an asset is used for a family purpose, only that part should be considered a family asset; sole use by one spouse alone should not be sufficient to render an asset a family asset; and an unrealized intention does not change the status of an asset from being a family asset. It would also specify at the outset which assets will generally not be considered family assets, such as assets associated with hobbies. In addition, the onus of proof would be on the person claiming that the asset in question is not a family asset.

Finally, it is submitted that the approach adopted by the Family Relations Act 1996, whereby business assets which are normally excluded from division may form part of the community fund where contributions are made by the non-owning spouse, possesses considerable strengths. There should, therefore, be a provision allowing contributions to business assets to re-categorise these assets as quasi-family assets which also fall into the community for sharing.

It is now necessary to turn to the second issue in the consultation question, namely the issue of spousal needs.

**Spousal Needs**

If the basis for not sharing non-matrimonial property, as suggested in the CP, is recognition of the contributions of the owning spouse to the property or their attachment to it, why should a spouse get a share in such assets on the basis of needs? They may not have made a contribution to the asset and may have no
attachment to it, yet it is suggested that their needs should supersede this. Can this be justified?

Pursuant to my proposal, the entitlement to equal shares of the family assets is afforded on the basis that it is a consequence of marriage. The entitlement to an equal share in quasi family assets is based on contributions. Therefore, a reapportionment of such assets or the provision of a share in non-community assets should not be awarded on any basis related to a spouse’s needs. There simply is no justification for such provision. Nevertheless, it is submitted, the needs of dependent children may give rise to such a reapportionment or provision of a share in non-community assets.

While it is clear from the above that the needs of a spouse would not give rise to a reapportionment of community assets or the sharing of non-community assets under this proposal, the issue of compensation must be tackled. To this extent, I follow the Joanna Miles school of thought that a compensation based approach is much more theoretically acceptable than a needs based approach.

Although the issue of compensation must, therefore, be considered, it is contended that it should not, as a default position, be relevant in the context of sharing the community of property. The practical and theoretical difficulties created when the issues of compensation and property division are considered together were highlighted in British Columbia over 20 years ago:

'Requiring that [the need for economic independence and self-sufficiency] be taken into account when dividing family property blurs the distinction between property rights and maintenance obligations. One may easily question whether [this factor] has any relevance in determining entitlement to property.'

The 2011 Act redefines the relationship between compensation and property and the approach adopted under sections 95(3) and 161 of that Act is replicated by my proposals. Compensation should, therefore, be first met by spousal maintenance provision. Only where maintenance is inappropriate, would compensation be converted into an interest in the property, thereby giving rise to a reapportionment. Whether and to what extent compensation may be converted into an interest in non-community assets is hard to say. However, as a last resort, it would appear permissible to make such provision in order to counteract losses suffered due to the relationship.

Does this mean that spousal needs are for all purposes irrelevant – perhaps not.
Once the community fund is established and the sharing principle is applied, it is then necessary to determine how the actual assets are divided and to whom the family home, for instance, is allocated. In this regard, it is highly possible a dispute may arise. It is submitted, therefore, that the court should be empowered to resolve such disputes and, to this end, the first priority ought to be the needs of the family. To this extent, the needs of a spouse may be relevant in the allocation of the assets.

**Conclusion**

As noted at the outset, the aim of the Commission is ‘to move the law in the direction of clarity and predictability’. The proposed community of acquests regime would partly ensure this aim would be achieved – on a superficial level there would certainly be greater clarity and predictability as to what is or is not matrimonial property. However, the above discussion has demonstrated the practical and theoretical weaknesses in the approach suggested in the CP. The possible exclusion of a) protection for the family home and b) recognition of the contributions of non-owning spouses to business assets which are non-matrimonial seems unfair.

It is submitted the proposal presented in this response for the characterisation of assets based on a functional analysis (family assets) and contribution based approach (business assets which become quasi-family assets) presents a better fit with the justifications for sharing put forward by the Commission. Although outside the remit of this consultation, it should also be noted that the provision of a clear theoretical foundation also ensures that departures from equal sharing can be more easily justified. By corollary, where there are theoretical weaknesses, these are amplified when seeking to justify a departure from equal sharing.

Nevertheless, it will be the belief of many, particularly if already pre-disposed to an excluded assets model, to dismiss a functional test as vague and likely to give rise to considerable litigation. There will still be contention over title to assets, what actually constitutes family assets, the value of assets, whether contributions other than those in the home are sufficient to re-categorise business assets as quasi-family assets. Nevertheless, it is submitted the number of issues which will arise can be limited by effective, detailed legislation, drawing from the strengths inherent in British Columbia’s Family Relations Act as currently enacted and the Family Law Act 2011.

Professor Cooke noted in relation to the protection of surviving spouses where the other spouse dies intestate, ‘we need to find a method of sharing that is not merely simple to calculate or to administer, but also is targeted at the people we really want
to protect.\textsuperscript{34} It is contended, such a goal is equally relevant to matrimonial property division. The proposal I have delivered above, may be more complicated, yet it is submitted, it would be better directed at those vulnerable members of society who we seek to protect.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

Introduction

The family home should, irrespective of when it is acquired, automatically fall within the community for sharing as is generally the case under the current application of the law in the courts of England and Wales. In purely economic terms, it frequently represents the single most valuable asset owned by spouses, irrespective of its origins. Moreover, its value is often more than monetary. Unlike most other assets, it is also a source of comfort, security and protection – again, irrespective of its origins.

As Professor Fox points out, the family home is a ‘powerfully emotive idiom, with considerable cultural kudos and, as such, may be regarded as carrying significant weight in policy debates’.\textsuperscript{35} However, despite its importance in the shared lives of a couple, the title to the family home is not always vested in both spouses. Although co-ownership of the family home has undoubtedly increased in recent years, where it is not co-owned, the consequences may now be viewed as less acceptable. As Professor Cooke observed in relation to England and Wales, again albeit on death, this increase in co-ownership ‘may … mean that the value placed on home ownership in our society is so great, that the risk of having to move is seen as correspondingly tragic, perhaps to a greater extent than it was in the early years of the twentieth century before we became a “property-owning democracy”’.\textsuperscript{36}

Moreover, the consequences of not possessing a legal interest in the home are often felt most acutely where the non-owning spouse is caring for the dependent children


\textsuperscript{36} Cooke, ‘Wives, Widows and Wicked Step-Mothers: A Brief Examination of Spousal Entitlement on Intestacy’ (n 34), 433.
of a marriage which has broken down. In many cases, custody is awarded to the mother and the spouse who does not hold a legal interest in the home is usually the wife. The vulnerability of such wives and mothers is often exacerbated by their financially inferior position to their husbands.\footnote{Unfortunately, although I have recent statistics from Ireland to support this claim, time constraints meant I was unable to source comparable figures for England and Wales although no doubt the same issues arise across the Irish Sea!} When these factors are combined, it is clear that for such women in particular, the legislative protections vis-à-vis the family home are of the utmost importance.\footnote{Although, this proposal does proceed on the basis that the non-owning spouse is a woman, the proposals made apply equally to men and are not gender specific.}

**Proposal**

In including a legislative statement to the effect that the family home is automatically considered a family asset and therefore subject to sharing, as noted in response to 7.11, my proposal departs from the British Columbian approach pursuant to the Family Law Act 2011. In various reviews of its matrimonial property regime, British Columbia has shown limited concern with protecting the family home. In considering the options for reform of the Family Relations Act in 1989, the Law Reform Commission examined the approach adopted in Ontario which includes special provisions directed at the protection of the family home. This approach dictated that the full value of the matrimonial home would be divided between the spouses at the time of marriage breakdown, even if the property was brought into the marriage, or received by gift or inheritance.\footnote{Under the Ontario regime, the value of any other property brought into the marriage would be deducted from net family property.} The British Columbia Law Reform Commission refused to recommend the incorporation of such special protection arguing:

‘First, the “special” nature of the matrimonial home as shelter and a focal point for family activity seems to be a factor of insignificant weight when assessing the increased wealth of the spouses over the course of the marriage … Second, while it is true … that the matrimonial home is a major asset, this in itself does not seem reason to accord it different status from other, possibly major, assets owned by the spouses … Third, the special treatment of the matrimonial home seems to cause the legislation, which is intended to adjust wealth acquired over the marriage in terms of personal rights between the spouses, to focus upon particular assets and the proprietary interests of the spouses in those assets … Fourth, it is an approach which appears to retain the flavour of the use for a family purpose test which has
contributed so much confusion to British Columbia law. Lastly, concerns over shelter can be addressed through possessory rights, a jurisdiction which the courts have separately. 40

Thus, the Law Reform Commission concluded that the matrimonial home should be treated like any other asset owned by the spouses. 41 This view was also adopted in the 2010 White Paper and, as a result, the Family Law Act 2011 makes no direct special provision for the family home.

However, it does not appear that that is the end of the story. The 2011 Act does include a provision which could potentially provide an avenue for non-owning spouses to incorporate the family home in the community of property. With regard to excluded assets, section 96 provides that such assets may only be divided in very limited circumstances. The first is where family property or family is debt located outside British Columbia and cannot practically be divided. The second, however, is where it would be significantly unfair not to divide excluded property in light of the duration of the relationship and a spouse’s direct contribution to the preservation, maintenance, improvement or management of the excluded property. This provision seems certain to be availed of where the family home is not community property.

Therefore, despite making strong submissions against the inclusion of special protection for the home, the British Columbian legislature has clearly left the door open for the family home to be brought into the community for sharing. However, this is insufficient. It is highly likely that where the home does constitute an excluded asset, a non-owning spouse would be advised to take an action under section 96. In such circumstances, it is hard to see how they would not succeed in many cases where the property had been a family home – most spouses are involved in the preservation, maintenance, improvement or management of the home. It is submitted, it would have been far better for the legislature to have provided direct protection for the home than requiring non-owning spouses to prove a claim under section 96.

Conclusion

It is submitted that the approach liable to be introduced in England and Wales limiting the community fund to post-marital acquests, to the total exclusion of any protection for a family home that was acquired before the marriage, was inherited or was the subject of a gift, is extremely harsh. If the Law Commission for England and Wales follows this approach, it could easily leave a non-owning spouse in a particularly
vulnerable position where the family home was held solely in the other spouse’s name and constituted excluded property. The home does occupy a special position and special provision for the family home ought to form an integral part of any proposals for reform. Moreover, if such special protection was afforded to the home, this, in conjunction with the inclusion of a provision affording the court the authority to resolve disputes to the allocation of assets, as I have suggested in 7.11, with the primary focus being the needs of the family, would give even greater protection to non-owning spouses vis-à-vis this most important of assets.

### 7.13 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.

*Supplementary Consultation Paper, Part 6, paragraph 6.59*

It is my view that the issues which have given rise to this consultation question again support the adoption of a more nuanced approach to the question of what constitutes the community of property subject to division. If a pure system of acquests is adopted, it seems unfair that certain categories of property acquired by one spouse during the period of cohabitation should be excluded. Yet, the question remains how should they be incorporated into the community?

I believe that simply modifying the community of acquests approach to push the start date back to the commencement of cohabitation is a little simplistic. There will often be ambiguity as to when the couple started to cohabit. A couple may break up/resume cohabitation numerous times. A couple may move in together very quickly for practical reasons (perhaps to save money), without it, at the outset, necessarily signalling the beginning of a more fundamental partnership. The idea that both spouses would share the entire value of all assets acquired during this period seems over-inclusive.

However, the reality is that in many cases, the cohabitation period will be akin to marriage and all assets acquired in this period ought not to be automatically excluded. I believe these difficulties again support the proposal delivered above in 7.11 based on a functional and contribution based test. The date of acquisition of the family home (or perhaps framed wider, assets used for a family purpose) should not
exclude the property from the community for sharing. If it was acquired prior to the marriage, whether during the cohabitation period or otherwise, it ought to be shared. Moreover, where business assets are acquired prior to the marriage, a share in the increase in their value ought to be afforded to a spouse who has made direct or indirect contributions as will be discussed below in response to 7.17.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

As is clear from the foregoing, I would support the inclusion of a family purpose test to determine, at the outset, which assets constitute the community. A number of arguments against the appropriateness of such a test are laid out above in response to 7.11 and further arguments are advanced in the CP. However, if many of the issues which are likely to arise are dealt with by detailed legislative provision, the heat would likely be taken out of the test. The essential problem in British Columbia under the Family Relations Act 1996 was the legislation provided no guidance in the application of the test and it took much case law to establish the key principles to be applied. Learning from their experience, it may be possible to offset the likelihood of such problems arising.

One legitimate concern which appears in the CP\(^{42}\) is what would constitute ‘involvement’ with the property? It is submitted that this may partially be a linguistic issue. I believe that the term ‘involvement’ denotes a lower standard while the term ‘use’ would perhaps have a more easily defined meaning and set a higher threshold. Other issues with the interpretation of ‘use’ could be minimised, again, through the introduction of more detailed legislation.\(^{43}\) For instance, the predominant ‘use’ of the property would be determinative of its status thus making arguments about frequency moot. Irrespective of how often it was used for the purpose, if the predominant purpose was for the family, it would fall into the community.

\(^{42}\) At 6.74.
\(^{43}\) This is not to suggest that all issues will be resolved by detailed legislation. Many people may feel that the more detailed the legislation the more likely there will be problems. However, it is my opinion that in an asset characterisation context such as this, the clearer the test, the less likely the difficulties.
In any event, the same arguments against a family purpose test can be made in relation to the investment of proceeds of non-matrimonial property discussed in question 7.15, yet the Commission does not perceive these threats to be an issue. What the difference is between the two scenarios is hard to see. It suggests to me that the Commission does see the merit in a functional approach but is, perhaps, fearful of applying the test too widely and therefore increasing the potential for litigation. It is to be hoped the above discussion will give the Commission courage in this regard!

<table>
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<th>7.15 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.</th>
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<td>Do consultees agree?</td>
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The inclusion of the family purpose test here is to be welcomed insofar as it is indicative of the appreciation by the Commission of the merits of a functional test. Despite this, I feel certain doubts must be raised about the application of the provision as a whole, particularly if special protection is not afforded to the family home as discussed above in response to 7.12.

First, consider the following scenarios:

a) If a family home which constitutes non-matrimonial property was sold and a new family home bought, this would not re-characterise the new home as matrimonial property and thereby give rise to sharing since the substitute property is of the same kind as the original property.

b) If a holiday home which constitutes non-matrimonial property was sold and a home was bought for the purpose of being the family home, this would give rise to re-characterisation since it has been bought for use by the family.

The reason for the distinction is explained on the basis that there is a choice made to invest in the family in the latter case – it is the choice to put the proceeds towards a family purpose that makes the new family home suitable for sharing. In other words, their intention was to invest in the family. Yet who is to say that it was not equally so in the former case? The inclusion of a restriction of the functional test where property
of the same kind is purchased is unhelpful. It is submitted it would be much more appropriate to consider that using assets for a family purpose demonstrates in intention to share.

Second, the provision that the new property must have been ‘bought for use by the family’ ie that that was the intended purpose of the property gives rise to even more anomalies. What if they didn’t intend the property to be for a family purpose? Consider the following scenario:

c) If an investment property which constitutes non-matrimonial property was sold with the intention of buying another investment property, the new property is bought with the purpose and intention of being a replacement investment property and is non-matrimonial property.

If, however, after the purchase, rather than merely being an investment property, it becomes the family home, applying this proposed provision, it will remain non-matrimonial property. After all, it was bought for the purpose of being an investment property not ‘for use by the family’, that was merely an unintended result. And since the Commission proposed in 7.14 that non-matrimonial property will not change its status over time, the property will never become family property. If the home is later sold, and a new home bought, it will equally be non-matrimonial as it will be of the same kind as the property sold.

Essentially, by placing the focus on the subjective intention of the owning spouse rather than the objective use to which the property is put, the potential of non-owning spouses being left vulnerable on divorce increases. Scenarios such as this again reinforce the need to ensure special protection for the family home is introduced as a priority. Moreover, even if protection of the home is introduced, the difficulty between the intended purpose of the new property when compared to the actual use of the property could easily give rise to difficulties. How the Commission would deal with a situation where property was ‘bought for a family purpose’ and ultimately not used for that purpose is unclear. If the Commission is determined to focus on intention, in order to avoid doubt, it could perhaps include a provision to the effect that an unrealized intended use does not change the status of an asset from becoming a matrimonial asset if the original intended use was for a family purpose.
sold and the proceeds invested in matrimonial property, the property (following that investment) should be matrimonial property.

Do consultees agree?

Supplementary Consultation Paper, Part 6, paragraph 6.88

This appears to be a reasonable proposal.

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

Introduction

Unfortunately, the approach adopted by the Commission seems unduly narrow in adopting a purely financial approach and excluding unpaid work in the home. Consider the following scenarios:

a) If a family farm is inherited, the property will, pursuant to the proposal put forward in the CP, be considered non-matrimonial property. If the non-owning wife works in an unpaid capacity on the farm this would, according the CP, be considered an investment. If, however, she provides unpaid work in the home, allowing the owning husband to focus on the business, it would not be sufficient re-characterise the asset as matrimonial.

b) A woman owns a florist shop and soon after gets married and has children. Her husband works in a different business and, like many men, knows nothing about flowers! However, as the florist shop gets ever busier the couple recognise the potential business growth and the fact that the wife is trying to split herself between minding the children and the shop. The husband gives up his job and dedicates himself to the home and the family, freeing the wife up to focus on the business.

Why should their contribution in the home not be considered an investment in the business? Is it right that both the wife in scenario a) and the husband in scenario b) come away empty handed? Of course, they will be entitled to compensation to a greater or lesser extent, but should they not also benefit from the fruits of their labour? If the florist shop turns into a chain of hugely successful outlets during the
marriage, the compensation which the husband may be provided would presumably be incomparable to what he would receive if entitled to a share in the increased value of the business for instance.

Proposal

It is submitted that the approach adopted by the Family Relations Act 1996, whereby business assets which are normally excluded from division may form part of the community fund where contributions are made by the non-owning spouse, possesses considerable strengths and ought to be adopted.44 The current approach in British Columbia under the 1996 Act ensures that where direct or indirect contributions such as ‘savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property’ are made, business assets are re-characterised as family assets subject to division.45 It is proposed that, like British Columbia, these contributions should give rise to some interest in such assets. However, variations on this approach are nevertheless suggested.

First, where such contributions are made, business assets do not become ‘family assets’ per se but rather quasi-family assets.46 Second, there would be a legislative statement to the effect that work in the home creates a rebuttable presumption that an indirect contribution was made to the business.47 Third, taking on board aspects of the Family Law Act 2011, it is submitted that where the business asset was acquired before the marriage or was a gift or inheritance, only the increased value of the asset

44 As noted: ‘It was open to the legislature to make all property owned by spouses divisible between them, but in many cases that approach would be inappropriate. It was recognised, however, that a separate property regime for business assets might be equally unfair in some cases, and so the legislature adopted a special test to determine whether a non-owning spouse was entitled to a share in business assets.’ See British Columbia Law Reform Commission, Property Rights on Marriage Breakdown (n 25) III(B).

The issues highlighted in CP at 6.96 would also be overcome by adopting a contributory approach.

45 The contribution is to the business, venture or family asset, not its acquisition. It was noted: ‘Any approach that attempts to determine entitlement on a case by case basis will not be problem free. The relationship of marriage represents a tangle of financial considerations. No single formula will provide a means to achieve perfect fairness when the financial interests of spouses are to be separated. How is the law to distinguish between generous and mean income earners? Should different rules apply to a dependent spouse who is a master of economy and to one who has a taste for the fine things in life? The only approach which can accurately take these factors into account is to prepare a balance sheet of contributions and benefits conferred by spouses during the marriage. That approach is undesirable and probably unworkable.’ ibid.

46 This distinction is important for reapportionments.

47 No link needs to be evidenced between the actual indirect contributions and the business. Under the Family Relations Act 1996 as currently applied the weight of authority suggests that a spouse who is an effective homemaker will usually be entitled to a share in business assets without proof of more, ibid III(C)(2)(b) relying on the decision in Elsom v Elsom [1983] CanLII 692 (BC CA).
would be subject to division. Fourth, there would be no distinction between business assets and ventures.\textsuperscript{48} Indirect contributions in the home can cause either to be re-categorised as quasi-family assets. Fifth, the sharing of quasi-family assets would be subject to temporal accretion whereby equal sharing would only be achieved after five years of marriage with a spouse accruing a 10\% share each year until the fifth year. This reflects the fact that ‘the actual value of most non-pecuniary contributions, especially homemaking, is implicitly linked to duration’.\textsuperscript{49} The main benefits of adopting such a scale would be to minimise the applications to court for a reapportionment where the marriage was short on the basis that equal sharing is unfair and, simultaneously, to retain certainty in the fixed rules.\textsuperscript{50} Thus, the fundamental rationale for the sharing of quasi-family assets is based on contributions and it submitted such assets should be subject to reapportionment where the temporal accretion system gives rise to a result which is ‘clearly unfair’ having regard to the extent of the contributions made\textsuperscript{51} or, again, where the needs of the children require such a reapportionment. Spousal needs ought not to give rise to a reapportionment of quasi family assets.

\textbf{Conclusion}

Admittedly, a contribution based approach which includes unpaid work in the home goes far beyond the proposal made by the Law Commission in relation to ‘investment’. The inclusion of such provision in my proposal is made in light of the overall context and the theoretical basis for sharing which I have advanced. On the

\footnotesize
\begin{itemize}
\item It was noted, ‘It is difficult to see what is gained by treating ventures separately from business assets.’ See British Columbia Law Reform Commission, \textit{Property Rights on Marriage Breakdown} (n 25) III(D).
\item See Cooke, Barlow and Callus, \textit{Community of Property: A regime for England and Wales?} (n 49) 38 where they note: ‘There was support for marriage itself to be a basis for entitlement although the lukewarm response to equal division in our examples might well justify guidance similar to that in Sweden whereby equality would normally be departed from during the first five years of marriage.’
\item Thus, to this extent it avoids the dangers of assuming domestic contributions are equal as highlighted in Cooke, ‘Miller/McFarlane: Law in Search of Discrimination’ (n 49) 101. However, in only extreme cases, it is envisaged, would such contributions not be of equal value.
\end{itemize}
other hand, incorporating such a provision into an excluded assets model would extend the community for sharing in a manner which is potentially far reaching – arguably too far reaching. Nevertheless, to continue with an excluded assets model which does not recognise unpaid work in the home as an ‘investment’ in non-matrimonial property seems backwards!

It is submitted that the hybrid approach delivered in this response represents a considered and well-thought-out alternative for characterising what assets should constitute the community of property for division and will hopefully be of interest to the Commission.
Dear Sirs

Law Commission Consultation Paper No 208
Matrimonial Property, Needs and Agreements

We are writing on behalf of our Family Team in response to the above referred Consultation Paper.

On 5 November 2012 we met to discuss the Paper and we you will not be surprised to learn that there was significant divergence of opinion from members of our team. In view of this we have found it impossible to complete the response form on behalf of our firm, but we hope that it is helpful if we pass on some of the thoughts that emanated from our discussion.

PRINCIPLED REFORM

There was a consensus that the current law requires reform to ensure that the payment of spousal support is founded on a principled basis. However, we do not consider that a principled basis must require an explanation of what has to be paid by way of spousal support, and for how long. This has the hallmarks of a prescriptive approach whereas our general view is that the court should retain its discretionary powers, with the assistance of guidelines. Using the bus driver analogy at paragraph 3.3 of the Consultation Paper, we liken guidelines to general directions as to where the driver should take the bus.

We consider the “relationship-generated needs” approach to be problematic with the potential for unhelpful arguments including the dissection of roles undertaken in a marriage. Recognition should be given to the fact that the principle of compensation to emerge from Miller v Miller: McFarlane v McFarlane seems to have largely fallen away.
We prefer the “merger over time” model but note that the American writers who developed the theory did not propose it as a basis for discretionary provision. We do not support a formulaic approach.

With regards to 4.115 of the Consultation questions, in general it was considered that factors including length of marriage, marital standard of living, roles adopted during the marriage and occupation of the former matrimonial home were all relevant. However, other views expressed were to question the relevance of the marital standard of living save in cases where there are children to avoid potential disparity of lifestyles enjoyed by each parent.

With regards to question 4.117, the issue of incentives towards independence greatly divided opinion. Some found in favour of encouraging independence by placing limits on the extent of support given. Others considered that there were real problems with this approach in the UK in circumstances where affordable childcare is an issue and familial support may be less available or common than in some other European countries.

However there was a consensus in the proposition that joint lives maintenance orders can sometimes create a self-fulfilling prophecy of the weaker financial party having little incentive to get back into the workforce. There was agreement that term orders should be imposed more frequently (but on the basis that the hurdles to extending them are lowered).

NON-MATRIMONIAL PROPERTY

Subject to the Law Commission’s recommendations in respect of the issue of needs, we agree with the proposed definition of non-matrimonial property set out in paragraph 6.41.
Opinion was divided on the issue of whether the family home should be excluded from the definition of non-matrimonial property in circumstances where it may be an ancestral home, in short marriages where one party provides the purchase funds (or owned the property pre-marriage) and where the home was gifted to one of the parties.

The proposal to exclude the family home from non-matrimonial property would only be considered appropriate if (1) the court retains its full discretionary powers in respect of the sharing of matrimonial property and (2) there is no presumption or starting point or cross-check that the family home should be divided equally.

We could not reach a consensus on the question of whether non-matrimonial property can ever become matrimonial.

Yours faithfully
This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from **11 September 2012** to **11 December 2012**.

Please send your completed form:

- **by email to:** propertyandtrust@lawcommission.gsi.gov.uk  
- **by post to:** Law Commission  
  Steel House, 11 Tothill Street, London SW1H 9LJ  
  Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

**Freedom of Information statement**

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

### Your details

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<tr>
<td>Sarah Anticoni</td>
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| Charles Russell LLP  
| 5 Fleet Place  
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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

In advance of the 11 December 2012 cut off for the consultation, the Family Law team at Charles Russell (comprising 13 partners, 17 associates and 3 trainees both in London and Guildford offices) have considered the documentation.

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
PRINCIPLED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

There was no clear consensus on any requirement that the current law should be reformed and that a principled basis be established.

If funded legal advice was still available to all, then tailor made discretionary solutions under the current law had produced consensual satisfactory results since 1973.

Most could not see the professional desire for change save for acknowledging that geographical differentials between outcomes should not exist. How this could be achieved was more problematic. If the perceived wisdom of solicitors and judges was that joint lives maintenance was the norm within the M25 area but not elsewhere, judicial guidance/training might address this.

In the context of a greater proportion of litigants in person, clarity as to the range of possible outcomes in certain factual scenarios, should be made available to all.

Whilst gender neutrality is embodied within the statute, it is not in practice. Nobody in our team had experienced a joint lives maintenance order in favour of a husband.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

There was little support for the proposal that spousal support be restricted to the compensation of loss caused by the relationship or the seeking to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution.

The idea that this could be codified or contained within an information hub seemed unrealistic.

In long marriages (with or without children) joint lives maintenance seemed more acceptable and fair an outcome. Society expected spouses rather than the state to supported their ex’s if there were the resources to do so.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

(1) Length of marriage should be more relevant for how long spousal support is paid for. A short marriage seemed to be the only circumstance in which compensation of loss was relevant and achievable.

Short marriages could be defined as:

(a) those between three to five years

(b) but in any event no longer than the length of the marriage (including any cohabitation prior to marriage) and

(c) where there were no children. To put both parties back where they were before they married was a realistic exercise for these couples.

The position in Germany was considered. The period of spousal support was limited to a proportion (up to a third) of the length of the marriage. It is unknown if seamless cohabitation prior to marriage is added to the marriage but it is thought not. For calculation purposes, the English seamless cohabitation approach now used adds complexity and lacks clarity as when it started (no definition of cohabitation)

(2) Standard of living is a factor which only few have the luxury of reference to. Where it is relevant in big money cases, a strong factor towards achieving fairness is, where there are children, to achieve a degree of parity between the 2 homes.

(3) As to the impact of joint responsibilities (for example the provision of children) either during the marriage or shared after its ending, that appeared to be fact specific and had to be considered in a socio economic climate. Professional experience still reflected that the homemaker/child carer was more likely to be the woman. Some concern was expressed as to whether the same value was or should be attached to such responsibilities during the marriage or those anticipated in the future.

(4) Occupation of the marital home following divorce was a key need and dominated all other financial decisions upon dissolution. How can the occupation of the home be funded? If not possible, liquidate and divide cost effectively using resources (mortgage ability etc). Since 1980’s, the accepted expectation of housing is for home ownership. If a mortgage is taken on then all need to know who can commit to a third party obligation for the length of that term? Upon divorce, the possibility of families owning two homes is unrealistic except in a tiny minority of cases.

The current financial environment with the need for high percentage of purchase price deposits; limited availability of mortgages (especially to women with curtailed employment chances/interrupted/lower/part time earnings/high cost of childcare); increased cost of SDLT and a stagnant property market) dictate what options, if any, are available to a separating couple and what they can afford.

If they cannot buy, renting is a less secure, permanent option especially for the non earning wife with young children and not always that much cheaper. In the absence of secure unencumbered housing, joint lives spousal maintenance is the safe option.
A term order is more likely to prompt the need for return to courts.

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

The team considered both (1) a reformed discretionary approach or (2) a formulaic calculation.

(1) There were some strongly held views that the current system was perfectly adequate, it having existed since 1969 - 1973 and would operate if funded independent legal advice was available to all. It was anticipated that that is not the socio economic context within which the Law Commission could be making any recommendation.

As a general point, whilst “needs” have been referred to in the bulk of the paper as income needs, that is not the Section 25 criteria. Needs which are also linked to resources includes capital needs. Currently, the cost of acquiring a home and running that home for the future dominate most of the financial discussions and Consent Orders.

There was some discussion as to the use of a standard income needs budget akin to the Form E1 for Schedule 1 proceedings to be approached so that everybody addressed the budgeting/needs exercise in the same way.

(2) Only a few favoured a formula. Most were sceptical as a result of poor (mainly CSA) experiences. The clarity it brought for some was little benefit as compared with the hardships it might impose upon others.

Much interest was expressed in the Canadian formula which was understood to create a high and low range of outcomes.

Concern as to how there could be a fair transition from the current discretionary process to a formula was raised and how “fairness” could be achieved.

Whilst all understood that judges rarely did more than confirm and seal a consent order, the safety net of an exercise of discretion benefitted the weaker party and should not be discarded lightly. Concern lay in their being some sort of safety net meeting needs so that welfare state was not leaned upon.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

Most felt that an encouragement towards financial independence should be expressly made in advice and ultimately stated on the face of an Order.

Step down reducing spousal support could be encouraged (currently not imposed by
judges but approved if presented by consent where the receiving spouse has an established earning record). For example, that maintenance be reduced by x% or to x% of net income on certain trigger events. This could be:

(a) the youngest child entering full time secondary education or
(b) ending full time secondary education or
(c) retirement of paying party.

All of these would require a minimum of say six months notice to be given before any such step down was to take effect. This might address the weaker receiving ex-spouse having to initiate an extension of a term order or the issue of variation proceedings where a review may be more appropriate.

To encourage a return towards independence, section 25A MCA 1973 could be included as a mandatory recital in any final order with a date or trigger event when, the parties anticipated dependency might end be. If this could not be agreed, joint lives could be explained on the face of the order and the intention to apply to reduce/end appear on the order.

The status of possible guidelines was unclear and how that would fit into the current statutory framework. On the basis that 93% of court Orders made were by consent, would the guidelines simply be given to DJ’s considering all applications?

There was concern that any information or guidelines might be misinterpreted in the absence of any legal advice, to suit one or others agenda.

7.7 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?

   Supplementary Consultation Paper, Part 4, paragraph 4.118

We did not have any proposals on this.
**Our case studies: the basis of support**

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:

   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

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**Comments**
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?
**Our case studies: the factors that affect levels of support**

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

| Comments |
7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

Authoritative guidance will not only be necessary at the time of relationship breakdown but more pertinently given by the Registrar of Marriages/Civil partnerships in advance of entering into marriage/civil partnership.

(a) In some factual scenarios it is easier to predict when independence is to be expected (teen children and full time working mother). The younger the children the more difficult it is to look into the future.

(b) Consider step down periodical payment over an agreed period of time or a natural review date.

(c) Financial arrangements to be made after short childless marriages are the easiest to predict (despite the decision in Miller) although are more complex.
generally if they are second marriages.

(d) Family Justice Council and/or others could provide guidance although it would need to be frequently updated to dovetail with case law. The geographical idiosyncrasies are so great at present, should forum shopping not be known to all litigants not just those with independent advice?

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

All agreed that it should not be possible to contract out of provision for need by means of a qualifying nuptial agreement. It was felt that needs included capital housing needs as well as future income needs.

NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

All agreed that non matrimonial property held in the sole name of one party to the marriage or partnership and received as a gift or inheritance or acquired before the marriage or civil partnership should no longer be subject to the sharing principle save for where it was required to meet one of the parties needs.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

However there was division as to whether or not the family home should be excluded from the non matrimonial property as proposed. Many felt that the length of marriage would have a bearing and that these cases were much more nuanced and fact specific. In Court of Appeal civil partnership case of Lawrence where the property was pre-acquired by one party and done up prior to the civil partnership (albeit whilst the parties were cohabitating) there was then argument as to which of the homes was the matrimonial home, effectively shifting the basis of the litigation to another forum.

Others felt that the matrimonial home should not be dealt with in a different way if the purpose on acquisition was to provide a home for the family why should it be excluded? There would be a difference if it was used as a second home. See the Court of Appeal desirability arguments in Lawrence.

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

Where the property was acquired by one party during cohabitation with the other should be excluded caused a wide range of views. All the arguments that have previously been put to the Law Commission relating to the definition of cohabitation and when it starts are relevant. There was great concern and that at present no real adjustment could be made for many same sex couples who until the Civil Partnership Act 2004 could not form a partnership, their factual scenarios would need to be adjusted in some way. Others felt strongly that where the marital home was put in joint names then that should be treated separately and differently.

There was considerable concern that where there was a seamless transition between cohabitation and marriage, that could add to either parties arguments on length of marriage which might enhance financial claims and yet it was unclear as to whether or not assets acquired whilst cohabitating might be argued as pre marital acquest and
therefore be excluded. At what stage do or can cohabitants indicate that they are committed and acknowledge that if they are later to marry or form a civil partnership that from that point on anything that is acquired is “in the pot”?

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

Most agreed that non matrimonial property should not lose its status merely by virtue from being used by the family although tracing exercises were not to be encouraged, they were achievable. Once the funds were mingled and changed status over a long period of time, most of the team felt unless the funds were needed to meet housing or income needs, they could be returned to whichever spouse contributed.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

7.16 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?

**Supplementary Consultation Paper, Part 6, paragraph 6.88**

The team agreed that where non matrimonial property had been sold but invested in the matrimonial property that it should remain matrimonial property subject to the possibility of there being qualifying nuptial agreements to adjust this.

### 7.17 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?

**Supplementary Consultation Paper, Part 6, paragraph 6.100**
Dear sirs

Please accept this email in response to the Matrimonial Property Needs and Agreements consultation, closing date for response 11 Dec 12.

I am a member of the public currently in financial dispute following my decree absolute earlier this year. The matters of needs and non-matrimonial property are very relevant in my case.

I believe that the current law in the UK is very unfair and I have even written to the Prime Minister calling for reforms because I am finding it so unjust and biased towards my ex husband. There should be some account taken of behaviour and who was the guilty party and there should not be an automatic assumption of a 50:50 split.

I have supported myself independently from my parents since I was 18 and have worked extremely hard for the modest assets that I have accumulated. I purchased my first property before I was 20 years old. I purchased my present home which was the matrimonial home in 1996, this was three years before the marriage in 1999. The property was purchased for £63,000 with the aid of a mortgage of £40,000; the deposit of £23,000 coming from the sale of my previous property. Immediately after moving in I spent £10,000 on refurbishments to the property from savings I had accumulated. These included redecoration, a new fire place and hearth in the living room and a new bathroom, so my initial outlay represented approximately one half of the total value of the property at that time.

When I married my husband in 1999 he was in his 30's and still living at home with his parents to whom he has now returned. He did not own any property and had not accumulated any savings or contributed towards a pension either, whereas I had my property, a relatively new car, my share save investments, savings of £40,000 and had been paying into a final salary pension scheme since I was 18.

In October 2003, some 4 years into the marriage I paid off the balance owing under the mortgage which then stood at £31,000. In 2008 I spent a further £30,000 constructing a new extension plus a new kitchen and boiler. These payments totalling £61,000, whilst spent during the marriage came from share saves which I had accumulated prior to the marriage and were therefore pre-acquired investments. My employers no longer operate a share save scheme so I have been unable to replace these. Since my ex husband moved out I have spent a further £2,200 on interior decoration and additional security measures after he broke into the property and removed items following our separation. My total cash investments in the property therefore amount to £93,000. That does not include the mortgage payments I made between 1996 and 2003 during which the mortgage reduced from the initial advance of £40,000 down to £31,000. If that is added in my capital input amounts to £102,000 in total.

When we married my husband made me a promise that if anything ever went wrong he would never make any claim on my house or pension. That promise was repeated many times during our marriage and underpinned the conduct of our finances during the marriage. It was clearly agreed and understood that we each had and would keep our own very separate property, savings and possessions and pensions. At the time of our marriage Pre-Nuptual Agreements were not considered to be legally binding but if I was going to have a lasting relationship I preferred to be married rather than "living in sin". Because of this agreement my husband never contributed towards the mortgage repayments or the household refurbishments, hence he was able to accumulate considerable savings by effectively living for free. We always kept our finances separate, save for a joint account which we both paid into to cover utility bills such as gas and electricity. That did not, however, include shopping and food which I paid for. There was a significant period when he
did not contribute anything at all towards the joint account after he was made redundant. He retained his redundancy money for himself and did not share this with me or use it to contribute towards the household.

My pension scheme commenced when I was 18 years of age and so at least 17 years of my pension scheme accumulated before the marriage. I have also started paying into AVCs since our separation. My ex husband had no pension at all when we married and only started one after much prompting from me.

On the strength of the promise made by my husband I have sacrificed holidays and other luxuries in order to put most of my savings into my home, without any contribution from him. The property is only a modest three bedroomed semi worth approx £170,000 currently. Without the money I have invested in my property it would be worth much less than it is now.

We both worked full time and had a reasonable but not extravagant standard of living. There were no children. I believed we had a happy marriage with a good social life and friends. Nearly two years ago, my husband suddenly announced he was leaving me and wanted another woman. Having persuaded me not to name his new young lady friend in the divorce proceedings, he then proceeded to break his promise about my house and pension which has culminated in him issuing court proceedings.

I am now aged 47 and my ex husband is aged 43. I currently earn approximately double what he earns although my job is at threat of redundancy.

In his Form E my ex husband has declared disposable assets and savings of £46,000, whereas I have the house which has remained in my sole name and savings of £82,000. My pension is worth ten times what his is worth. However it is currently being reviewed by my employer and will cease to be a final salary scheme in the near future requiring me to pay more in for longer and even then I will receive much less than the amount originally promised.

Quite apart from being betrayed by my husband, I feel that I am now being punished for having been prudent, worked hard and saved all my life and that he is simply being rewarded for his deceptions, both in leaving me for another woman and therefore breaking his marriage vows and now in breaking his promises about my property and pension.

Unlike most couples we did not buy a home together and we kept our finances separate. During the marriage my ex husband managed to accumulate considerable savings in his own right through being subsidised by me but he now expects that his supposed housing needs should be met entirely from my assets. I am sceptical as to whether he does intend to buy a property because he has given very contradictory information regarding his mortgage capacity, and I believe he will stay living with his parents indefinitely and eventually inherit their house.

Since he left my ex husband has refused to communicate except through solicitors, and has consistently refused to say what he will accept thus pushing up the costs and has refused my offers of financial settlement. We attended mediation but that broke down. He now says in his Form E that he needs £60,000 to £80,000 for a deposit on a property of his own. I have already made an open offer of £25,000 which he has refused. My costs to date amount to £7,500 and his amount to £9,000.

My offer would meet his needs, assuming he honestly intends to buy a property. Together with his savings it would enable him a sizeable deposit and he could then afford to take out a mortgage on a property. He claims that he should not have to use up his own savings because he would have no savings to fall back on and that it would not be fair for him to have a mortgage while I live mortgage free and have savings. Most first time buyers have to start with a mortgage and use all their savings, that is what I did and everyone else has to do so I do not see why that is a problem. He has put very little effort into any negotiations with me and has left his Form E section 5 entirely blank on the matter of what he seeks but after seeing what my pension is worth he now appears to be trying to claim that as well. I don't see that it would be fair if I have to provide all my savings to buy him a property, that will leave me with nothing to fall back on, in the present climate especially when I could lose my job, and having done nothing wrong myself to deserve this. We both had our own savings which were kept separate and we should both keep our own savings. I do not actually
feel that I owe him anything at all.

I think the law should take much more account of behaviour and who was the guilty party in the marriage breakup. Through no fault of my own I have had to deal with the break up of my marriage through the betrayal of my husband and to add insult to injury am facing potentially losing all my savings and possibly having to remortgage and on top of all that he is now trying to claim a share of my pension. It is not fair that he was the guilty party but can then try and claim all that he is doing, while dragging out the process as long as possible.

I invested all my pre-acquired sharesaves into my home, because I thought it was the right thing to do in order to pay off the mortgage earlier and to ensure that I would always have somewhere to live that was paid for. I was not at any time aware or warned that those sharesaves could lose pre-acquired status by simply paying off my own mortgage and if I had known that might be the case I would certainly not have done so. It is not fair if those assets are not protected now. He did not contribute at all financially. I do not think it is fair that he should have a claim on my pension when it was his choice not to pay into a pension of his own until after he was married and even then he only paid in a pittance into the one he took out for himself. I will be strenuously resisting this and seeking to ensure that any pension share I do have to comply with has a weighting attached to it to take account of his choice not to invest in one earlier himself.

The idea that there should be an automatic assumption of 50:50 sharing of assets is absolutely unfair in our case. I brought vastly more into the marriage. I could understand if we had brought in equal amounts but we didn't so why should we be made "equal" now? The law seems to be on his side simply because he has less. I have done nothing wrong and am being penalised for being prudent and being a saver. He brought zero financially but accumulated significant savings through living for free all the years he was with me, he was the party who broke the marriage for his own selfish reasons, he made certain promises which underpinned our finances and he is now breaking those promises and pursuing me for an equal share. What a charlatan!

For the last 2 years he has refused to negotiate or say what he will accept. He has used the threat of going to court as a way of trying to blackmail me into giving into him, because he knows it will be incredibly expensive. For him that doesn’t matter too much because he has expectations of a large pay out, but for me it is of course more a matter of damage limitation. I can't afford to spend all my money on legal fees but if I have to I will, because I would rather it go to my solicitor than to him. However it is deeply unfair that I could end up in financial hardship and lose all my own savings and pension and everything I have worked for since I was 18.

The law seems to assume that he should be provided with a property in his own right, I do not think that is a realistic assumption given the dramatic increases in property prices compared to earnings over the last 10 years. There are many low income families who cannot afford to get on the property ladder. My ex husband never had a property of his own and has gone back to live with his parents, where he came from. It was entirely his choice to do that. He has a roof over his head, his needs are met with the offer I have made whether he spends it on a house or not. Why should he end up in a better position simply through being married to me? If he is awarded a lump sum for housing then the law should also insist that housing is indeed what the money is spent on. Unfortunately that is not the case, I suspect he will continue to live with his parents and pocket my hard-earned money to do what he likes with.

The law should not give an entitlement to continue living at the same standard of living for an uncertain period. Marital standard of living should be related to the amount that each party brought financially and not assumed to continue equally.

The idea that there should be a formula to look up a calculation is flawed because it would fail to take into account individual circumstances and promises, as in my case. I find this idea absolutely abhorrent.

Financial independence should be absolutely encouraged, and there should be a finite limit on the amount of time for which support may be required.

Non-matrimonial property should absolutely not be shared and should be subtracted from the assets before sharing.

The family home should not necessarily be regarded as matrimonial property, that property should remain with whoever brought it to the marriage. There should be no assumption that the family home should be
shared on divorce, if it was solely owned by one spouse before the marriage.

Non matrimonial property should not become matrimonial even if it has been used as a part of the matrimonial household. In my case I managed my own share saves outside of the marriage, until they were used to pay off my mortgage. It will be a disaster for me if those are considered as matrimonial assets when it comes to Financial Dispute Resolution and I am praying that I get a sympathetic judge.

I am not a solicitor and I am sorry to have rambled and repeated myself. However I am totally stressed by what I am going through, to the extent that I have been suffering from depression, weight loss and sleepless nights. I would never ever have married in the first place if I had any inkling of what could follow. I cannot currently see any end in sight, which does not involve me incurring huge financial losses. It upsets me immensely that my ex husband, having behaved despicably, can profit from me following the marriage breakdown.

I hope this feedback has been useful and that you will take my views into account, to prevent others in my position having to go through this same stress.

Yours sincerely
I'm responding to the consultation as former Chair of the Family Justice Review, not as Chair of the Family Justice Board.

I very much welcome the consultation paper, which is clear, well argued and thorough.

As a panel we did not take formal evidence on ancillary relief, but your findings are very much in line with what we were told. The current situation is unclear and confusing to separating couples and often to their lawyers too. Outcomes appear to depend too much on the stance taken by individual judges, and there can be wide variations in the decisions that may be taken on apparently similar cases. All this adds to the stresses felt at an already stressful time, with potential consequences for children as well as for adults.

Against that background I strongly support the possible work on a more formulaic approach. I would urge that this should be considered both from a principled approach and from further research on what would result from some form of averaging of what judges do actually decide.

I am not in a position to suggest who should do this work, but there is a need for a strong economic input. The Institute for Fiscal Studies may be able to offer support, having as they do substantial expertise in household circumstances and social security.

It will be important to test possible formulae with as wide a group as possible. This could include web based case studies where people (the general public as well as judges and lawyers) could decide cases, compare their decisions to the results of proposed formulae, and offer comments.

A move to a well founded formula could in my view make a major contribution to a better process for divorce and separation. The tricky choices will be around how far the formula should be complicated in order to capture the variety of household circumstances. I would argue that as far as possible a simpler approach is to be preferred to a more complex one.

David Norgrove
**Your details**

<table>
<thead>
<tr>
<th>Name:</th>
<th>Grant Howell</th>
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| Postal address:| Charles Russell LLP  
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Are you responding on behalf of a firm, association or other organisation?  
If so, please give its name (and address, if not the same as above):  
Centre for Child and Family Law Reform c/o above address.  

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:  
Not applicable.  

As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

Yes. The current law requires reform as it is too uncertain and lacks focus. A variety of outcomes are possible on the same set of facts, which added to a system struggling to cope with reduced resources and an increase in self-represented people causes serious problems. A lack of stated principle leads, for example, to a lack of equality in that joint lives maintenance orders are common for women, particularly within the M25 (as highlighted in paragraph 7 of the Executive Summary and paragraph 25 of the Overview for Lawyers), but rare for men. CCFLR welcomes and shares the values set out in paragraph 41 of the Overview for Lawyers, to which it would add:

- National uniformity: removing regional variations in the types of orders made, best illustrated by the joint lives maintenance order example above.
- Realism: in addition to the stated values, a need to take account of cultural issues and the social context, such as the level of child care, when comparing foreign systems or law to our own.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

As the Law Commission has made clear during the consultation process it wishes a choice to be made between these two options, CCFLR prefers option (2). Option (1) is unattractive as it is ‘backward looking’. Compensation also has a conceptual link to conduct, which is rightly otherwise rarely relevant to a financial outcome and, should current plans come to fruition, soon be removed as a fact justifying divorce.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

All are relevant and as regards each points that CCFLR would stress are:

(1)(a) “short marriages” should be expressly defined as suggested by the 2009 Centre for Social Justice “Every Family Matters” report mentioned at paragraph 91(3) of the Overview for Lawyers, with the objective also as recommended.

(1)(b) The current uncertainty and inconsistency in the court’s taking into account of pre-marriage cohabitation should end. “Cohabitation” is not defined and if couples choose to marry this should not result in actions when they were not married being used as if they had been married at the time.

(2) In the minority of cases where needs are adequately covered, ‘marital standard of living’
should be more strictly defined as to its impact. For example, achieving a degree of parity
between the houses of each party, particularly where there are children, is to be encouraged
whereas facilitating first class air travel when that had been the practice in the past is not.

(3)(a) “Double counting” needs to be guarded against here (as regards the position during the
marriage) as, for example, a spouse’s lack of earning capacity due to child care in the past will
already be a factor. While ‘compensation’ for loss of career prospects was highlighted in
McFarlane that has not attracted support subsequently and it is considered that is right as if it
increases the award this would be a good example of ‘double counting’ in practice.

(b) In contrast, it is right to take account of the ongoing impact of child care after the ending of the
marriage. This is being carried out to the mutual benefit of the parties and they should share
the cost if they can rather than burden the State.

(c) Other than child care, ‘joint responsibilities’ after the end of the marriage should be limited.
For example, care for an elderly parent should be the responsibility of the spouse who is the
child. The impact on their financial position would be relevant but not because the
responsibility is a shared one with the other spouse to his or her former parent-in-law.

(4) If there are children, the preferred option should be retention of the home during their minority
but this must depend on financial realities. In that respect, separated couples should not be
immune to the current social context when house ownership as opposed to renting is
increasingly hard to achieve. Accordingly, both parties may have to rent following a sale of the
former matrimonial home. In the minority of cases where another house can be afforded to be
purchased, the objection should be parity, in terms of bedrooms to quote an example.

7.5 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?

A formula would assist to reduce uncertainty but purely as a starting point. The Child Support Agency
experience demonstrates pure formula does not work. The Canadian approach set out at paragraph
63 of the Overview for Lawyers giving a range of possible outcomes is attractive. By way of
qualification of a strict formula, account should be taken of; in particular of the need to avoid hardship,
defined as being forced to rely on State benefits, when that was not the case previously. While this
could be long term reform, an immediate short term improvement would be to spell out the guideline,
favoured in practice, of using one third of income as a starting point in cases where income exceeds
needs.

7.6 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?

CCFLR supports this principle. In practice, this should include:

(a) Stating the principle in a preamble to each financial order.
(b) A term order without a bar on subsequent extension being the presumption, echoing
paragraph 91(l) of the Overview for Lawyers.
(c) Triggers for a reduction in income support being considered in every case such as retirement,
to allow time for retraining, children leaving school or automatic percentage reduction at stated
intervals.
(d) The payer only being able to rely on the term if he or she reminds the recipient six months
prior to the end of the term payments are then due to stop.
(e) Judges to be more robust in promoting independence and take account of the disadvantages
of future applications, financially and otherwise, rather than using nominal orders to leave
options open and indicating a reluctance to ‘crystal ball gaze’.
### 7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

Research should be carried out to confirm current issues, such as the variation in orders within the M25 as compared to the rest of country mentioned in 7.2 above, and international experience. As regards other jurisdictions, the Scottish experience given the limited income orders and the same welfare benefits available may be particularly instructive. Similarly, Australia with its similar culture but no joint lives income orders. The detail of the research is best left to others although academics specialising in family law with adequate funding would be preferred.
### IMPROVING THE CURRENT LAW RELATING TO NEEDS

**7.8** 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:
   - the considerations involved in an assessment of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);
   - the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

3. Provision about the following either by way of statutory amendment or in the form of authoritative guidance:
   - the time within which independence is to be expected (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);
   - the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and
   - the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

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.

Reference should be made to the comments above. The response in summary to the specific questions posed is:

1. Agreed.

2. Agreed with provision of the information given to those giving notice of intention to enter into marriage or civil partnership. CCFLR supports the approach suggested in paragraphs 96 and 97 of the Overview for Lawyers but not in paragraph 98 of the same documents as any case study is bound to be fact specific.

3. See above.

4. Yes, as part of a concerted approach involving interested bodies such as the Law Society, Family Law Bar Association, Resolution and the Family Procedure Rules Committee. Incorporation into the approach expected by courts in the past of the Law Society Protocol and the Resolution Code of Conduct provide a template. It would also be vital that the senior judiciary agree with the guidance and promulgate it robustly in their decisions and comments.

5. Agreed.

**7.9** 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.

Nothing to add to earlier comments.

**7.10** 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.

Supplementary Consultation Paper, Part 5, paragraph 5. 70

Qualifying Nuptial Agreements (QNA) should play a key part in reducing the current uncertainty that causes the issues outlined at 7.2 above. Accordingly, as long as parties are shown to have been fully aware of the implications of entering into a QNA and there is no evidence of duress, their autonomy should be respected and they should be able to contract one of provision for needs just as in Australia, where such agreements are binding even if needs are not met. In the alternative, if this is not the case then the level of needs required should be the same as in matters when there is no QNA.
### NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

Yes.

7.12 We ask for consultees' views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

In principle, the family home should be excluded as it is integral to the marital relationship. In practice, there should be a qualifying period within which it would not be excluded, say three years. Also guidance is required as to the definition of the term to seek to avoid the issues which arise as in, for example, *Lawrence v Gallagher*.

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.50

To follow the logic in our response at 7.4 (1) (b), it should not be excluded unless it satisfied the qualifying period under 7.12 above. This would also have the effect of avoiding potential unfairness on cohabiting single sex parties who began cohabitation before the Civil Partnership Act 2004 came into force enabling them to become civil partners.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

Yes, unless it is used to acquire the family home and the qualifying period under 7.12 above is satisfied.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

No, consistent with our view as to non-matrimonial property retaining its status as stated at 7.14 above.

7.16 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?  

Supplementary Consultation Paper, Part 6, paragraph 6.88

Yes, given the deliberate decision to invest it in matrimonial property rather than it acquiring that status by default as anticipated under 7.15 above.

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

It would be possible but, in our view, inadvisable given the capacity for uncertainty that would arise when the thrust of any reform should be more certainty. If, in the alternative, this approach was to be proposed it would be important to limit it to traceable financial investment.
Dear Sirs

I am a 66 year old woman who has been very happily married for 45 years. You might therefore wonder what interest I have in your consultation on divorce. If I had not witnessed the pain that my daughter’s family have gone through being involved in joint-lives maintenance, then I would never have believed that the family courts deal out such injustice on a daily basis. The emotional burden and confrontation generated by open-ended, life-long dependency is unfair on every level. It also generates significant harm to the children who are caught up in it, as their parents never stop arguing over money.

My daughter married a man who, upon divorce from his first wife, was ordered to maintain her at a very high level for life. He is a well-educated professional and his first wife was not. He simply earned more than she did. She had not made any career ‘sacrifices’, beyond those made by all women who have children. It was deemed at the time of the marriage that, due to her lack of education and training, she would never be able to earn much and he was ordered to pay her a substantial amount for life. It is staggering that no onus was placed upon her to train, or even to seek a job and no time limits were placed upon this support, given the relatively short length of the marriage. Thus, many years later, my son-in-law toils long hours in a stressful job to keep 2 homes, whilst his first wife does not work and has no responsibility to provide even £1 for her own upkeep.

My daughter was also married before, but despite having a young child, managed to maintain her career through a great deal of effort and sacrifice. She obtained a ‘clean break’ and was left fully financially responsible for herself and my grand-daughter and could never seek support from her first husband if life dealt her any financial blows.

I have discovered that my son-in-laws first wife is entitled to a share of any increase in his income generated through the hard work and financial decisions made during his long marriage to my daughter. How can that ever be fair? This has lead to very stressful situations for my daughter and considerable legal costs as she defends her personal and financial information from disclosure. At times the stress of it has made her ill. I cannot see why my daughter’s financial and emotional security, privacy and peace of mind must be given away to support a woman who chooses not to work and with whom she has no relationship. She has also been told by lawyers that when my son-in-law retires, he will be required to give up some of his pension assets accrued with my daughter, to ‘buy a clean-break’. This is despite his first wife being given 50% of their own marital pension pot. My daughter lives with such financial uncertainty and it is not fair that the first wife is awarded a high level of maintenance but then has no responsibility for her own pension provision. The courts appear to treat maintenance recipients like small children. What other sector of society are so absolutely absolved of responsibility? My daughter should not be saving diligently to provide a pension to a woman who is already in
receipt of over-generous maintenance. My daughter has been told that her own earnings may not be awarded as maintenance to the first wife, but will be considered in determining the proportion of my son-in-laws income that should be awarded. Isn’t that exactly the same as my daughter paying the maintenance? The more she earns, the more is deemed available for the first wife, therefore it is her money that is being handed over. My daughter’s earnings and financial position are none of his ex-wife’s business and it is unbelievable that the courts think my daughter ought to disclose them.

Why does the law treat people so differently in different circumstances? Surely divorce is the ending of a contract, in the same way that many other contracts may be ended at law? How can one set of circumstances bring about an immediate end to all financial ties between a couple, yet another allows for life-long, responsibility-free dependence, with every financial decision still being subjected to sharing for life? It is grossly unfair and disproportionate.

Of course there will be situations in which one party will need financial help and assistance at the end of a marriage. However, that assistance should be entirely for allowing the recipient to retrain and get into work. It should also be properly defined, should not be subject to increases and should have a defined end without further recourse to the courts. It must also be proportional and linked to the length of a marriage.

When you tell the story of joint-lives maintenance to any lay person they are quite simply staggered. They say things like ‘surely there must be some sort of statute of limitations’ or ‘but surely it must end once the children are 18’? No right thinking person can honestly believe it right for one person to live off another for life, without responsibility. Even criminals serve their time and know when their penance is paid, but high earners are punished forever. Please take this opportunity to address this unfairness and allow everybody to be absolutely certain about their financial position.

Yours faithfully
Joanna Miles – response to Law Commission CP 208

Senior Lecturer in Law, University of Cambridge

Thank you for another tightly and lucidly argued consultation paper. Direct responses to specific consultations in bold below, other comments on preceding argument in normal font, both attached to relevant para nos..

Part 3. I agree entirely with your diagnosis and analysis of the present difficulties.

I remain of this view despite any contrary suggestion that might be drawn from Dr Emma Hitchings’ presentation at the Nuffield Foundation seminar on Dec 4 that the degree of inconsistency and uncertainty may not be that great. She would be quick to acknowledge that hers is a small, geographically-limited study, and that much more work is needed with many more vignettes and a wider range of respondents across all regions. Her two vignettes arguably dealt with two quite typical cases, both involving children with low-ish assets, and so did not raise any particularly difficult questions of principle to which the law presently provides no answer at all or obviously divergent answers, and the scale of the assets at stake in those cases (particularly the “Frenches” case, which might otherwise be thought to raise some difficult principle) was such that that would, of itself, I think confine the likely options for resolving those cases within a relatively narrow compass. And of course, her data did reveal quite marked disparity of practice on the duration of spousal support, if not its quantum.

To the extent that her data does suggest some degree of consistency, that of course bodes well for the possibility of creating basic guidelines to explain the operation of the current law and for the beginnings of work seeking to encapsulate the current law, or something like it, more concretely in formulae/advisory guidelines. But that we need basic guidelines (à la Part 5) or in due course “advisory guidelines”/formulae of some sort (à la Part 4) seems to me to be hard to argue against.

The law needs to provide answers to the Law Com’s case studies 2 and 3 – it is astonishing that it currently does not – and could doubtless provide a cleaner answer to case study 1. Without clear answers to such questions, the entire process becomes unacceptably arbitrary. Indeed, for as long as we have different panels in the CA taking fundamentally different approaches, and for as long as it is widely perceived by practitioners that different first instance courts around the country, even different judges within the same court, will or might react very differently to similar facts (a perception which influences at least some practitioners’ decisions about where to issue proceedings), it might reasonably be asked whether we are dispensing justice under law at all.

Moreover, the opacity of the current law must surely present a very real danger that legal entitlements will simply be lost by default by those most vulnerable parties who are least able to access the law and legal advice in the post-LASPO world, and so whose “cases” are likely to be resolved by reference to non-legal norms. There seems to be international evidence, certainly from Canada and possibly from NZ, that highly discretionary components of financial relief are likely to fall by the wayside, compared with those components that can be more simply and clearly stated in a way that takes us readily to a number (or range of numbers) and so to a more concrete right to provision.
Part 4.

4.12 and second para of box on p 53 I would disagree slightly with your presentation of the situation where a home is made available for primary carer with dependent children while those children remain at home. I think it is helpful to recognise that a good part of any property adjustment order made for the benefit of a primary carer is in fact not made for the benefit of that spouse as spouse but rather for the benefit of the children. (We can see this plainly in non-marital cases where a home is made available for the child’s occupation together with the primary carer). To the extent that it provides the children with a home during their minority, a Mesher order (for example) is an order for the benefit of the child, in a sense meeting a shared responsibility of both parents towards the child; it is the ultimate division of the capital that is for the benefit of the primary carer in her capacity as spouse (that is evident from the fact that that is the only aspect of a Mesher-style arrangement which is not available under Sch 1 to the Children Act for the benefit of the child). So the question of the use value, i.e. the occupation, of the family home during any children’s dependency can I think be kept quite separate from the question of the division of its capital value between the spouses. That the non-resident parent must in the interim find other accommodation without his capital is an important factor, but it goes to his ability to provide for his child in this particular way (the child’s interests being only first, not paramount, consideration), not to his ability to provide for his ex-spouse. Only once the children have left home does the continued allocation of the home for one spouse to occupy alone become a component of spousal support. See also your reference to “substitute income in the form of the right to stay in the home” at para 4.93).

4.25. Text to n 27: I do not think the “if she had not been married” scenario is the appropriate comparator – should that not be a situation in which she had not given up work for the children (say)? Of course, one might do that even if not married, so perhaps you mean “not married” as shorthand for “no relationship at all”. Cf in relation to case study 2 where the “if not married” comparator seems right – because M’s inferior position at the end of the marriage is not the product of his contribution to married life.

4.26. Whether we need to think about separate provision for compensation is surely dependent on what we do with the needs principle. If, as I hope we might, we end up with a formula which seeks loosely to reflect a particular view of both, the distinction would not greatly matter. I think one of the great advantages of a set of advisory guidelines/formulae is that a lot of the detail that we currently worry about greatly in trying to identify the basis and extent of responsibility would to some extent at least fall away – on one view, it’s just “noise”, and noise which (if we listen to it) may inexorably drag us down horrible routes requiring impossible evidence and quantification of losses etc. However, if one had a system which, as in Canada, produces ranges (which I think is very appealing), one might wish to distinguish those cases that had a “compensatory” flavour from those that were “pure need” (i.e. in no sense related to the conduct of the marriage) by allocating to the former awards from the upper end of the range and to the latter awards from the lower end. But whether the claim was based on pure need or compensation would not been an “all or nothing” determining factor, or one which radically determined the nature of the award (as of course it does not now). Indeed, it is worth noting that compensation seems already to be a factor that may push
one’s award to a more “generous assessment” of need, i.e. towards the upper end of whatever invisible range of quantum is being deployed (e.g. McFarlane (no 2)).

4.32 You suggest a mixture of rationales in operation. I think it can be helpful also to be aware that there may two principles of different orders operating: a liability principle (that says you have to pay something) and a quantification principle (that tells you what you have to pay and for how long) (I think I have this idea from Ellman). The ALI regime does without the former – another good way of cutting out the noise and so cutting the cost (albeit necessarily being even more average and less individualised in one’s justice). The Canadian scheme in principle allows for entitlement to spousal support to be dealt with before one reaches the guidelines – I wonder how often that stage is consciously engaged – but as noted above the nature (at least) of the assumed liability principle can also influence where in the quantification range one ends up.

4.40 and last para of box at p 53. What is “harsh”? This is one of the more emotive aspects of this project, but (you’ll be unsurprised to learn) I think we need to be very careful in articulating expressly the argument in favour of provision for case studies 2 and 3. Evident need + ability to pay is not, in my view, a sufficient rationale for an ex-spouse being required to pay, or if it is, it certainly cannot justify it indefinitely: the logic of no-fault divorce and freedom to remarry dictate otherwise. Again, however, we might avoid the emotion by cutting out the noise and simply accepting the merger over time theory. That will provide something in both case studies 2 and 3, rather than nothing. It may not cater fully for the claimants’ needs (however defined – and of course, we can’t do that satisfactorily), especially in case study 3. But that is not an outcome that concerns me: I simply cannot see the justification for my having to support for life someone to whom I was once married because they happened to have a catastrophic accident while we were married – it is far too fortuitous a basis for fixing me with a life-long and potentially costly liability. If my ex-spouse is that catastrophically injured that they cannot work, the fact that I have been supporting them for some years has probably given them more support than they could otherwise have hoped to receive from other sources (and may have disadvantaged me substantially too); it is not a reason to require me to continue to make that provision now (i.e. beyond what the merger over time or parenting partnership theory would support), and my ex-spouse should now resort – as they would have had to without me – to the appropriate state support to make up the difference. When we talk about transition to “independence” here (e.g. at para 4.88), we can only mean in the sense of ceasing to be dependent on the ex-spouse, not necessarily actually independent of all external sources of support: Pat may simply need to depend on the state to some degree/at some point. The arguments you set out at para 4.41 are very good arguments in favour of having an income-disparity quantification tool.

4.41, 4.96 et seq I have been going quietly mad over the last few weeks grappling with sharing then need or need then sharing... I think I am still in the share then need camp (which after all reflects the pattern of every jurisdiction in the world that operates a more explicitly pillared system than ours). We can see this most clearly perhaps where the numbers are big, and generate sufficient capital that it can be put to use as a source of income-stream instead of as well as capital that has use or other immediate value. If the wife’s equal share of the fruits of the partnership is her return on her investment in the marriage, why is it wrong to expect her to look to that capital (first) to meet her needs, whether as capital or income-generating? After all, the husband’s share of the capital may be part of his income stream, whether it’s just investments or a farm or other business. But then perhaps this is only a problem for us because we insist (a) on trying to get a handle on the idea of
needs and (b) on doing so in a way that encompasses both capital and income needs. If we simply split the acquest equally and then dealt with “need” (i.e. spousal support) based on income disparity/length of marriage/parenting, we wouldn’t need to resolve that knotty problem directly, and again in so far as the capital split produces an income stream, that is relevant to the parties’ income disparity going forward and so of course must feed into that formula. I would also observe that if we want need to dominate under our current system, we really need to get a grip on what we mean by need, because where a need award is fully capitalised, we are awarding need in full, without possibility of subsequent variation, which may not always be appropriate.

I would certainly support the view, at para 4.94, that occupation of the family home (or indeed any future home) is something that could and should be separated out from treatment of the money values at stake, with an occupation rent added into the equation (once dependent children are no longer present in the house).

**4.101** To the extent that this para might be taken to be summarising my views in (2008) CFLQ (which you have said in fact it is not), I’m afraid it does distort them: as I explain at p 392, I see principled scope for compensation to arise as a separate issue after sharing in a way that need does not. But if, as discussed above, we are in fact no longer going to try to deploy these two as distinct principles (if ever we have!), then it no longer matters: both will be subsumed within a merger over time/parenting partnership approach, which would surely have to take effect after sharing of the acquest.

On a different note, in response to your last sentence of this para, I would observe that the fact that one spouse may be “barely managing” with their equal share is not *ipsa facto* troubling: it is only troubling if we think that there is some outstanding liability that has not been met in full. As argued above, if we adopt a merger over time etc approach, we should do equal sharing first.

**4.113. Yes.**

**4.114(1) No.**

**4.114(2) Yes.**

**4.115 (1) The length of the marriage or – in a case involving children who are not dependent at the date of divorce – the length of the continuing parenting project, should play a key role in determining the duration (and so total capitalised max. quantum) of spousal support payable, as it does in the Canadian scheme (though we would need to fix a multiplier suitable to the English context).**

(2) I think the marital standard of living is too slippery a concept, and one that in most cases will be incapable of attainment for either party post-divorce in any event. Some degree of sharing of income disparity post-divorce, whilst that disparity will change over time, seems to be a better way forward.

(3) Ongoing child-care responsibility should be factored in as above as part of the durational aspect of the award. Other caring responsibilities are different, because not similarly measurable in duration in a standard way, and so would probably have to be the subject of exceptions, possibly entirely discretionary. The Canadian scheme does not have an exception or category for
this case specifically, but it could doubtless be accommodated in something like the prior support obligation exception.

(4) I would treat occupation as an entirely separate “pillar” from monetary relief, certainly where dependent children are also occupying the home with the spouse: it is then (in principle) an aspect of provision for the child rather than for the spouse. Once the children leave, we are then firmly in the realms of spousal support, and so one ought then to factor in some monetary equivalent value (occupation rent, or the mortgage being paid by the other spouse) for the right to stay in the home as an aspect of the spousal support due. But note that where the mortgage is still being paid and if the other spouse is making a contribution to this then, unless the other spouse’s capital share in the property has been expressed as a fixed sum rather than as a percentage, then he is enlarging his own capital asset (the equity) as he pays down that mortgage and so benefiting himself as well as securing the home for continued occupation by the other spouse.

NB: any formula based on income-sharing would need to take effect against a provisionally equally split matrimonial property pool (the acquest?), though of course that could be departed from in capitalising all or part of the spousal support component.

4.116. I do not see how we can render the discretionary approach more consistent and predictable without to some extent confining it within the (potentially wide) tramlines of advisory guidelines akin to those used in Canada. So I say no to (1) but a modified yes to (2), in so far as I would support a set of formulaic “guidelines” (i.e. a formula that produces a range within which to work), rather than the stricter sounding formulaic “calculation” (which sounds like it might give you one number). NB it is inevitable that, as well as formulating clearer guidelines on spousal support, we will also have to go down a deferred community of property line (at least as a preliminary starting point from which departure can be made – in capital terms – in line with the spousal support required, if capitalised) – not least because you need to know what you are doing with the capital (some of which may be income-generating) before you can assess income disparity.

4.117. There must be some limits. Formulaic guidelines would do this automatically in so far as, in many but not all cases, the support would be time-limited, and that time-limit selected in a way that was to some extent sensitive to the facts of the case (in terms of marriage duration, parenting duration). That seems to me to be preferable to a more discretionary approach to relief on to which some more arbitrary time-limit is imposed across the board.

4.118. This question is difficult to answer other than in an “turkeys very much not voting for Christmas, but instead voting in favour of their being sent on an exciting fact-finding mission” way... Clearly, if we are to consider going down a Canadian-style route, we need to do a lot of work, probably with some degree of governmental mandate or support, and realistically academics will have to take a leading role (not just academic lawyers, but at least also economists and/or other social scientists adept at handling quantitative data and developing software for modelling outcomes). That work at minimum will consist of:

1) identifying the range of outcomes currently achieved
   a) across the country
b) across different asset ranges and lots & lots of different fact patterns

2) modelling the outcomes that would be produced by various formulae, across different asset ranges and fact patterns, on an equivalised household income basis, and testing those outcomes against current outcomes / for acceptability

3) that will require a lot of background work not only on the basic spousal support model but also on crucial areas of intersection with benefits and tax rules for the time being, and the child support rules.

Point (1) will require either a large working/advisory group consisting of practitioners and district judges from each HMCTS region, and/or lots of focus groups conducted in each region. The likelihood is that a bit of both will be required (partly to ensure wide buy-in to the project), and that the former will need a lot of goodwill to work as the working group is (if the Canadian experience is anything to go by) likely to be worked hard. It would also benefit from work analysing existing court outcomes closely, and there are at least two datasets in existence/under construction (Woodward’s pension order study data and Hitchings and Miles’ financial order study data) which could be used (with HMCTS permission) for this purpose.

Point (2) will require the construction of a suitable computer programme – the Canadian team and Ira Ellman’s teams in the US have experience of doing this sort of work and their expertise and advice could doubtless be drawn on by the English & Welsh team.

It should also be emphasised that while I am enthusiastic about exploring this sort of model for the English context, it needs to be borne in mind that no suitable model might be found, at least not one which manages to reproduce the sort of outcomes that practitioners would currently expect or want to achieve, either because no formula can be found which will do that and/or because current outcomes are indeed so inconsistent in a way that cannot be rationalised and accommodated within a scheme, that significant policy choices need to be made about the sorts of outcomes that a new English scheme should produce. So any project would need to anticipate having potentially 4 phases: (1) gather/analyse data re current practice (2) can we reduce current practice to any sort of formula? If so, splendid – test formula umpteen times, tweak and publish. If not, (3) policy decisions need to be made before we can produce a formula... may need to go out to consultation... before can (4) produce formula based on policy decisions so taken. It may be that failure at step (2) would result in the end of the project: it would at that stage become a law reform project, rather than an attempt to digest current practice, and so the case for continuing in that vein would need to be evaluated before any further work were done.

Needless to say, as the Canadian experience suggests, all this will take considerable time and some degree of investment, even assuming that quite a lot of the participants (in particular on the working group) will be doing pro bono. The academics’ time would probably have to be costed and paid in the usual way for large research projects (on an FEC basis), though in reality they will well end up working pro bono to some large extent as well (as they always do). There will be travel costs for meeting/focus groups.
Part 5.

5.7 it is important not to lose sight of the fact – evident from published court statistics – that in many cases, periodical payments are not ordered at all, so in most cases the clean break is the reality.

5.11 There is a real tension with the current law that we have a compensation idea underpinning to some extent our concept of needs, and yet re-marriage automatically terminates pps designed to deal with that. Cf if you capitalise the award instead – do courts consciously or otherwise make any sort of contingency for the possibility of remarriage? It is very interesting that compensatory spousal support in Canada (cf pure needs support) is not automatically ended by repartnering.

5.23 And of course many (most?) cases don’t involve a periodical payments order at all.

5.29. Your discussion of possible statutory amendments seem to focus on the issue of duration of support. I find it deeply problematic to do this in isolation from any proper attention to the issue of quantum, as there is a real danger here of under-provision. I consider the formulation you offer in this para to be too strong: “direct the courts to bring it to an end where possible” – not least if we don’t have clear criteria for judging what is “possible”. It sounds like the different judicial attitudes to mothers’ employment will simply result in very different views about what is “possible”.

5.30. I disagree with the assertion in the last sentence – surely they can trade-off more capital for pps? At least if we have a clear sense of when pps would end, and so what the total pp liability would be. But bear in mind also that if we capitalise, we ought in theory to make a discount for the value of cash in hand and for future contingencies that would have meant a termination of pps.

5.31 I think one ought to distinguish primary and secondary school age children here, as different lengths of school days and maturity of children makes a difference to what work options are realistic. But beware of abandoning the long-term housewife whose kids have grown-up, possibly long ago, and yet who has remained out of the workforce: she may have the time to go to work, but may be so far out of the workforce that getting back now would be difficult. NB that on a merger over time approach, such a wife would be entitled to long-term pps...

5.33 Here too I think we struggle because it is hard to “clarify” the law on duration of pps when we are aware of so much difference of practice around the country on this very issue...

5.34 Any stated period should, in line with the Part 4 discussion, relate to the length of the marriage and/or any ongoing child care obligations

5.35 I think we need also to be very conscious that any “starting point” or “presumption” is likely to gain a life of its own and evolve into a fixed rule, esp in the hands of self-rep parties. So we need to be very comfortable with where we place that starting point... Re n 34: it may be that the less well-off aren’t making pps even now...

5.40 et seq. Yes, there is a strong need for guidance, though as discussed at the Nuffield Foundation on Tuesday, it may be easier to say what the law isn’t in some respects than to say what it requires! But even that would be valuable. What is perfectly clear is the Government’s own attempt to create
a website providing such information has been abysmal. The writing of any such guidance must be overseen by qualified family lawyers, and subject to scrutiny by a wide group of experts before publication. It must be in plain English, accessible to people with relatively elementary literacy standards, and readily navigable whilst not sacrificing accuracy.

5.62 (1) See the various concerns outlined above, in particular for the long-term housewife – she cannot magically become independent on divorce just because she has no children at home. I think in that case that duration needs to be tied to length of marriage in some way.

(2)(a)(b) Yes.

(3)(a) Yes, but see above on what that time is.

(b) This will be most challenging – the current variation of practice seems to take this beyond a mere matter of “clarification”.

(c) Yes, I think it would be particularly useful to create a clearer position on this specific category of case, though one would need to retain discretion to depart from starting point in exceptional circs, (i.e….?)

(4) I think the FJC / President would be a good source, but the actual authorship needs to be undertaken in the matter outlined above. Lawyers emphatically must be in control, but they will need to work with “plain English” experts if the resulting guidance is going to be accessible to SRPs.

(5) Yes. It is plain that whichever body takes on this project must be given control of all the relevant pages of the Government’s new Sorting out Separation site. They need radical overhaul as it is.

5.63. I think it is important not to get too carried away with the internet, specifically, as a forum for legal information and advice. Evidence from colleagues at the LSRC indicates, perhaps surprisingly, that young people particularly value face to face advice, in preference to the internet or even phone (see papers by Cat Denvir). NB also that not everyone has good/any/private internet access. Thought will need to be given to how interactive website content might be rendered in more traditional paper formats as leaflets to be used by advice agencies sitting down with clients in person.

5.65 My worry here is that the move to QNAs is going to leave Radmacher dangling – non-QNAs may still be determinative in some cases, and potentially leave the claimant with provision only for “real needs”. That concept, apparently intended to be quite restrictive, may yet die a death as a result of case law post-Radmacher – cases have so far done needs generously assessed. But it remains an annoying wrinkle in the law until it is authoritatively squashed.

5.67. To be entitled to be left with housing after a short childless marriage could be far too much!

5.69 I think you have touching faith in the motivations of some entering pre-nups, who may wish precisely to squeeze any provision to the bare minimum...
5.70 I think it is difficult to make any sort of statement here beyond whatever statutory amendment or simple guidance is provided in relation to needs in the run of the mill cases. And there seems no obvious reason – on your approach – why need in the QNA context should be any different from need in the normal case. I have an argument as to why need in the QNA context could indeed be more restricted, based on the idea that our subjective concept of need, based on marital standard of living, is another manifestation of our partnership theory of marriage – that I am entitled to retain that standard (at least for a time) because of the marriage deal – such that it should be open to parties who do not wish to view themselves as having that sort of partnership to adopt a more objective and so restricted concept of “need”, as well as to exclude the sharing principle. But I doubt that such an approach will find favour, so do not press it here.
Part 6.

My general comment here would be to say that, ideally, the default position would accord with widely-held opinion amongst the group who might wish to have pre-nups, so as not to put the burden on the majority of those people to have to go to the trouble of reaching agreement to do something else, with all the awkwardness that will involve in broaching the issue - cf the alternative of not marrying at all (as you address at 6.36 and n 51). The underlying question is how far should the owner be confident of being able to protect his or her property unilaterally, bearing in mind that the non-owner has been amply provided for on a needs-basis. Of course, since we probably don’t have the necessary attitudinal evidence, we need to make as good an estimation as possible and/or take a normative decision.

6.17(3). If it’s not valuable, it should be easy. Courts rarely if ever deal with trivia (in terms of value)

N 35. I agree.

6.24. Clarity in the law is particularly important for those who are not super-wealthy but may have a legitimate wish to have an agreement - they ought not to have to seek detailed legal advice. But if they can’t afford such advice query whether they are in the QNA bracket at all – they are likely to be a needs case. As to the rich: will they know and will they make arrangements? In the case of the rich, surely yes, or yes it is reasonable to assume that they do or reasonable to expect them to do so: many of them will deal with this as part of their standard family asset/tax/inheritance management.

6.27. No to (1) and (4), yes to (2), with needs appropriately confined as per Parts 4/5, or (3) à la Jones – I agree with your discussion at 6.29, but see no justification at all for the alternative approach outlined in n 47.

6.41 Yes, though there is some oddness in legislating on the back of a case law concept. This will inevitably involve giving the sharing principle some express statutory recognition, which in turn may require a view to be taken about its inter-relationship with needs and comp – see discussion above. I would ideally want to treat as non-matrimonial assets acquired after separation, but I can see that that is a messier situation – some such acquests will be generated by endeavour during the marriage, and so only fortuitously arise post-matrimonially. Though of course the same may be said about some early marital acquests: i.e. that they arise from pre-matrimonial endeavour. But rules need to be established, and it would be too easy for spouses to delay the timing of acquests when the relationship is rocky, so it is probably right just to have a rule for pre- and not post-.

6.50 No. Emphatically. To include the FMH automatically as matrimonial property, whatever its source, would be a disincentive for some people to marry at all, would be a disincentive to the owning spouse to allow the family to enjoy the use of a particular asset, would operate unevenly when both have a house and only one is used as the MH, could easily be avoided by the rich by use of family trusts to ensure ownership lay elsewhere, and would in all cases subvert the rationale of the sharing principle in so far as that mandates the sharing of the acquest generated during the marriage by the parties’ presumptively joint efforts: to include the full value of the FMH automatically from day one would be a gold-digger principle. It would also be inconsistent with
the rest of English law’s treatment of the matrimonial home. It is perfectly true that neither can say (6.43) “it is not your home”, but I can certainly say (and a third party can certainly say) “it is not your property”, and that is what we are talking about here – property, and its monetary value. Yes, you have a right to occupy it and can register statutory home rights – but usually only while we are married. You have no right to its capital value. If we thought that your status viz a viz the MH were so important, we would have automatic joint ownership of the MH during marriage – but we do not; you do not even have the right to restrain my actions in dealing with the asset during marriage. Your attachment to it (as a “home”) is emotional and domestic – even if its value is included in the sharing pot, you may very well not be able to keep it or occupy it in specie (which is the only outcome that your emotion-based argument logically supports). If its value has to be shared, that may simply result in its sale, and then neither of us gets to keep it. Remember, we are only talking about this at all in a case that is not a needs-based case. So you are already being amply provided for. You do not get to plunder this asset just because I happened to allow us to use it as a shared home while we were together; and no amount of decorating and cushion-buying on your part can help you – cf substantial increases in value caused by your investment in the property. The concern that because we are not investing in a matrimonial home together may mean that we are not investing in anything together is I think unsound: if we are not a needs-based case, there are clearly lots of other assets swilling around that are available to be divided. If there weren’t, we would be a needs-based case, and the argument would not even arise. (If under a new scheme in future there is no property to share and we have to conduct the case through spousal support and occupation orders, so be it – then we need to focus on the extent of spousal support provision.) Ditto the implicit reference at 6.49 to those who cannot afford to access discretion: if they can’t afford to access discretion (bearing in mind the orders to get me to pay your legal costs, available under LASPO), they are a needs-based case, so again the argument does not arise.

6.59. To include pre-marital cohabitation acquests would either put a lot of weight on the concept of “seamless cohabitation” (if that is what we would want) or (perhaps unjustifiably) incorporate a lot of assets independently acquired at a time when we were not fully committed to our relationship, and require tricky evidence about exactly when cohabitation started. That one party acquired the property in his or her sole name even during cohabitation may indicate a desire at that stage to maintain some independence, particularly where that property was the shared home (cf where the sole nature of the acquisition can be explained on tax grounds – e.g. of course we both invest independently in ISAs etc so that tells us nothing about our mutuality) . As you say, the issue will arise most starkly in long-term-ultimately-civil-partnership cases: but whilst some of those will indeed have been fully committed long before CP, it would be wrong to assume that of all cases. So seamless cohabitation seems to be the better requirement, but that may be difficult and costly to administer as a test: when did the cohabitation commence at all, at what point did it become seamless? Part of the issue here is where you want the onus to lie: should it be for the non-owner to argue for its inclusion, and so to have to prove the seamlessness, or the other way around? It may be cleaner simply to set the clock running from the date of marriage. To include this class of pre-acquired property in the pool necessarily makes these cases closer to full community rather than community of acquests.
6.65 I would say that use of the income from investments to support the family is in the same category as use of a house for occupation as the shared home: neither should alter the status of the underlying capital value.

6.77. Yes. I agree that it would be unrealistic and potentially undermining of relationships to set up rules which require owner-spouses artificially to shelter some of their assets from family enjoyment as the means of protecting them from sharing. I support all of your analysis in 6.76, including n 87, and 6.78, but I do not agree with n 86.

6.87 No. Your analysis at 6.81 is of course right, but then I fear you lose the thread. The mere fact – at 6.82 – that I happen to invest in a different type of property (cue ghastly arguments about what “type” means here) should not of itself automatically mean that I’m changing its matrimonial status. I may simply have been advised that asset class x is looking better than asset class y as a long term bet, so I reorganise my asset portfolio accordingly. I do not know what you mean by “to invest in the family” in 6.82 – it’s a rather throw-away expression. That I invest in something not (just) because it’s a better investment but because we will also get to enjoy it together, eg as a holiday home or a painting on the wall or even because it will generate extra income for us to enjoy, is not a sufficient argument for saying that I’m effectively transferring the capital value to you. To argue otherwise is inconsistent with your position on the FMH, with which I’ve agreed above. I accept your point at 6.85 about tracing, but that is a rather different situation from my acquiring a solely owned asset, even one I let you enjoy while we are married. I disagree with 6.86.

6.88 Yes. And I agree that it is fair in the instance outlined by you towards the end of 6.89 to put the onus on the parties to create an agreement in that situation to preserve the owner’s position.

6.100. This is I think the hardest question, but agree that some effort should be expended to create a set of rules to ensure consistency (if some degree of arbitrariness) rather than rely on ad hoc judicial decision.

I agree with all your analysis on p 108 and into para 6.96. I am troubled by the case where the owner spouse’s livelihood is based not simply on personal earning capacity but depends on a particular asset base, eg a farm. It seems to me appropriate for the non-owner to share in the income (as appropriate) under spousal support rules, but not to be able to invade the underlying assets that generate that income. Yes, this carries the danger that the owner can seek to minimise his income by ploughing as much profit as possible back into the asset base. But to require sharing of this capital will dramatically undermine that spouse’s earning capacity in a way that he or she will not straightforwardly be able to recoup in the market place, and unfairly burdens those spouses whose earning capacity happens to have that sort of capital underpinning that can be shared in a way that personal earning capacity simply cannot. Of course, we are only having this discussion at all because the business was pre-acquired and not one built up during the marriage...Perhaps that is a relatively arbitrary distinction that we just have to accept...

Things naturally get much murkier as soon as we get into 6.97 territory... Some sort of reimbursement/shared in increase of value seems inevitable, despite the evidential troubles that will generate.
Part of the answer to this conundrum may lie with the burden of proof: that the default position should be that everything is matrimonial property until it is proved to be otherwise, whether that is simply by reference to timing or source of acquisition, or whatever the relevant rule demands. That is the position taken, I understand, by the continental regimes. It will undoubtedly be costly to litigate this sort of factual dispute, but I can see no way of avoiding that if we are to draw lines between matrimonial and non-matrimonial property. And since we are by definition dealing here only with the highest value cases, that is perhaps acceptable? On the other hand, however, if we are in future to move to a system which takes as its starting point something akin to a deferred community of acquest, supplemented by spousal support, such disputes might become more widespread – though reduced capital sharing might simply have the effect of boosting the amount of spousal support required under whatever formula were eventually adopted, so that may reduce incentives to argue the point.
RESPONSE TO

LAW COMMISSION PAPER No 208

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS
: Supplementary Consultation Paper (SCP) (Part II)

BY

FAMILY LAW SOCIETY
### Your details

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<th>Name:</th>
<th>George Piskor (author)</th>
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<td>[REDACTED]</td>
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<td>Brian Hitchcock</td>
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<td></td>
<td>Coordinator</td>
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<td></td>
<td>CV4 9SL</td>
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<td><strong>Telephone number:</strong></td>
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**Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):**

Family Law Society  
(see address above)

**If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:**

**As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.**
PHRASED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

Agree.

The consultation document sums up the situation perfectly in para 4.107: that “the current law, based as it is upon a mix of mutually inconsistent principles, is not a sustainable policy choice for the future.”
7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

We feel the question in unnecessarily constrained in choices While the stated choices may be “obvious” to the Law Commission, the Commission itself recognises in para 4.105 there may be other alternatives which, with due respect, may be more obvious to others. We feel the Law Commission may have unwittingly undermined the range of viable options and desirable principles in this regard.

Every English-speaking jurisdiction among developed countries has characterised spousal support as “vague” and “arbitrary”. This stems from the specification of evaluative factors without provision of any rationale for doing so.

Jurisdictions like Canada which have attempted “advisory” guidelines have essentially implemented an illusion of legal legitimacy as the formula, based on acknowledged arbitrary results, is by definition similarly arbitrary. At best, the formula defines the upper and lower bounds of experienced arbitrariness within which courts will continue to produce arbitrary judgements.

The ALI formula, savaged by the AAML critique among others, provides a case study of the fallacy of defining any formula without rationally-connected principles.

As the Commission itself has noted, solutions must follow principles, which is why we deem this question to be premature in the absence of underlying stated principles.

It seems self-evident that the failure of any country to provide a rational approach to spousal support to date strongly suggests that the fundamental and largely universal jurisprudential foundations of “needs, compensation, and sharing” need to be critically re-examined with a view to eliminate contradictory principles. Presumably this is what the Law Commission had in mind in para 4.22: “What is wanted is a fresh policy direction for the law on spousal support.”, all the more so as not one of the multiplicity of theories proposed has been subjected to any quantitative analysis to

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ascertain its prospective merits.

Indeed, there may be no basis for continuing spousal support as the Law Commission noted in para 4.69:

“The problem was similar to what occurred in the US and is familiar here: 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. ”

In short, this question regrettably places the cart before the horse. Consequently, options (1) and (2) are both equally valid and invalid, as well as being overinclusive and underinclusive, in the absence of underlying principles.
7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

We agree that the stipulated items constitute a portion of the determinants in any financial settlement, or portion thereof.

A more comprehensive list of relevant factors from a Law & Economics perspective is:

- Relative contribution based on market earnings and participation by spouses
- Relative contribution based on economic equivalent of non-market (i.e. domestic labour) earnings and participation by spouses
- Opportunity costs based on pre-relationship earnings and earnings during relationship
- Depreciation factors for changes from pre-relationship to relationship career, either market-based or domestic
- Savings rate as determinant of Standard of Living (SOL) and wealth accumulation
- # of dependents
- Duration of relationship
- External market factors (i.e. rates of return on human capital and savings)

Modelling\(^2\) indicates that economic “fair division”, which includes property settlement and spousal support, is generally most sensitive to the following ordered list:

- Relative earnings ratio of spouses (both market and non-market valuation)
- Savings rate as determinant of consumption-based SOL and wealth accumulation
- Number of dependents
- Duration of relationship
- Opportunity costs of career change required by specialization of labour in the relationship

\(^2\) Piskor WG, “Quantitative Determination of Fair Division & Alimony in Relationship Dissolution”, CORS/MOPGP ’12 Conference (Niagara Falls, Canada), presentation attached as separate copy [Piskor]
Depending on the mix of relationship parameters noted above, this allows determination of fair division for each of the spouses. The graph below illustrates the percentage “fair division” for the lower earning spouse on the vertical axis plotted against relative earnings of lower to higher earning spouse (with 100% being equal earnings) on the horizontal axis.

We note that SOL required specification of critical definitional issues relating to equivalent per-capita consumption and wealth. This can be best illustrated via example. Using OECD scales for equivalent adult units (1 for first adult, .5 for second adult and .3 for each child), assume a household with 1 child with spouses earning 100 and 50 respectively with no savings (i.e. no accumulated wealth)

In this case, SOL = (100 +50)/( 1+.5+.3) = 83.3 per capita

Now assume the same family has an annual savings rate of 20%. In this case, the consumption-based SOL becomes SOL = (1-.2) (100 +50)/( 1+.5+.3)= 66.7.

It is evident that a purely consumption based definition of SOL ignores the “latent” SOL available via accumulated wealth based on external rates of return on invested savings. It also ignores the duration of the relationship and life-cycle annual SOL.
enjoyed. Most financial settlements result in some form of double-dipping as they typically base the SOL calculation on the full earnings (i.e. SOL=83.3) for purposes of spousal support and treat accumulated wealth as an independent factor. This is clearly not the case.

We suggest that it is critical to define “standard of living” appropriately as a precondition of equitable consideration. We propose adopting standard financial engineering methodology used by business valuators, in which case the Life Cycle “well-being” (WB) would be the total of the life-cycle SOL expressed as a Net Present Value (NPV) lump sum plus accumulated net worth (i.e. assets minus liabilities).

We concede this is a more complex “equitable distribution” formulation, but posit this should not pose an issue in the era of computers.

We propose the following axiomatic principles:

1) Relationships will be evaluated purely as contract, and not status

2) As in any contractual relationship, obligations by one party to another shall be treated as debt. Debt may reflect economic assessment of: unequal contributions, opportunity costs, sacrifices incurred during the relationship, truncated investments by one party in the other.

3) All financial calculations will be done in accordance with accepted business valuation methodologies to arrive at the best answer with a specified confidence level.

4) Property Division, spousal support, and child support are interrelated components that must be calculated as an integral whole at dissolution.

5) Equity and Social welfare (i.e. “needs”) are conflicting concepts and must be separately determined. The former relates to private law, the latter to public law

The above axiomatic principles allow lump sum (post-tax) contractual settlements to be derived which may be optionally structured to be discharged over time in whole or in part.

Using the above principles, spousal support would be determined as separate components in equity and need calculation. The former would constitute lump sum
debt in the event of insufficient wealth at dissolution to discharge inter-spousal debt obligations; the latter could be performed by a statutory needs based welfare formula payable by one spouse and/or state depending whether spousal welfare is treated as a private and/or public obligation.

We illustrate the above principles with the following example of Financial Settlement on divorce for a couple, Mr. & Mrs. (L)ower and (H)igher Earner. In this instance, the assessed Net Property Wealth of 16 units is determined to be 7 units of debt and 23 units of assets by L and H respectively. Under community property rules a transfer of 15 units is required (Line D) to achieve Property Equalization (Line E).

<table>
<thead>
<tr>
<th>Line</th>
<th>Calculation</th>
<th>L</th>
<th>H</th>
<th>Total</th>
<th>Gov't</th>
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<tbody>
<tr>
<td>A</td>
<td>Assets</td>
<td>5.0</td>
<td>21.0</td>
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<tr>
<td>B</td>
<td>Liabilities</td>
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<td>2.0</td>
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<tr>
<td>C</td>
<td>Net Wealth</td>
<td>A+B</td>
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<td>23.0</td>
<td>16.0</td>
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<tr>
<td>D</td>
<td>Balance Required</td>
<td>(H-L)/2</td>
<td>15.0</td>
<td>-15.0</td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>Property Equalization</td>
<td>C+D</td>
<td>8.0</td>
<td>8.0</td>
<td>16.0</td>
</tr>
<tr>
<td>F</td>
<td>Property balance</td>
<td>D</td>
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<td>-15.0</td>
<td>0.0</td>
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<tr>
<td>G</td>
<td>Debt:inter-spousal</td>
<td>-20.0</td>
<td>20.0</td>
<td>0.0</td>
<td></td>
</tr>
<tr>
<td>H</td>
<td>Total Equalization</td>
<td>F+G</td>
<td>-5.0</td>
<td>5.0</td>
<td>0.0</td>
</tr>
<tr>
<td>I</td>
<td>Disposition (Lump sum)</td>
<td>negotiation</td>
<td>-2.0</td>
<td>2.0</td>
<td>0.0</td>
</tr>
<tr>
<td>J</td>
<td>Lump sum</td>
<td>negotiation</td>
<td>-3.0</td>
<td>3.0</td>
<td>0.0</td>
</tr>
<tr>
<td>K</td>
<td>Spousal Support- equalization</td>
<td>negotiation</td>
<td>-2.0</td>
<td>2.0</td>
<td>0.0</td>
</tr>
<tr>
<td>L</td>
<td>Total Equalization</td>
<td>H</td>
<td>-5.0</td>
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<td>0.0</td>
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<tr>
<td>M</td>
<td>Spousal Support Calculation</td>
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<tr>
<td>N</td>
<td>Spousal Support- &quot;Equalization&quot;</td>
<td>K</td>
<td>-3.0</td>
<td>3.0</td>
<td>0.0</td>
</tr>
<tr>
<td>O</td>
<td>Spousal Support-&quot;Need&quot; (Joint public/private)</td>
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<td>10.0</td>
<td>-5.0</td>
<td>0.0</td>
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<td>P</td>
<td>SS- Lump Sum</td>
<td>7.0</td>
<td>-2.0</td>
<td>0.0</td>
<td>-5.0</td>
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<tr>
<td>Q</td>
<td>SS-term ( years)</td>
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<td></td>
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<tr>
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<td>SS- annuity rate (% APR)</td>
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<tr>
<td>S</td>
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<td>0.124</td>
<td>-0.035</td>
<td>0.000</td>
<td>0.089</td>
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</table>

In addition, a secondary equalization calculation is required to determine relative contributions, opportunity costs, and sacrifices made by both spouses which constitutes inter-spousal debt. These calculations would be performed as per the attached file referenced in [Piskor] to yield Line G resulting in the final equalization of Line H.
It is agreed between the spouses that the 5 units of equalization payable by L will be done via 2 units of lumps sum payment (Line J) and 3 units of equalization spousal support (Line K) payable over time at the prevailing interest rate.

With equitable division reached, we turn next to examining any “Need” component of spousal support. For purposes of illustration, we assume that family law recognises “need” and that it is determined via an offline formula with lump sum equivalent of 10 units to be shared equally by H and the Government (Line O). The net equivalent lump sum of the two spousal support components is shown in Line P where L will receive 7 units payable 2 from H and 5 units by the government.

Assuming a specified 5 year term at a stipulated 2.5% interest rate, it remains to convert the lump sum spousal support into monthly payments of .035 and .089 units respectively for H and the government payable over 60 months. The calculations are done using a standard annuity formula.

In summary, L pays H 2 units of partial property settlement (Line J) and receives monthly spousal support payments of .124 units for 60 months as blended payments from H and the government as co-pays in the assumed joint scheme.

To our knowledge, this represents the first instance of a rationalised financial settlement calculation for property and spousal support issues that formulaically incorporates issues of relative spousal contributions (both economic and domestic), opportunity costs, and career sacrifices. We propose to publish our proposal for divorce valuation in 2013.

While there is some underlying mathematical complexity, these calculations can be readily performed in a standardised spreadsheet. What is important to divorcing spouses is to understand the underlying equitable concepts that have formed the basis of family law for at least two decades but have not been quantified to date.

We would be pleased to make a custom presentation expanding our proposal at your invitation.
7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

Our strong preference is for a formulaic approach, openly developed, and certified by an accounting or actuarial body as being appropriate within a determinable error margin. The model can be automated for use by lawyers or accountants on personal computers.

Financial settlement, or any component thereof, in essence constitutes a business valuation of the family no different than that required for small businesses. Fairness and equity requires that the same level of stringency be utilised in dissolution. A reformed discretionary approach would simply serve to perpetuate the openly acknowledged unfairness of the current approach.

At heart, once principles are defined as proposed in para 7.4, this becomes an accounting rather than a legal issue. The challenge is to define appropriate principles.

We note that the separation of spousal support into equity and private welfare components raised public policy issues whether individuals should bear the welfare burden of what is arguably a state responsibility.
7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

Within the context of principles laid out in para 7.4, and the implications of downloading state welfare obligations (i.e. needs) to individuals discussed in para 7.5, we posit that it is a state responsibility to fund spousal independence post-dissolution as a form of standard employment retraining and/or job-seeker allowance.
7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

(1) Our suggestion is that a government-led independent multidisciplinary law & economics committee of academics without judicial representation would be the most appropriate vehicle. Based on historical experience with purely legal committees such as the ALI, it is reasonable to draw the conclusion that the legal profession generally lacks the economics/financial/actuarial/accounting skills required to solely formulate an equitable and practical approach. We suggest a government-led committee as there is an overriding requirement to define a public policy rationale for spousal support (if any), as well as to deal with examination of post-dissolution government support for spouses to reintegrate with the labour force, much as is the situation with retraining and employment programs. We do not recommend judicial involvement as the views of the judiciary are evident from unprincipled and inconsistent case law found in all jurisdictions.

(2) We propose the following methodological approach:

a. Public Policy – alternatives and recommendation for spousal support rationale (if any). In our view this will require consideration of the following issues:

- **Equity vs Need:** We posit that equity and need (i.e. social assistance) are conflicting issues within private law. By definition, once equity is reached, then any private “need” contributions beyond that point make dissolution inequitable.

- **Public vs Private law obligations:** The equity vs need issue may also be framed in terms of private vs. public spheres of responsibility respectively.

- **Examination of historical contract vs status view of relationships:** Fundamentally, what justification is there for ascribing status to relationships in a pluralist, secular society in which spouses- unlike the couverture era- are autonomous and co-equal individuals.
b. **Principles:** The Public Policy phase should lead to fundamental principles.

We believe the principles should be (as per question 7.4):

- All financial calculations will be done in accordance with accepted business valuation methodologies to arrive at the best answer with a specified confidence level.
- Property Division, spousal support, and child support are interrelated components that must be calculated as an integral whole at dissolution.
- Equity and Social welfare (i.e. “needs”) are conflicting concepts and must be separately determined.
- In any no-fault regime in which damages for breach are not obtainable, it follows that relationships must be assessed solely as terminating “contracts” with no residual rights attributable to relationship “status”.

c. **Analysis:**

- Create data base of historical settlements for property division, spousal support, child maintenance, legal costs indexed by spousal earnings, duration, gender, regional court, etc. to serve as reference baseline.
- Create statistical models (i.e. regression analysis) of as-is situation to derive the driving variables and their statistical significance in current policy.
- Using data base, simulate the impact of proposed alternatives and recommended policy.

d. **Polling:** Conduct survey of public attitudes and preferences to policy alternatives.

e. **Report to Government**

f. **Public Consultations**

g. **Legislation/Regulation**

(3) We suggest 18 months to prepare the Report to Government. We leave estimated costs as an exercise better performed by public servants.
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:

- to live at the same standard as he would have lived during the marriage, and if so for how long?
- to as much as he needs to relocate and to start again as a single person?
- to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments

I) Proposed Model

We enclose as separate PDF file presentation entitled “Quantitative Determination of Fair Division & Alimony in Relationship Dissolution” illustrating proposed solution methodology.

The solution methodology calculates “fair” division based on relative spousal contributions (both economic and household labour), opportunity costs, and career sacrifices based on standard of living and accumulated wealth. In our model “fair” is synonymous with equitable and excludes “need” (i.e. social assistance). Once property distribution is achieved, spousal support can be viewed as a conversion of some portion of the property distribution lump sum to an annuitised cash flow over a desired time period. If there is no accumulated net wealth as occurs in about 40% of marriages, there is no property distribution, and hence lump sum available for conversion to annuitised cash flow. In essence, the model calculates a “clean break” partnership dissolution, but leaves child maintenance as a separate exercise.

We view the “need” component as a state responsibility in the same vein as
retraining, relocation or unemployment benefits. However, should state laws mandate private welfare, the privately paid “need” component would be specified in regulations commensurate with state programs. It may be that the “need” component is jointly shared as a private/public responsibility. Note that the proposed model recognises career loss as a a compensable issue as part of property division.

II) Response to Case Studies

A. Should Michael be entitled:

- to live at the same standard as he would have lived during the marriage, and if so for how long?

  Continuation of marital standard of living (SOL) by one spouse is one mathematically possible by having the other live at an SOL below the marital SOL, and is therefore discriminatory. The premise of continued marital standard of living is based on the false premise that two households can live at the same economies of scale as a joint household. We reject this scenario out of hand.

  Furthermore, once equitable property distribution is reached, each spouse is responsible for their own well-being, subject to additional calculation for child maintenance. Should separate households commence before finalization of property distribution, each spouse may make a draw against final distribution, assuming the level of net worth at dissolution is projected to be adequate.

- to as much as he needs to relocate and to start again as a single person?

  Relocation is strictly a personal life style decision to be funded by proceeds from property distribution, and not by the other spouse. Once again, this goes to the issue of separation of equity and “need”.

- to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

  As above, this is a “need” issue. Each spouse is responsible for their own well-being post-separation based on equitable property distribution.

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

  As stated above, any “need” component is redundant once equitable distribution has been attained. Once party may wish to draw a cash advance against property distribution entitlement.

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

  Presumably Chris and Pat should have had the foresight to carry appropriate Accident, Life & Disability insurance for this eventuality but chose not to do so. The issue here is what degree of self-insurance is implicit in any relationship. In our view, unless agreed beforehand, there is no onus on either party to support the other post-separation, all the more so as the nature of a civil partnership colours the relationship as one of relative independence of lifestyle choices.
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. We posit that it is the obligation of the state as part of constitutional authority over regulated forms of relationships to provide comprehensive and consistent relationship dissolution rules and the means to calculate them.

Our attachment provides one such equitable distribution calculation, and illustrates this Divorce Valuation is a specialised form of a Business Valuation exercise.

E. All current and proposed schemes in common law countries for spousal support duration suffer from arbitrariness due to lack of underlying principles. We believe that any resolution can only be arrived at by first separating the incompatible calculation issues of equitable distribution from “need”.

As mentioned in responses to earlier questions, we feel “need” is a state welfare obligation distinct from equity. However, if a state can constitutionally justify privatisation of welfare, then the “need” component should be stipulated in regulations. Our view is that any entitlement should not exceed the duration of severance pay entitlements allowed under law in order to maintain consistency. We feel this should also be a joint public/private obligation in that scenario.
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

F. Unlike the Victorian couverture era in which women were not legally recognised as “persons”, contemporary liberal democracy is founded of equal recognition of both gender as legal autonomous persons. Legal scholars have been unable to find an acceptable rationale for continuing spousal support in the modern age with pluralistic family norms and increasing “no fault” provisions. We start from the premise that couverture is dead, and that the rationale for spousal support is non-existent.

We believe the indeterminacy of spousal support is due to the belief that the circle can somehow be squared with the incompatible notions of “equity” and “need”. In our view, the former is a matter of private law, while the latter is an acknowledged state obligation. In our view, the state has violated constitutional norms of a democracy by privatising welfare obligations post-dissolution whereas all other life transitions are supported by the state.

However, to the extent that a state can justify privitisation of welfare, we believe it should be based on standard provisions for severance pay under labour law, and furthermore, that the state should undertake to subsidise any payments resulting.

G. We reject post-dissolution marital standard of living as discriminatory as this can only be achieved by the paying spouse being denied that same standard of living. This is simply a mathematical reality that two households can not live at the same standard as one. (unless one posits there are no economies of scale in doing so which contradicts all known economic literature).

H. Beyond child maintenance, we do not believe spousal support is applicable. While the literature notes that the residential parent has less opportunity for economic gains, it also ignores the intangible benefits of being a parent. On balance, we feel that the tangible economic loss is offset by intangible benefits of self-actualisation of parenthood.

I. Neither party has “entitlement” to continue living in the family home unless they pay market value rent to be calculated in property distribution.
IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

   (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

   (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

   (c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

   Supplementary Consultation Paper, Part 5, paragraph 5.62

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(1) Disagree. As stated earlier, the fundamental issue underlying spousal support lies in the recognition that equity and needs are contradictory if treated simultaneously. We suggest the attempt to do so in the modern era is the reason no theory of spousal support (aka alimony) has been developed to date. By separating equity from need, a two stage process can logically take place. First, equitable property distribution can be achieved with a portion of
the resulting lump sum (if any) being eligible for conversion to spousal support as an annuitised cash flow. Secondly, should there be legitimate “need”, as defined by existing statutory provisions, then the spouse can be enrolled in existing state programs.

The fundamental statutory change required is to eliminate “need” from current family law provisions as a private responsibility, and instead define it as a state responsibility.

(2) See (1)

(3) See (1)

(4) If statutory reforms in (1) made, no further guidance is required as ex-spouse in deemed “need” would apply under existing state programs.

(5) No comment.
7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

See (1) in response to Q. 7.8

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

See (1) in response to Q. 7.8

If “need” is appropriately defined as state obligation, then this question becomes a non-issue.
NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

Agree. Furthermore, any gains from non-matrimonial property would likewise be excluded as a matter of definitional consistency.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

Yes, if acquired prior to marriage.

In the event of comingled matrimonial home, best effort basis to segregate matrimonial and non-matrimonial components using Business valuation techniques would be required.
<table>
<thead>
<tr>
<th>7.13 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.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes, under cohabitation, separate property regimes are automatically assumed unless contractually specified otherwise. Resultant and constructive trust interpretations would not apply.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>7.14 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?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agree. Furthermore, in event of dissolution, owner would be entitled to recovery of deemed rent as a matter of equitable distribution, unless otherwise agreed contractually.</td>
</tr>
</tbody>
</table>
7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Disagree. Non-matrimonial property and its subsequent mutation over time should retain its original status (including accrued gains) unless otherwise explicitly agreed between the parties.

We recognise this may yield to difficulties of comingled assets, but this is not an intractable issue.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Disagree. Non-matrimonial property and its subsequent mutation over time should retain its original status (including accrued gains) unless otherwise explicitly agreed between the parties.

We recognise this may yield to difficulties of comingled assets, but this is not an intractable issue.
7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

This is a standard comingling situation that can be treated as deemed shares repatriatable upon dissolution as per standard Business valuation techniques.
Quantitative Determination of Fair Division & Alimony in Relationship Dissolution

George W. Piskor SM, MA Sc, P Eng
Quantitative Determination of Fair Division & Alimony in Relationship Dissolution

- Setting the Scene
- “Fair Division” of Property Model
- Example
- Alimony
- Summary
- Taking it Further
Setting the Scene

- Divorce: 40-50% probability (30 yrs)
- Separation: 2-4 X divorce rate
- Social Cost: ~ 6-8% GDP
- Financial Settlement
  - Property Division + Child Support + Alimony
  - Varies by Jurisdiction
  - Significant Judicial Discretion
  - Relationship Dissolution Statistics not captured
# Financial Settlement in Dissolution ~ Brownian Motion

<table>
<thead>
<tr>
<th>TOPIC</th>
<th>LEGAL MODELS/GUIDELINES</th>
<th>STATE OF THE ART</th>
</tr>
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<tbody>
<tr>
<td>Child Support</td>
<td>• POOI (Percentage of Obligor Income)</td>
<td>• Most Evolved</td>
</tr>
<tr>
<td></td>
<td>• Income Shares</td>
<td>• But, 50% still discretionary</td>
</tr>
<tr>
<td></td>
<td>• Cost Shares</td>
<td></td>
</tr>
<tr>
<td>Property Division</td>
<td>Two dominant “Theories”</td>
<td>• Aspirational “theories “only</td>
</tr>
<tr>
<td></td>
<td>• Community Property (Horizontal equity)</td>
<td>• Undefined principles</td>
</tr>
<tr>
<td></td>
<td>• Equitable Division (Vertical equity)</td>
<td>• No quantitative models except 50:50</td>
</tr>
<tr>
<td></td>
<td>• But exception conditions (eg. short duration, hi-lo earnings)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Conflicting Judicial Principles</td>
<td></td>
</tr>
<tr>
<td>Alimony (Spousal Support)</td>
<td>• Conflicting Judicial Principles overlapping with Property Division</td>
<td>• “arbitrary”</td>
</tr>
<tr>
<td></td>
<td>• “Theories” – contractual, compensatory, rehabilitative</td>
<td>• Least defined</td>
</tr>
<tr>
<td></td>
<td>• Legal Community searching for “Theory”</td>
<td></td>
</tr>
<tr>
<td>Financial Settlement</td>
<td>• FS = CS + PD + SS ???</td>
<td>• Law of equity applicable but not discernable</td>
</tr>
<tr>
<td></td>
<td>• Typically treated standalone components</td>
<td>• Known problem but no solution to date</td>
</tr>
</tbody>
</table>

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CORS/MOPGP '12  Quantitative Determination of Fair Division & Alimony in Relationship Dissolution
CHALLENGE: Dissolution Valuation (DV) as rigorous as Business Valuation (BV)

Core Issue: Quantitative Model to PD & SS

Key Legal Principles:
- Relative Contributions - i.e. paid and unpaid labour
- Opportunity Costs – e.g. foregone career
- Hardships Endured
- Needs & Means (more so for SS)
- Law of Equity must be respected

Objective: Provide PD & SS Models
1) ENGINEERING ECONOMICS AS STANDARD BV TOOL
   • Convert temporal variability to equivalent value statics to facilitate comprehension and calculation

2) EQUIVALENCE SCALES TO MODEL FAMILY SIZE

3) RELATE VERTICAL EQUITY TO HORIZONTAL EQUITY USING OFFSETS

4) ADOPT PER CAPITA LIFE CYCLE WELL-BEING AS FUNDAMENTAL BASIS OF MEASUREMENT
   • SOL(consumption) + Wealth (deferred consumption)

5) MAJOR ASSUMPTIONS
   • Property Division based on Parents as Contributors
   • Contingent Liability for Child Support treated as separate issue
   • Domestic Tort calculation for hardship/suffering excluded
Property Division: Fundamental Model

1) “Fair Division” for (L)ower Earner

\[ F_L = \frac{WBC_L}{WB} \]
\[ W_L = F_L W \]

\( W = \) Net Worth at Dissolution
\( L, H = \) Lower/Higher Earner

2) Differential Contribution Portion (WBC)

\[ WBC_L = .5WB - OFFSETS \]
\[ WBC_H = .5WB + OFFSETS \]

3) Per Capita Well Being (WB)

\[ WB = LSOL + Wpc \]

\( LSOL = \) Life Cycle SOL
\( Wpc = \) Per Capita wealth of contributors
Well-Being: \( WB = LSOL + Wpc \)

**Life Cycle SOL~per capita consumption**

\[
LSOL = FF(i_e, T) \ E[(1 + b)(1 - s) + u]/[1 + a + c]
\]

- \( E \) = equivalent annual earning of higher earner
- \( b \) = earnings ratio
- \( s \) = savings fraction
- \( a \) = equivalence scale for second adult (=.5)
- \( c \) = equivalence scale for children ( @ .3/child)
- \( i_e \) = discount rate for earnings = CAGR
- \( T \) = duration of relationship

**Per Capita Wealth ~ per capita deferred consumption by contributors**

\[
Wpc = W/[1+a] = FF(i_w, T) \ sE[1+b]/[1+a]
\]

- \( i_w \) = discount rate for wealth accumulation ~ WACC

**Domestic Labour Portion**

\[
u = v[D/E] + [1-v] [(1+b)/2]
\]

- \( v \) = weighting factor for housekeeping labour and social/cultural labour/interaction
- \( D \) = market value of Housekeeping services

**Financial Factor**

\[
FF (i,T) = FV(i,T) \ NPV(i,T)
\]
OFFSETS

OFFSETS = Differential Contributions + Opportunity Costs + Career Rehabilitation Cost

**Differential Contributions** = Economic + Domestic

\[ FF(i_e, T) \ E \left[ \frac{(1-b)}{2} \right] + FF(i_e, T) \ u_E[.5- u_L] \]

\[ u_L = \text{Fraction of domestic labour performed by lower earner} \]

**Opportunity Costs** = \( OC_H + OC_L \)

\[ \{ FF(i_e, T) \ E/(1+a) \} \ \ast \ \left[ \text{MAX}(0, a-b) - \text{MAX}(0, (b'-b) - (1-ab')) \right] \]

\[ b' = \text{pre-relationship earnings ratio of lower earner} \]

**Note:**
1. “Marrying down the scale” - If economies of scale of relationship do not outweigh earnings ratio, higher earner suffers opportunity costs.
2. “Foregone Career earnings loss” – If relationship earnings during relationship are lower than pre-relationship earnings, lower earner suffers opportunity costs.

**Career Rehabilitation Cost** = \[- r \ b' \ E \left[ 1- (1-x)^T \right] \ \text{if } b' > b\]

\[ r = \text{factor of higher earnings for re-qualification and living costs} \]
\[ x = \text{annual skills depreciation rate} \]
Fair Division (Lower Earner) – Putting It all Together

Fair Division for Lower Earner by Earnings Ratio

<table>
<thead>
<tr>
<th>a</th>
<th>n</th>
<th>c'</th>
<th>E($K)</th>
<th>b'</th>
<th>r</th>
<th>x</th>
<th>D($K)</th>
<th>v</th>
<th>uL</th>
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<tr>
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<td>44</td>
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<td>0.1</td>
<td>30</td>
<td>0.67</td>
<td>0.75</td>
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<td>14</td>
<td>2.0%</td>
<td>5.0%</td>
<td>15.0%</td>
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Fair Division for Lower Earner by Earnings Ratio
with career change

-10%  0%  10%  20%  30%  40%  50%  60%  70%  80%  90%  100%
earnings ratio

95% - pre
50% - pre
0% - pre
Individual Offsets to Fair Division by earnings ratio

<table>
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<tr>
<th>a</th>
<th>n</th>
<th>c'</th>
<th>E(SK)</th>
<th>b'</th>
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<th>x</th>
<th>D(SK)</th>
<th>v</th>
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<td>14</td>
<td>2.0%</td>
<td>5.0%</td>
<td>15.0%</td>
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</table>
Fair Division (Lower Earner) – Major Drivers are Economic and Domestic Labour

![Graph showing earnings ratio and community property distribution]

- **Community Property** = Equitable Distribution Point
- **“Free Rider” Zone**
- **Contemporary Dual working parent zone**

<table>
<thead>
<tr>
<th>a</th>
<th>n</th>
<th>c'</th>
<th>E($K)</th>
<th>b'</th>
<th>r</th>
<th>s</th>
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CORS/MOPGP '12  Quantitative Determination of Fair Division & Alimony in Relationship Dissolution 13
### Property Division-Sample Calculation
(Assume Typical Net Worth Statement & Historical data)

#### STEP 1: INPUT

<table>
<thead>
<tr>
<th>Variable</th>
<th>Value</th>
<th>Description</th>
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<tr>
<td>a</td>
<td>0.5</td>
<td>Family economy of scale factor</td>
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<tr>
<td>c'</td>
<td>0.3</td>
<td>Child equivalence scale</td>
</tr>
<tr>
<td>n</td>
<td>1</td>
<td># of children</td>
</tr>
<tr>
<td>D (SK)</td>
<td>30.0</td>
<td>Housekeeper ann salary</td>
</tr>
<tr>
<td>v</td>
<td>0.67</td>
<td>Housekeeping as fraction of dom. labour</td>
</tr>
<tr>
<td>x</td>
<td>10.0%</td>
<td>Ann. Deprec. Rate for &quot;L&quot; career skills</td>
</tr>
<tr>
<td>r</td>
<td>0.75</td>
<td>retrain. Cost as factor of career salary</td>
</tr>
<tr>
<td>T (yr)</td>
<td>10</td>
<td>Duration of relationship</td>
</tr>
<tr>
<td>u_L</td>
<td>0.75</td>
<td>Fraction of dom.lab. Performed by L</td>
</tr>
<tr>
<td>W (SK)</td>
<td>139.0</td>
<td>Divisible Wealth at dissolution</td>
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#### STEP 2 - FAMILY EARNINGS HISTORY ANALYSIS

<table>
<thead>
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<th>Earner</th>
<th>Year</th>
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<th>Year 2</th>
<th>Year 3</th>
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<td>30.0</td>
<td>32.0</td>
<td>35.0</td>
<td>38.0</td>
<td>40.0</td>
<td>41.0</td>
<td>42.0</td>
<td>43.0</td>
<td>44.0</td>
<td>48.0</td>
</tr>
<tr>
<td>E_L</td>
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<td>20.0</td>
<td>22.5</td>
<td>23.0</td>
<td>8.0</td>
<td>22.0</td>
<td>28.0</td>
<td>25.0</td>
<td>15.0</td>
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</tr>
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<table>
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<tr>
<th>Calculations</th>
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<th>NPV Factor</th>
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<tr>
<td>Total (excluding)</td>
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<td>NPV</td>
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<td>$155.8</td>
<td></td>
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<tr>
<td>NPV Factor</td>
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<tbody>
<tr>
<td>b'</td>
<td>0.67</td>
<td>Pre-marriage earnings ratio</td>
</tr>
<tr>
<td>i_e</td>
<td>0.4%</td>
<td>discount rate for earnings</td>
</tr>
<tr>
<td>E_H (SK)</td>
<td>57.1</td>
<td>Equivalent annual earning for H</td>
</tr>
<tr>
<td>b</td>
<td>0.38</td>
<td>Relationship earnings ratio</td>
</tr>
<tr>
<td>c</td>
<td>0.30</td>
<td>Equivalence scale for children</td>
</tr>
</tbody>
</table>

\[ b' = \frac{20}{30} \]
\[ i_e = \text{via CA6R} \]
\[ E_H (SK) = 405.6 \times 9.8 \]
\[ b = \frac{155.8}{405.6} \]
\[ c = 1 \times 0.3 \]
### STEP 3 - CALCULATE DOMESTIC LABOUR

| u | 0.63 | Domestic labour as portion of $E_H$ | weighted avg formula |

### STEP 4 - FAMILY INVESTMENT HISTORY ANALYSIS

<table>
<thead>
<tr>
<th>Earned</th>
<th>Year</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>Total</th>
<th>NPV</th>
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</thead>
<tbody>
<tr>
<td>$E_H$</td>
<td></td>
<td>$3.0$</td>
<td>$3.0$</td>
<td>$4.0$</td>
<td>$4.0$</td>
<td>$8.0$</td>
<td>$1.0$</td>
<td>$4.0$</td>
<td>$5.0$</td>
<td>$5.0$</td>
<td>$-$</td>
<td>$37.0$</td>
<td>$36.2$</td>
<td></td>
</tr>
<tr>
<td>$E_L$</td>
<td></td>
<td>$2.0$</td>
<td>$4.0$</td>
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<td>$9.0$</td>
<td>$7.0$</td>
<td>$-$</td>
<td>$62.0$</td>
<td>$60.7$</td>
</tr>
</tbody>
</table>

| $s$ | 10.8% | Savings rate | $= 60.7 / 551.4$ |

### STEP 5 - RETURN ON INVESTMENT

<table>
<thead>
<tr>
<th>$W (SK)$</th>
<th>139.0</th>
<th>Divisible Wealth at dissolution</th>
<th>Input</th>
</tr>
</thead>
<tbody>
<tr>
<td>$i_w$</td>
<td>8.45%</td>
<td>Discount rate - accumulated wealth</td>
<td>via Goal Seek</td>
</tr>
</tbody>
</table>
### STEP 6 - CALCULATE OFFSETS AND FAIR DIVISION PERCENTAGE

#### 5B) CALCULATE OFFSET & FAIR PERCENTAGE FOR "L"

<table>
<thead>
<tr>
<th></th>
<th>Value</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>$D_{C_E}$</td>
<td>-0.22</td>
<td>Differential Contribution - economic</td>
</tr>
<tr>
<td>$D_{C_D}$</td>
<td>0.11</td>
<td>Differential Contribution - domestic</td>
</tr>
<tr>
<td>$O_{C_H}$</td>
<td>-0.05</td>
<td>Opportunity Cost -H</td>
</tr>
<tr>
<td>$O_{C_L}$</td>
<td>0.00</td>
<td>Opportunity Cost -L</td>
</tr>
<tr>
<td>$O_{CCL}$</td>
<td>0.03</td>
<td>Career Rehabilitation-L</td>
</tr>
<tr>
<td>OFFSET</td>
<td>-13.3%</td>
<td>Sum of Component Offsets</td>
</tr>
<tr>
<td>+ 0.5</td>
<td>50.0%</td>
<td>Baseline</td>
</tr>
<tr>
<td>$F_L$</td>
<td>36.7%</td>
<td>&quot;Fair Division &quot;Split-Lower earner</td>
</tr>
</tbody>
</table>

### Q.E.D.

### STEP 7 - CALCULATE PROPERTY DISTRIBUTION VALUE FOR "L"

<table>
<thead>
<tr>
<th></th>
<th>Value</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>$F_L$</td>
<td>36.7%</td>
<td>&quot;Fair Division &quot;Split-Lower earner</td>
</tr>
<tr>
<td>W</td>
<td>139.0</td>
<td>Wealth</td>
</tr>
<tr>
<td>$W_L (S_K)$</td>
<td>51.0</td>
<td>Property Division</td>
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</tbody>
</table>
Alimony (Spousal Support)
Slicing Through the Gordian Knot of Arbitrariness

1. Recall typical legal factors:
   • Relative Contributions - i.e. paid and unpaid labour
   • Opportunity Costs – e.g. foregone career
   • Hardships Endured
   • Needs & Means (more so for SS)
   • Law of Equity must be respected

2. But, IF “Fair Division” (FD) of Property is deemed equitable
   THEN any alimony payments over and above violate FD equitability

   Ergo,
   **Alimony can only be equitable as a cash flow offset against lump sum property award.**

3. Otherwise stated:
   • Equity and welfare are null intersecting sets
   • “Needs and Means” is a separate private welfare issue which, assuming constitutional validity in a jurisdiction, should be identified separately as such.
SUMMARY

Two (controversial?) “firsts” in Divorce Valuation:

1. Quantitative model for Property Division developed
2. Alimony rationalized as cash flow offset to Property Division

Implications:

1. Provides basis for uniform approach to Divorce/Dissolution Valuation minimizing need for judicial discretion
2. Allows courts to focus on legal considerations of equity and private welfare separately
3. Promises to reduce Divorce/Dissolution costs
4. Provides heretofore missing framework for Dissolution Valuation debate
5. Provides new business opportunities for lawyers, accountants, and valuators
6. Expands field of Law & Economics
TAKING IT FURTHER

• Technical -Model Refinement
  ➢ Incorporating Taxes (including tax optimization)
  ➢ Sensitivity Analysis (e.g. Monte Carlo)
  ➢ Highlights need for empirical Domestic Labour models

• Legal/Legislative
  ➢ Validity of Private Welfare
  ➢ Testing for legal inclusiveness
  ➢ Reviewing “Feminization of Poverty” rationale

• Commercial
  ➢ Sets the stage for integrated divorce/dissolution calculator services
THANK YOU

• QUESTIONS
• Copy of Presentation/Paper

George Piskor
This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: Law Commission

Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

Name: This response to the Law Commission’s Consultation Paper No 208 on Matrimonial Property, Needs and Agreements is sent on behalf of 12 judges of the Family Division who agree with it. The remaining 7 judges have differing views, or prefer to express no view. Some of them may submit a response of their own.

Email address: c/o

Postal address:
Royal Courts of Justice
Strand
London WC2A 2LL

Telephone number:

Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

As explained above, we will take full account of your explanation but cannot give
an assurance that confidentiality can be maintained in all circumstances.

PRINCIPLED REFORM

7.2 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?

We stated in our response to the First Consultation paper (“the first response”) at para 23:

*We consider that the law at present is sufficiently certain in its application in the vast majority of cases. We also raise concerns that the pursuit of certainty in only one potential element of the discretionary exercise will have its own cost and uncertain consequences whilst the greater the pursuit of certainty the greater the likelihood, on occasion, of “very real injustice”.*

We consider that these words equally apply to the law relating to needs/spousal support (whether to be paid periodically or capitalised).

We do not at all agree that the present law is “based … upon a mix of mutually inconsistent principles” nor that there are present “multiple justifications, which generate inconsistent results”. We question the assertion that the existence of a “variety of explanations” or “rationales” leads to inconsistent results. Different results are not inconsistent if they reflect factual differences. The same applies to different reasoning or explanation; the matters referred to, for example in paragraph 3.31, are not of themselves inconsistent. If they do no more than reflect similar factual differences, we would suggest that they are based on consistent not inconsistent rationales.

We consider that the law is principled and is adequately certain. As explained above, we question the proposition that the presence of more than one rationale means that the law is not principled.

Further, the statistics quoted in para 13 of the first response show that the overwhelming majority (about 95%) of financial remedy cases are settled, and of these the overwhelming majority are not even initially contested. This strongly suggests that the current law is sufficiently certain and properly understood.
In our opinion the law requires the judge, in the exercise of his discretion, to do no more than fairly and holistically to assess needs in the individual case by reference to three simple factors viz:

(1) the respective resources, both actual and potential, of both payer and payee;

(2) the way the parties lived (which encompasses both financial structures and methods, as well as standard of living); and

(3) the length of time they did so.

In order to be able properly to exercise discretion the court must conduct a fact finding exercise in relation to these factors. In a significant majority of cases the objective will be to meet relationship generated needs subject to section 25A of the Matrimonial Causes Act 1973 and the well-established clean break principle (see 7.6 below) But, in order to achieve fairness, in some cases other objectives, as referred to in the Paper, will be justified.

We consider that it would be difficult, if not impossible, to articulate a set of more detailed rules or principles, let alone to devise a formula, to capture the different types of cases where needs fall to be considered. The most that could be done, if reform is to be undertaken at all, is to provide a guide to the exercise of discretion, which guide could perhaps contain a number of starting points. The danger of starting points however is that they risk prioritising their subject matter leading to an unbalancing of the existing discretionary function where none of the statutory matters has any hierarchy.

### 7.3 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?

We do not consider that either of these proposals would improve the current law. We cannot see them making it more certain and we question whether they would better achieve justice.

(1) In our opinion, if reform is to be undertaken at all, it would be highly
retrograde and capable of meting out real injustice if spousal support were confined only to the compensation of loss caused by the relationship. Further, such a reform would undoubtedly lead to an explosion of litigation as to the scope and scale of the compensation claimed.

(2) To single out an objective of **redressing the disparity in lifestyle caused by the divorce or dissolution** again risks unbalancing the existing statutory function and prioritising this aspect over all others.

7.4 In answering the question at paragraph 7.3 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.

All of these factors are already highly relevant in conducting the needs appraisal. There is no hierarchy between them, although, under the existing law, the provision of homes is of central importance. We would also add that a further important consideration under the existing law is to try to ensure that neither party is, nor their children are, thrown onto state support.

7.5 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?

As we have stated, we would not support any specific reform to the law relating to spousal support. However, if there is to be reform we would strongly oppose the imposition of any kind of a formula. The utterly disastrous experiences of the CSA speak for themselves; yet that deals with but a small aspect of a family’s needs.

7.6 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?

The existing law specifically requires such incentives to be incorporated in an award, where appropriate: see s25A MCA 1973. As Sir Mark Potter P stated in VB v JP [2008] 1 FLR 742 at para 59 “a clean break is to be encouraged wherever possible”.

But this admirable principle has to yield in so many cases to practical reality. The combination of age, length of marriage, and duration out of the work place renders, in very many cases, an ambition of independence to be impossible.

Reflection of this practical reality suggests that the law in this regard cannot be improved. Indeed were a more rigorous version of s25A to come into being the injustice (in Scotland) referred to by Lord Hope in Miller would likely translate south of the border (see para 22 of the first response).

7.7 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?

If a new approach is to be promulgated we consider that an interdisciplinary working party operating under the auspices of the Family Justice Council is the best way forward.

IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

(1) As stated above we would oppose this proposal. We believe the law presently strikes a fair balance within s25A.

(2) – (5) We can see the potential advantages of guidance. We consider that if any future guidance is to be promulgated it should be in the form of Practice Guidance formulated by the FJC Working Party referred to above and endorsed by the President. We support publication on the new hub.

7.9 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.

Given the ever increasing prevalence of self-represented litigants we consider that a clear statement of the current principles should be formulated by the FJC Working Party and expressed in Plain English. This should achieve the ends of consistency,
predictability and accessibility.

7.10 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.

We think that it would be impossible to prescribe a minimum level of support from which it should be impossible to contract. How would it be fixed? By reference to the national minimum wage? Average earnings? Social Security levels (as the original CSA formula attempted)? Were such a minimum to be prescribed we are convinced that the injustices referred to by Lord Hope would become a reality here.
NON-MATRIMONIAL PROPERTY

7.11 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?

There should not be an absolute rule to this effect. We think the present demarcation between matrimonial and non-matrimonial property, and their respective treatments, as propounded in Miller, is perfectly adequate.

We also repeat what we said in the first response. In how many families should these issues be relevant or even considered given the resources available? It appears to be assumed that categorisation will usually be achieved easily. In respect of all the following questions, we consider that specific categorisation and sub-categorisation increases rather than reduces the scope for argument.

The asset in question may have been used as a family asset or resource for many years. Is a valuable picture which has hung above the drawing room mantle-piece for decades but which was owned by one party before the marriage to be excluded from the sharing principle? What if it had been sold and the proceeds used to buy another which was chosen by the parties jointly? (see S v S [2007] 1 FLR 1496 at para 31 per Burton J).

So, if reform is to be undertaken at all (which we would not support), we would suggest a starting point to this effect, but no more.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Again, there should not be an absolute rule to this effect. The home in question may have been in a family for generations. It may even be in trust. To say that in all cases it should be subject to the sharing principle risks sacrificing fairness on the altar of principle. But, generally speaking, we agree that the family home is usually a central
item of matrimonial property, and this is already recognised to be so. So, if reform is to be undertaken, we would suggest a starting point to this effect, but no more.

7.13 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.

Again, we would not support an absolute rule. If there were to be reform we would suggest no more than a starting point that property acquired during a period of cohabitation followed by marriage should be included as matrimonial property.

7.14 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?

Again, we would not support an absolute rule. If there were to be reform we would suggest a starting point to this effect, but no more.

7.15 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?

Again, we would not support an absolute rule. If there were to be reform we would suggest a starting point to this effect, but no more. We have very significant concerns about this degree of categorisation. What is the “same kind” of property? Why is such a significant change in categorisation justified? Is this in the broader economic interests of the State?

7.16 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?

Again, we would not support an absolute rule. If there were to be reform we would
suggest a starting point to this effect, but no more.

7.17 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?

This question highlights the difficulty of too absolute an approach to categorisation as demonstrated by some of the points raised in the Paper. Where is the line to be drawn? What does investment mean? Is money to be placed above endeavour? How are contributions to be measured? If this is to be pursued, at most it should be limited to a guided discretion.
PRINCIPLED REFORM

7.2 Do Consultees agree with our essential 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?

Response

We agree 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. The uncertainty engendered by the current law often leads to great resentment and bitterness on the part of the paying party or fear and anxiety on the part of the potential recipient. With cuts to public funding due to increase in April 2013, the need for greater certainty is likely to be ever more acute both for lawyers and self-represented litigants.

7.3 Should spousal support:

(I) Be restricted to the compensation of loss caused by the relationship; or

(II) Seek to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution?

Response

We consider that restricting spousal support to the compensation of loss caused by the relationship could cause undue hardship and unfairness in the case of long marriages or marriages where there are children or other dependent relatives.

In short childless marriages, it may be appropriate to restrict spousal support to the compensation of loss caused by the relationship where that loss is quantifiable, for example loss of widow’s pension on remarriage.

We believe that the computation of the appropriate level of spousal support should recognise the “merger over time” by redressing the disparity in lifestyle which will
potentially be caused by the divorce or dissolution, to a greater or lesser extent depending on factors such as the duration of the marriage, whether or not there are children and other factors referred to in the response to the question below.

7.4 In answering the question at paragraph 7.3 above, it would be helpful to hear Consultees’ views on the relevance or otherwise of:

(I) The length of the marriage;
(II) The marital standard of living;
(III) The way that joint responsibilities (for example, provision of child care or care for an elderly parent) have been shared during the marriage and will be shared after its ending; and
(IV) The occupation of the former matrimonial home following divorce.

Response

We consider that the first three factors i.e. the length of the marriage, the marital standard of living and the way that joint responsibilities have been shared during the marriage and will be shared after its ending are all of relevance if one is seeking to unravel the "merger over time". We consider that a transitional approach whereby spousal support is provided to even out any potential disparity between the lifestyles of the couples post divorce for a period of time proportionate to the length of the marriage would be the fairest way to approach spousal maintenance.

If one party continues to occupy the former matrimonial home in the expectation that she will be able to “downsize” and release capital in due course, that should be taken into account.

7.5 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?
Response

Reform of spousal support should take the form of a reformed discretionary approach with the objective of achieving a greater measure of certainty while at the same time retaining the flexibility to address unfairness.

7.6 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?

Response

We consider that reform should embody incentives towards independence by placing limits on both the quantum and the time for spousal support. The limits should allow a reasonable period for the recipient to re-establish earning capacity or to acquire new skills. Full account should be taken of childcare and retraining costs as well as limits on the recipient’s ability to work full-time.

7.7 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?

Response

We do not feel equipped to make a recommendation about this.

Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.
Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:

- to live at the same standard as he would have lived during the marriage, and if so for how long?
- to as much as he needs to relocate and to start again as a single person?
- to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Response

We favour the neutral approach which offers support to facilitate adjustment to independence.

A. There should be a graduated transition to independence with some income contributions from Sophia for a period of 2 years.

B. Michael’s entitlement should be calculated after the capital value of the home is shared.
C. Chris should have responsibility for contributing to Pat’s care after the ending of the civil partnership depending on his/her ability to do so.

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Response

D. We consider that Sarah and Ian would find a calculation inflexible and frustrating.

E. It would be appropriate in this case to make a term order without a bar on extension of the term. This would put the onus of moving towards independence on Sarah. In Michael’s case, there should be a term order which is capitalised.

Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your
view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Response

F. If all other factors are the same for Sarah and Ian, the term should stay the same. It takes childcare and lower earnings into account. For Sophia and Michael, there should be an increase from 2 to 3 years for capitalised maintenance. For Pat and Chris, there should be a reduced and limited responsibility over a term of no more than 2 years.

G. There should be no entitlement to carry on living at the marital standard of living for Sarah, Michael or Pat.

H. Continuing responsibilities are very important and should make a difference to the level of support in case study 1.

I. Sarah should be entitled to carry on living in the family home after divorce. Neither Ian nor Michael should live in the family home.

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Response

(1) Statutory provision to enable a payee spouse to become independent within a reasonable period should be made, taking full account of childcare responsibilities to the conclusion of full-time secondary education, with a reduction in the level of support once the children complete primary education.

(2) There should be an authoritative source of guidance for the courts and for members of the public about the considerations involved in an assessment of needs and the priority to be afforded to different elements of need.
(3) There should be provision either by way of statutory amendment or in the form of authoritative guidance about the time within which independence is to be expected and the normal form of orders for periodical payments and the financial arrangements to be made after a short childless marriage. Term orders should be the norm unless the payee spouse has used best endeavours to achieve financial independence without success. The burden of proof should lie on the payee and it should be possible to invoke section 31 of the MCA even if circumstances have not changed.

Unless there has been a significant period of pre-marital cohabitation and/or one party has lost benefits such as widow’s pension as a result of remarriage, the parties to a short childless marriage should share the marital capital and thereafter be returned to their pre-marital financial position via a short-term order.

(4) The Family Justice Council should provide guidance in the form of Practice Guidance.

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

7.9 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.

Response

Non-statutory means of improving the law in relation to needs could take the form of provision of greater information for litigants about the extent of needs and what is included within needs. It would be helpful to have an explanation of the relative importance of different types of need to include differentiation of basic needs and discretionary items such as holidays, private schooling and health insurance which will depend on the standard of living during the marriage and the continuing affordability of such items.
7.10 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.

**Response**

*Statute should specify some general principles in respect of the needs provision for which it shall not be possible to contract out:*

(i) need for appropriate housing;
(ii) need for sufficient maintenance to meet the reasonable expenditure of himself/herself and any children of the family, at a level commensurate with (not exceeding) the standard of living enjoyed during the marriage.

Statute should not specify the level of needs, as the level of needs which will be appropriate in any particular case will depend on the circumstances of the parties at the time. The level of needs specified by statute may be less generous than provided for by the law at the time of the marriage breakdown.

7.11 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?

**Response**

*We agree that non-matrimonial property, defined as property held in the sole name of one party to the marriage or civil partnership and*

(i) received as a gift or inheritance; or
(ii) 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. This will provide increased certainty and may give couples an incentive to marry, particularly in circumstances where they have been married previously, knowing that they can safeguard assets acquired prior to the marriage.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Response

The family home should be excluded from the definition of non-matrimonial property.

7.13 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.

Response

If it is required to meet the parties’ needs following their marriage, it may be taken into account to a limited extent. If not, property acquired by one party during cohabitation should be covered by the definition of non-matrimonial property.

7.14 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?

Response

We agree that non-matrimonial property should not lose its status as such merely by virtue of having been used by the family.

7.15 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?

Response

We agree that where non-matrimonial property has been sold and a 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, e.g. a work of art or antique furniture.

7.16 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?

Response

We agree that where non-matrimonial property has been sold and the proceeds invested in matrimonial property, the new property should be matrimonial. It should, however, be subject to the court retaining discretion to adjust the parties’ shares in the property to reflect unequal contributions or derivation from non-matrimonial property.

7.17 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?

Response

We consider that the owner of the non-matrimonial property should benefit from the increase in value unless specific provision has been made for the non-owner’s contributions to be reflected as a share of the asset or of the enhanced value of the asset.
LAW COMMISSION
CONSULTATION PAPER No 208
MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS
RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from **11 September 2012** to **11 December 2012**.

Please send your completed form:

- **by email to**: propertyandtrust@lawcommission.gsi.gov.uk or
- **by post to**: Law Commission
  Steel House, 11 Tothill Street, London SW1H 9LJ
  Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

**Freedom of Information statement**

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

N/a

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

[Redacted]

As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

Yes. Widely different approaches to the exercise of discretion by judges regionally and otherwise, and an absence of guidance on what should be expected from litigation results in:

*Longer/more expensive litigation*

- ‘Bad’ advice is given by solicitors;

- Litigants in person prolong litigation with little chance of success (but this is unknown at the time) which causes additional stress to all affected parties and their children.

- High costs of litigation result from running complex arguments. Applications seeking variation of orders considered unfair by one party, add to financial pressures on already limited income following a divorce.

- There is a disincentive to use mediation because there is no clarity about the outcome in court which in turn can lead to unrealistic beliefs about the strength of a case and an unwillingness to compromise.

*The law failing to accord with cultural change*

- Equality in the workplace should mean that each one of a separated couple has had an equal opportunity to continue working during a marriage. The law on spousal support following divorce should recognise that adults now each have a financial responsibility for themselves and their children. Successful marriages in this day and age primarily provide emotional support rather than financial support. Society has changed from the time when marriage was essential for women who had children because they were not protected in the same way by equal opportunities legislation. A small number of people choose to marry, and are happy to divorce, for the money. Clarity about the law may discourage the divorce of this small percentage (which would be a good thing) and is unlikely to have any effect on the decision to divorce for those whose emotional relationship has irretrievably broken down. Ancillary relief law on the whole is not the reason for marriages failing; there are many
other much more important factors at play in society which have affected the growing divorce rates.

- For parties without the means to make significant capital payments and achieve a clean break under the current law, spousal support (where this is calculated on a needs basis) works against the psychological needs of separated parties who need to put a bad experience behind them and get on with their lives. It encourages long term dependency on one side and resentment on the other resulting in multiple opportunities to open unhealed wounds.

- If a principled basis were taken which aimed to reduce dependency, it would support second marriages entered into for emotional support and stability. The current state of the law has an unseen but significant negative effect on couples post divorce wishing to commit to a second marriage and thus a growing section of society failing to benefit from the emotional stability of marriage. The current law discourages second marriages due to a fear of obligations towards stepchildren and of the second spouse’s capital or income being taken into account in proceedings to vary spousal maintenance.

Factual experience on which recommendations are based

I had two children outside marriage, and my partner left when I was pregnant with my second child, with the support of my employer and close family, together with hard work I was able to maintain a [redacted] career. This has been of huge benefit to my children in that they have had a positive parent taking action to boost self-esteem and provide for them financially. The law on child support has been an important backstop to enable my partner and I to more or less agree a level of financial support for many years. I am sure my dependency on his contribution, particularly in the early days, was another factor to help me accept that it was far better to cooperate in contact arrangements than to succumb to the temptation to keep his 18 month old and new born baby from him and his new partner. I am proud of my maturity and the fact that my children have had regular and extensive contact with their father in spite of geographical separation. It is relevant that my ex-partner has now ceased to contribute financially to his two eldest children’s maintenance, a short time after my recent marriage. I have made an application to the CSA.
My husband was married for years and had three children who were at the time they separated. One significant factor in the breakdown of what may have been an unsatisfactory relationship for both parties, was the strain put on the relationship when his former wife chose to live with his children for a year while her then husband remained in England to work and provide financially for them. The law has been unable to achieve an equitable outcome and there is a risk that considerable psychological damage will result for the children in particular; it is also apparent that continuing proceedings (now into the year) have had a huge financial and emotional impact on my husband and probably his ex-wife.

In AR proceedings the husband agreed to a consent order when he was not legally represented because he was very anxious indeed about the legal debts of his then wife. At the same time as a litigant in person he was also trying to enforce a contact order to enable staying contact with his children. Legal advice he has since received is that he would have had a good chance of obtaining a residence order in view of his ex-wife alienating his children completely from him, if his children were younger and living in England. His children and ex-wife have now moved permanently to . He is currently seeking a variation of an AR consent order in which his ex-wife obtained all that remained of the capital (tied up in their holiday home), half of his pension, and now obtains half of his income. An irony (and injustice) in this factual tale is that my own income is relevant to my husband’s ability to pay for the maintenance of his ex-wife. My income level results from many years of maintaining a career when also bringing up a family as a lone parent.

A needs based calculation seems to allow those who might choose for lifestyle reasons to live where incomes are low, and indeed to choose not to work when competent to do so, to claim a financial need, and for there to be no account taken of behaviour which will have lasting damage on the children of the family. The direct contrast with the positive outcome achieved in my own case where ancillary relief proceedings were not available to me is stark.

The law should recognise that the critical trigger for financial responsibility is having children together and that marriage itself is primarily an emotional bond. My basic premise is that marriage should be entered into because it will provide emotional cohesion and stability, and should not be seen as a financial crutch.
7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

Spousal support should seek to compensate for the loss caused by the relationship, not the disparity resulting from a merger over time, and this should be a separate exercise from that taken to divide jointly owned property. If this position were widely understood, it would enable couples to make decisions about whether one party should stay at home and look after the children in the knowledge that this would affect their personal financial independence. If this step were taken it would as a matter of policy accord with cultural change seeking to bring more women into the workplace and to support them in seeking senior positions as well encouraging shared responsibilities for child care.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

(1) The length of the marriage is relevant if it has lasted more than a minimal period of time (say two years) but much more important and relevant is whether children of the marriage still require practical care which genuinely prevents a party from obtaining their own income such as in the case of care of a severely disabled child.

(2) This is not relevant for spousal support. The law should in all cases
encourage financial responsibility and independence except where genuine
disability of one party prevents them providing for their basic needs. Where
divorce might otherwise result in significant and unfair disparity in living
standards between the parties, a presumption of equal division of property
(subject to exceptions for inherited or 'brought to the marriage' property)
should adequately provide for each parties reasonable expectations post-
divorce.

(3) This is relevant where such decisions were taken jointly in the marriage; in
most cases it would be fair to presume a decision had been a joint one,
however, where one party had given the other little choice in a relocation
decision which affected their career or childcare arrangements for example,
that should be taken into account. There may be a need for a process to
determine as a single preliminary issue a finding of fact on such matters.

(4) Occupation of the former matrimonial home should not be presumed post-
divorce unless extreme hardship would be caused, particularly to children
living in the home. Most children and affected adults know that divorce
means things change.

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

I favour a formulaic calculation because this will give most clarity and with a
transitional period and publicity it would allow couples to make choices about career, property and dependants care which recognises the need for everyone to take responsibility for their own financial futures. I accept that there may be exceptional cases where an exercise of discretion would be important; it would be essential to describe genuinely exceptional circumstances to avoid creep by litigation. One such circumstance could be where there had been a finding in Children Act proceedings of alienation of the children by one parent from the other parent. This phenomenon is growing and should be recognised in family law.

An alternative would be the issue of some very clear guidance on the exercise of discretion based on a presumption of a number of years beyond which spousal support would not be provided.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

I believe an approach which favours incentives towards independence would reflect the current position on equality of opportunity, would encourage both parents to jointly care for their children, and would assist parties to recover from the emotional trauma of divorce by achieving a clean break within a limited and known time.
7.7 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?

   Supplementary Consultation Paper, Part 4, paragraph 4.118

I do not feel qualified to recommend on these issues.
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments

A. No. No. Yes on the basis of a formula for a period of 3 years.
B. Yes.
C. To the same extent as any other dissolution. I advocate an ‘exceptional circumstances’ exception and think there is a need to recognise that if a spouse is say diagnosed with multiple sclerosis after a marriage lasting 20 years, then if their spouse immediately left the marriage, this is conduct which could be taken into account in extending the period of spousal maintenance.
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. A formula approach would be appropriate and would allow a similar result to outcome three in the first case study, which in my view would be the fairest and most desirable outcome for both parties. The maintenance payments could be used by Sarah to pay part of the mortgage if she chose to do this.

E. Yes. Strict rules would be preferred on the basis they bring clarity and certainty to the issue. It is the right approach for Michael too. There is a big advantage in certainty and a short transitional period would partly compensate for any choices he had made to his detriment in the marriage. If a formula approach was widely understood it would allow parties in a marriage where they held doubts about the strength of the emotional bond to make future choices taking into account the potential implications of so doing.
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

F. My views do not change. A minimum period (say 2 years) should trigger spousal maintenance payments based on a formula for a period of 3 years to enable transition.

G. No for reasons given in answers above.

H. These should not affect spousal maintenance payments. If the position were widely understood it would enable couples to make informed choices recognising their own responsibilities for financial independence and where within a marriage adjustments might be needed to lead to a fair outcome (such as payments into a pension or savings for the ‘stay at home’ spouse) those should be achieved within a marriage, not for the law to impose once a relationship has irretrievably broken down.

I. Not unless the payee spouse can independently afford it. Divorce brings change.
7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.
(1) I agree statutory provision should ensure the courts aim to enable a payee spouse to become independent within a period and there should be a strong presumption as to the length of this period, say 3 years. I disagree with the fundamental premise that independence is not practicable until children have finished full-time education. The facts do not bear this out. Lone parents who were not married achieve independence through child support, practical assistance from the wider community including close family and by seeking employment. If there is a policy imperative to retain the difference it must be justified not on the basis of incorrect assumptions. I have advocated that the policy should distinguish marriage from partnerships with children through the payment of spousal maintenance for a transitional period. In addition, property law distinguishes and is able to compensate parties where capital is available. This recognises important cultural changes mentioned above such as equality of opportunity, support for shared childcare and the growing phenomenon of alienation of children from non-resident parents post divorce. The law has an obligation to deal with the injustice caused to thousands from failing to recognise these changes.

(2) Yes but a formula approach is preferred.

(3) Ideally statute, but strong guidance from the legislature if not.

(4) It should have the backing of the legislature.

(5) No view other than it should be widely disseminated.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

No further comments to make.

7.10 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.
### NON-MATRIMONIAL PROPERTY

7.11 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?

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

I agree it should not be subject to the sharing principle. It should not be taken into account by the courts in seeking to make an order which meets the needs of the payee spouse, except to the extent that it provides income to the payor, or reduces their own housing costs. I prefer a formula approach in any event.

7.13 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.

Yes, but clarity must be brought to meaning of ‘the family home’. It should not, for example, be a holiday home to which one spouse and their children has moved post-separation.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

Yes, I agree.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Yes.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Yes.

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

I do not feel adequately informed about the complexity to comment here.
THE ASSOCIATION OF HER MAJESTY’S DISTRICT JUDGES

Response to the Law Commission’s Supplementary Consultation Paper

relating to

Matrimonial Property, Needs and Agreements

Introduction

1. The Association of Her Majesty’s District Judges (“ADJ”) represents the District Judges of the County Courts and District Registries of the High Court in England and Wales.

2. District Judges are responsible for hearing the vast majority of divorce and financial remedy work. As such, the ADJ is uniquely placed to comment on this consultation.

The consultation

3. We understand the two aspects now under consideration to be:

   1) the law relating to financial needs on divorce and dissolution; and

   2) the legal status of “non-matrimonial property.”

Our primary position

4. Our primary position is that the law is not in such dire need of reform as the Supplementary Consultation Paper would indicate.

5. In our experience, s.25 of the Matrimonial Causes Act 1973 provides the court with the appropriate degree of flexibility and discretion needed to ensure a fair outcome.

6. If there is inconsistency in outcome – as opposed to variations in the exercise of discretion - (and we understand that there appears to be at least some apocryphal evidence of regional variations), that is best dealt with by the appropriate judicial training, as opposed to wholesale reform of the law. A set of principles governing the approach to discretion and disseminated either by a judgment of the higher courts or a President’s Practice Direction may be of further assistance in this connection.
7. Further, we see evidence on a daily basis that lawyers are not giving realistic advice to their clients as to the likely range of outcomes. This becomes very clear at the Financial Dispute Resolution stage, by when parties may have already incurred considerable costs and be entrenched in their positions. The abolition of public funding for financial order applications will compound the difficulties attendant upon ensuring that the parties have realistic expectations.

8. Any inconsistency of approach and unrealistic advice might be ameliorated if the higher courts were able to give guidance in principle in relation to lower value cases; the approach in “big money” cases is of only limited assistance in respect of the more routine cases coming before the courts. In practice, this is unlikely to occur because small and modest money cases are rarely, if ever, pursued in the High Court, Court of Appeal or Supreme Court.

9. The temptation to legislate for every possible situation so that parties simply input their details and obtain an answer must be resisted. Firstly, it is impossible to contemplate all possible scenarios – the circumstances and financial arrangements of families are almost infinitely variable. Secondly, parties may be less willing to come to a mediated settlement if they are wedded to a particular position as a result of the application of a formulaic approach (which may, in fact, not be the appropriate one). Thirdly, rules do not necessarily equal fairness, and that is a concept which absolutely must be retained in any legislative change. Finally, the proper exercise of judicial discretion is a proper and valid approach to these cases where there are many and variable circumstances.

10. We are also concerned that, even in the 21st century, it is still most commonly the woman who takes on the majority of childcare. Many of the proposals, although having an apparently superficial attraction of certainty, risk being unnecessarily harsh to women, as is the perception of the Scottish system where maintenance is paid for a maximum of three years.

11. We deprecate the view that “predictability is preferred to attempts at individualised justice.” That is all very well, but what about the situations which will cause injustice – and considerable hardship? The variables of a fair and reasonable result are such that “predictability” in its common understanding is not possible without leading to such injustice and hardship in many cases. The variables of a fair and reasonable result are such that “predictability” in its common understanding is not possible without leading to injustice and hardship in many cases.
The consultation questions in relation to financial needs on divorce or dissolution

12. [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?

13. We refer to our primary position set out above. Further, the court is already required to give active consideration as to whether a clean break may be effected. Whilst it is an issue that would ordinarily be found in any judgment, it may well be that this could be further emphasised by a requirement for the court to include in its final order a recital as to the basis upon which it was not considered appropriate. An agreed set of principles or “starting point” associated with spousal maintenance could be promulgated as set out in paragraph 6 above. Any departure from the principles should be explained by the Judge in the judgment.

14. We also ask ourselves what would be the principles upon which the matter would be resolved; they are not readily identifiable to us. And, the answer to the question “how long?” may be “how long is a piece of string?” because it all depends on the particular facts of a case. Take, for example, a 10-year marriage with the wife giving up work to look after the three children. In one case, depending on the qualifications of the wife, the wife may be able to get herself back to work relatively quickly. In another case, it might be genuinely much harder. So, in the first case, little or no ongoing spousal support might be necessary and, in the second case, it may needed for considerably longer. A relevant consideration might also be the income of the husband. Hence our comment above that the proper exercise of judicial discretion is the best and most appropriate way to meet these variables.

15. [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?

16. First, we ask ourselves whether it is appropriate to plump for one approach over the other; both have their superficially logical attractions. Second, are the two approaches mutually exclusive?

17. More importantly, however, the longer the marriage does not necessarily equate to the greater need. It all depends on individual circumstances, especially the presence or absence of children of the relationship.
18. [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.

19. In the context of income needs post-separation, the length of the marriage is less significant than the standard of living. Not only do needs require to be met, but it would be inappropriate to leave one party considerably better off than the other. We acknowledge that the length of the marriage may be increasingly relevant in this latter respect. Joint responsibilities – past and continuing – are relevant in the context of a person’s ability to become independent, either because someone has been away from the workplace for some time, and/or restricting a person’s future ability to work as much as otherwise my be liked. The age and health of the parties are also important considerations in this respect.

20. Assuming that children will continue to be the court’s first consideration, if it is thought best that one party should remain with them in the former matrimonial home (“FMH”), income needs may be greater – or different – than if the FMH had, for example, been sold.

21. Without wishing to over-emphasise a point already made, these are all variables that militate against a “predictable” result, but support a discretion-based balancing exercise being carried out by the court.

22. [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?

23. If any reform is needed (and we refer again to our primary position in this respect), we prefer a reformed discretionary approach. Each case is fact-sensitive and not susceptible to the application of a rigid formula. Further, a formulaic approach is likely to lead to satellite litigation as to what circumstances constitute substantial injustice, and thereby enabling a departure from the formula. This satellite litigation is likely to lead to uncertainty in its own right and a whole raft of new case law.
24. [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?

25. Limits can only be placed on the extent of support, if appropriate. Otherwise, legitimate needs may not be met. There could, however, be a rebuttable presumption that independence is an aim within an appropriate period of time (although this is, arguably, already the case by virtue of s.25A Matrimonial Causes Act 1973). It would be important, nevertheless, for the court to retain a discretion in relation to the amount and duration of maintenance so as to avoid injustice and hardship.

26. [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?

27. We are not in a position to comment in detail on this question save to make the obvious point that, if this area of the law is to be looked at after nearly 40 years of the existing law, the necessary and considerable time and effort must be employed to do the job properly. There are also legal difficulties in piloting a new legal regime – as opposed to a new procedure – in specific geographical areas, resulting in the law (potentially) varying from one county to the next. We would suggest that a more detailed study be made of the outcomes, advantages and disadvantages of the Scottish formula-based system before seeking to create one within England and Wales.

28. [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 a marriage or civil partnership finish their education.

Whilst it might be appropriate for there to be a rebuttable presumption in such terms, how will spouse be “enabled” to become independent if that spouse is a person of a certain age, a home-maker for years and jobs are scarce? The duty on the court to consider a clean break already has the status of an “expectation” but anything more than that may lead to injustice, as we have highlighted elsewhere in this response.
2) An authoritative source of guidance for the courts and for members of the public about:

a) the consideration involved in an assessment of need;

b) the priority to be afforded to different elements of need.

It is not necessarily helpful to be prescriptive about prioritising different aspects of need; the parties themselves will have their own priorities, or wish lists. A common scenario is the sacrifice of a pension sharing order in favour of a larger share of capital (possibly to enable, commonly, the wife to stay in the FMH). As long as an informed decision about this is made, there is no merit in statute legislating as to the priority parties should give to certain aspects and, indeed, such a step may be wrong in principle.

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

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

It may be possible and appropriate to legislate more clearly in relation to short childless marriages by envisaging a return to the parties’ pre-marriage position, and a sharing of the assets acquired during marriage. However, the other aspects are fact-specific and, as we have emphasised elsewhere, it would be wrong to sacrifice fairness for apparent certainty.

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?

It would be appropriate for any guidance to be produced by the Family Justice Council, and endorsed by the President of the Family Division, or by the higher courts.

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

It would be important that any guidance was only by way of illustrative examples, rather than prescriptive answers, for the reasons we have given in paragraph 9 above, and because judicial independence is one element of the safeguards available to protect the most vulnerable members of society.
29. [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.

30. [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.

31. The level of needs will be case-specific and we do not understand how it will be possible to legislate so as to ensure a fair outcome in each case.

The consultation questions in relation to “non-matrimonial property”

32. [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 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?

33. We do not necessarily agree in every case, again for reasons of fairness, although this is, effectively, the starting point before needs enter the equation, and subject to the overall requirement of fairness. Take the example of a 20 year marriage where, by agreement, the wife gives up work to be a homemaker. Five years into the marriage, the husband receives a substantial inheritance. On separation the wife’s needs can be met – just – without recourse to the inheritance. Because of her role as homemaker, the wife has had no opportunity to build up her own capital. The husband is left considerably better off than the wife. Is that fair?

34. [142] We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

35. For all the obvious reasons, we are strongly of the view that the family home should be excluded from the definition of “non-matrimonial property.”
36. [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.

37. Any property has been acquired during the course of the parties’ “relationship” and, accordingly, property acquired during pre-marriage cohabitation should be excluded from the definition of “non-matrimonial property.” Capital acquired post-separation also should be classified as “non-matrimonial” unless derived from matrimonial property acquired during the marriage or to which the party in receipt became entitled during the marriage.

38. [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?

39. We do not necessarily disagree, provided a fair result can still be achieved. However, it may well all depend on the nature of the property, the reason why it was “used” and whether a “fair and reasonable” outcome can be achieved by excluding it. The proposition itself introduces a discretionary element which tends to support our opening position.

40. [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?

41. We do not understand the logic of this proposal. How is this different from the scenario predicated by the question at paragraph 158? Furthermore, the term “use by the family” is open to differing interpretations. For instance, if a portfolio of shares is inherited but then re-invested during of the marriage, does it mean that the new portfolio is to be regarded as matrimonial property if the income derived from the investment is used by the family?

42. [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?

43. Exactly the same difficulties as we refer to in paragraph 41 above would apply. Also again, we do not see the distinction between this scenario and that posed at paragraph 158. And, what would be “matrimonial property” for these purposes. What if an investment property owned by the husband was sold and a holiday home bought in its place? Would that be “matrimonial” or “non-matrimonial property?” The position remains that a “fair and reasonable” outcome is demanded which, we repeat, is best achieved by the exercise of judicial discretion to balance the variables.
44. [172] We ask consultees to tell us whether they think it is possible to devise rules – or 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?

45. We assume the word “investment” is intended to refer to both financial and non-financial (e.g. the investing of time and effort in a property). If that is the case, rules or even guided discretion may not produce a fair result. How does one quantify, for example, time spent in the furnishing and letting of a holiday property by the non-owning spouse where that effort has not only produced additional income for the family but has also resulted in an increase in its capital value?

46. A clear financial contribution by the non-owner may be easier to provide for on a quasi resulting trust basis. If both have contributed, even in uneven amounts, simplicity may demand that any increase in value is shared by the exercise of discretion, taking into account all the circumstances.

Conclusion

47. In relation to the proposed reforms, we have very grave concerns about the potential for unfair outcomes. We are also concerned that one set of litigation may simply be replaced by another. The vast majority of financial applications are settled: whilst superficially the certainty of a formula may appear to promote settlement, in fact it is likely to have the opposite effect. A formula cannot be the complete answer for the reasons outlined in this response; some elements of discretion will be required to address needs, especially the needs of any children. However, in order to reach consensus, the expectation sof the parties must be managed. If a party’s position hardens because he or she is unable to look beyond the formula, settlement will be more difficult to achieve – especially for the ever-increasing band of self-representing litigants.

For and on behalf of the ADJ
District Judge Julie Exton
Chairwoman of the Family Sub-Committee
Bristol County Court
Civil Justice Centre
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December 2012
Herewith my response to this consultation paper. It is short because of pressure of time, which is perhaps just as well.

General comments - I am very pleased indeed that after years of my writing that there were no longer any principles underlying the award of maintenance and the division of property on divorce, my views have become mainstream. Every time I have lectured on this I have received more letters in support than I can answer, and they all complain about the costs of determining financial provision on divorce, which arise from the exercise of judicial discretion and the uncertainty of the law; they complain that settlements are unfair and cause bitterness, this being the only area of the law where the transfer of funds bears no relation to fault, negligence, unjust enrichment or any moral principle that the payer can discern. Blogs from newspaper readers also make the same comments when financial provision on the end of marriage or cohabitation is in the news. I have heard from no one who supports the present law.

Sometimes it is suggested that the existing law has an underlying aim, one which is not spelled out - to deter men from divorcing their wives because of the cost, or to punish them. Certainly the deterrent effect is important. It may not be a bad thing in the long term if a couple stay together because they cannot afford to divorce! Your consultation paper quite properly points out the deterrent effects of changes in the law. In para 6.36 you note that avoiding marriage is suggested as a way to preserve preacquired property, which is a shame, in my view. If marriage is to be encouraged, then protection for preacquired property would be sensible, as one hears frequently that men or women with good careers and independent means are reluctant to marry because of the financial provisions that might be made on divorce.

Likewise in para 6.59 you ask whether property acquired during a cohabitation which is followed by marriage should be treated as non-matrimonial. It certainly should, otherwise the owner may be reluctant to marry because of the vulnerability of that property on divorce. If newspaper blogs are anything to go by, the general public has a keen sense of wanting to preserve what they regard as theirs, and reluctance to share it with a partner unless there is a formal step, such as marriage.

For a while I organised an All Party Parliamentary Group on Family Law. It was attended by many members of the public. What came out very clearly from at least two of the meeting was that people want to know at the outset of a marriage what the rules are, during it and at the end. They said they would like a Code that laid down who was entitled to what, what the obligations and rights were etc., and that this should be available from the start of the marriage (rather like the small print when booking a holiday!). There was a great desire for certainty about the division of property and finance at the end, not only because the uncertainty costs so much in legal fees, but also because people want to know where they are, how they will be affected. "for richer for poorer - until death do us part" no longer has any meaning, let alone any certainty.

Another general comment is that this area of law is still full of gender stereotypes. Women taking care of children for most of their lives is an example. No consideration is given to the much greater effort put into a marriage by a woman who raises children and also maintains a career. The childless non working wife is given apparently as much consideration in relation to her needs as a working woman or mother, which is hard for the public to understand. The burden assumed by most husbands in providing everything materially for the full time mother is underestimated, as is the childcare assumed by some men. "Sacrifice" of a career by the woman who marries is in many cases a myth. Compensation, as pointed out in the paper, makes no sense as a principle, because almost certainly the spouse would have been worse off if not married, and may have been kept by the other spouse during marriage. In most cases compensation would dwindle to nothing if one looked into who provided housing, paid the bills, holidays, clothing etc.
Sweeping generalisations about roles within marriage, and about employment possibilities are made by male judges who are trying to be compassionate. Lady Hale does not, and should not, see herself as speaking for all women, when describing the context to a financial award or prenup. The sexist assumptions made about the roles of men and women and their futures in many a judgment would be quite unacceptable in any area of the law other than financial provision.

In sum, I would welcome almost any reform of the law that renders it certain and removes, in most cases, the need to go to court. The removal of legal aid is a hugely significant change, and makes it imperative for couples to be able to work out for themselves the right amount of property sharing and provision. Family judges and specialist lawyers understandably think that nothing will do except the most minute examination of the couple's means and circumstances by themselves, whereas in fact this is hurtful and expensive. Better crude divisions and rough justice than the expense of lawyers and court appearances. (paras. 3.34 and 4.90 refer) Note also the ripple effect from the withdrawal of legal aid - judges are spending more of their time having to assist self representing litigants, and decisions take longer. More complaints are being made about barristers to the Bar Standards Board by self representing litigants who do not understand the task of the barrister when he/she is representing one side and the other has no representation, and some extra burdens also fall on barristers in those situations because they are expected to extend some assistance to the self-representing party.

7.3 Need arising from the relationship is a fairer basis. Unravelling the merger will be too complicated. The length of the marriage is very relevant and I am sympathetic to the CSJ view that a marriage of 3 years or less should be deemed to have made no difference at all. Standard of living is not very relevant because no one should be entitled to a standard of living for all time depending on whom they marry. Joint responsibilities are important but they should be calculated by also estimating the provision made by the non-carer who may have provided all the material means to enable the carer to stay at home and not go out to work. Occupation of the home is important for children, not for childfree adults.

7.5 A formula would be excellent for reasons given above, the avoidance of judicial discretion and legal costs.

7.6 There should be limits. Lifelong maintenance has unfortunate repercussions on women's progress in careers.

7.7 It is regrettable that many years of research are envisaged. There is no time to lose. We should adopt another country's formula as soon as possible and then change it if necessary after seeing it in practice.

I and some other peers stand ready to introduce a private member's bill, for example, extending Scots law to English financial provision, if that will hurry things along. I would be in favour of an immediate off the shelf solution, either Scots Law or Marital Acquests. I did not understand para. 6.12. Para. 6.20 is an attractive alternative.

7.8 Statutory provisions of this nature have tended to be disregarded, as pointed out in the paper. Guidance would be good, especially bearing in mind the desire of the public for clarity, as explained above.

7.9 Needs might be calculated according to the figures produced by government for the cost of living. It is not right to read, let alone have accepted, the sort of "needs" expressed by wives of pop stars etc. I am not clear whether the paper is referring to the needs of a particular spouse, or needs as defined for national purposes. (7.10)

7.11 Yes

7.12 Home has to be available for disposition in the case of minor children. Otherwise its source should be relevant.

7.13 Property acquired during cohabitation should count as non-matrimonial if it otherwise would be so, for reasons given above.

7.14 Yes

7.15 Yes
7.16 Yes, but there should be a default presumption that the proceeds of sale of non-matrimonial remain non-matrimonial, with a burden on the claimant to show that it changed.

7.17 It should stay non-matrimonial. I agree with the spirit of 6.27(1)

The making of contracts, supported by easily available standard forms, should be encouraged, and should deal with these issues.

Baroness Deech  
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RESPONSE TO CONSULTATION QUESTIONS

Principled Reform?

1. The Matrimonial Causes Act 1973 is sometimes criticised as lacking a ‘destination’ to be reached. This is a misunderstanding, for two reasons. First, section 25A already provides a duty to consider a “termination” of financial obligations (that is, ending financial interdependence). Second, the job of the court in applying of section 25 MCA 1973 is not to arrive at a particular ‘destination’. It is better understood as a ‘vectors’ model.

2. The task of the court is to achieve a reasonable outcome (the product of the vectors) which is the result of assessing a number of competing and opposing forces (as expressed in paragraph 3 below). Within individual families the varying strengths of these vectors will produce different results.

3. The modern purpose of financial provision after divorce, separation or nullity is to produce a reasonable result that:
   (1) shares fairly the legacy of benefit and obligation arising from marriage,
   and (in so far as is practicable)
   (2) enables the parties to lead financially independent separate lives, or
   (3) if financial independence is not reasonably practical, reduces the parties’ financial interdependence

4. If financial independence is not reasonably achievable, the court seeks to manage the foreseeable risks of financial interdependence in a way which reduces the risks for the more financially vulnerable party. For example, a wife with a lower earning capacity than the husband may be given a greater proportion of capital for housing in order to reduce her reliance on the payment of periodical payments from the man. This may arise in particular where the woman is the main carer of young children from the marriage.

5. Couples who marry are making a voluntary commitment towards and a mutual responsibility for each other, intended to be life long. Almost all couples who marry do so with the intention that it will be a life long union, and most organize their finances and personal decisions on that assumption. Even short marriages without children can have large financial effects for one of the parties if there is a divorce – for example, emigration from their home country; or the limitation of opportunity arising from the stigma of divorce in some cultures.

6. Britain (but in particular England and Wales) is a multicultural society in which there is no single, homogenous family model. A number of very different family structures flourish, with very different social expectations for the parties to a marriage. In turn, this produces highly diverse financial
consequences for the parties to the marriages. A rules based discretion will prove inflexible to cope with such variations.

7. I favour the discretionary system which applies in England and Wales. The factual matrix of the proposals for change is based on a very small number of reported cases of (usually) high or medium high value and which are contested. These are not typical of the huge majority (94%?) of cases which are dealt with in county courts.

8. The current discretionary system has proved highly adaptable to the very large economic and cultural changes over the last 40 years, including multiculturalism, and the advancement of economic expectations for women.

9. In the contested high value cases, most involve cases in which ‘needs’ (generously interpreted) are met, but the couples are determined to litigate. If rules, exclusions and technicalities are provided for in the legislation, the disputes will coalesce round those instead or as well as other disagreements.

10. In practice, little benefit will accrue from proposals which suggest a move from broad discretion towards rules or guided discretion.

11. The introduction of statutory priorities of considering needs will produce an over-technical process, will be poorly understood and applied by litigants in person, and will cause as many problems as it seeks to solve.

“Needs” Reform

12. If the definition or application of needs is to be reformed, it should be on the basis of thorough empirical research into those cases which form the majority – that is medium and low capital cases. In those cases, the assessment of needs is for the most part an assessment of relative hardships. All too often, there is insufficient money to go round and the court has to make hard decisions. Such cases are rarely reported – because they never reach the ‘appeal’ stage.

13. Such research should include a survey of the actual effects of the decisions made about financial provision. Whether assumptions made were borne out by later experience.

14. As it seems to me, much of the current discussion is based on the ‘moderated’ views of a variety of people, untroubled by statistically robust analysis. These views are often formed from the difficulties and issues which arise in a small proportion of high value cases, where wealthy people can afford to litigate, and are prepared to do so to achieve their purpose. Litigation in these cases is more akin to commercial litigation, where cost, chance, and benefit are carefully weighed up. These cases may give rise to
interesting technical issues debated by academics, but have less widespread application.

15. Applying rules (for example about inherited property), demonstrated by high net worth cases, to cases of low or middle value, will simply complicate the process of decision, and add further layers of factual dispute which will put up the costs of litigation.

**Non Matrimonial Property**

16. **(General remarks)**
   (1) The introduction of rules and guided discretion in this area will prove to be a costly mistake – both for the parties and court resources
   (2) It will emphasise the need to look backwards at the marriage, rather than forwards to a solution
   (3) It will increase technicality in an area where, in disputed cases, parties are all too ready to seize on factual disputes.
   (4) It will make it technically more difficult to give advice or encouragement to parties to agree at an early stage, because parties and their lawyers will want to be more sure of their technically correct factual positions under the rules or guidance before considering the reasonable outcomes.

17. **(Para 6.41)** Non matrimonial property should not be shared, unless it is required to meet need?
   (1) I am opposed to this proposal. The effect will be to bring in to dispute a large number of items in cases of small value. Most of those cases will be cases of need, but the provision will be misunderstood and mis-applied by many people in this range of cases. This will fuel disputes, rather than ease them.

18. **(Para 6.50)** Exclusion of family home from non matrimonial property?
   (1) If statutory rules are introduced about ‘non matrimonial property’, then the family home should be excluded, because:
      (a) the purpose of the family home is for the parties (plural) and any children
      (b) treating it as ‘non matrimonial property’ would undermine this purpose
      (c) it will be discriminatory against women (who more often have fewer financial assets)
      (d) classification of it as ‘non matrimonial property’ would be a contradiction in terms, and would not be understood.

19. **(Para 6.59)** Exclusion of property acquired by one party during cohabitation before marriage?
   (1) such acquisitions should not be treated as non matrimonial property:
      (a) the modern trend has moved towards recognition that cohabitation is often part of the marriage relationship (where the parties confirm the relationship by marriage).
Excluding it will introduce all the legal technicalities already seen in separation between unmarried cohabiting couples - a truly backward step.

Just at the time that it has been proposed that cohabiting couples should have remedies more similar to married couples (to avoid injustice), this proposal would move in the opposite direction in respect of property acquired before marriage.

20. (Para 6.87 & 6.88) Purchase of substitute property with proceeds from non matrimonial property?
   (1) the inclusion of such provisions will hugely complicate the task under section 25.
   (2) in the name of making things clearer, these provisions will fuel legal costs
   (3) disputes over these matters will often take place years after the transactions; documentary evidence will be variable; the agreements, many of them informal, which surround such transactions during marriage will bring into dispute many historical matters

21. (Para 6.100) Rules and guided discretion about the growth in value of investments?
   (1) such rules and guided discretion will simply add to complexity and technicality.

General Guidance to Litigants, the Profession and the Courts

22. If this is done, I think it best to be through (say) the Family Justice Council. This could be by way of statements of the general principles of the order of priorities used by courts when considering needs.

23. The difficulties of producing such guidance would be: Who would write it? Who would approve it? The nuances and complexity involved in attempting to summarise principles in a way which would be of any practical value in individual cases.

24. Maybe there is a role for a ‘Bingham’s Motor Claims Cases’ type of textbook, or on line web site (‘Finer’s Family Finance Cases’?), accessible to the public. Practitioners could be invited to send in brief, anonymised, case reports as happens with Current Law and personal injury awards (despite the JSB Guidelines).

8 December 2012
Clive Million
My comments relate to both marriage and cohabitation.

1. should financial needs be met by each other on divorce.

My view are:

In the case of a couple, in a short marriage/relationship, without children and own private income and separate pension schemes, I believe that there should not be an obligation for either to provide financial needs after divorce. The history before marriage would need to be considered e.g. what were their separate circumstances before marriage? If they both had their own income before marriage and this continues throughout the marriage with neither being financially dependent on the other, except for sharing of bills, I think it is the responsibility of each person to support themselves after divorce/separation.

I believe that there are moral questions to be asked in such a negotiation - each party to "consider being benevolent" towards each other, rather than there being a law about meeting financial needs.

Where there is considerable wealth involved, there is more reason for one spouse to provide financially for the other after divorce/separation but only where there has been a large discrepancy in income or if one spouse took on the role of carer for the home and children.

I believe that the nature of a relationship should have a bearing when dealing with a financial settlement as the interactions of the relationship will play out in the negotiation over money. Hence, Mediation not always being helpful e.g. a controlling spouse will seek to be controlling and demanding in Mediation or in Court. Although I understand this is a tricky area to consider, I still think it is relevant. Or, where mental abuse has been a theme in the relationship, there should be financial compensation made in the settlement for the loss of well-being and other effects of the abuse.

2. Non-matrimonial property.

I would like to see assets protected legally so that either spouse cannot make demands on assets accrued before marriage/cohabitation - relating this especially to short marriages/relationships. Some marriages do not always start on an equal footing financially, while others do.

I would like to see legal protection as follows: that all savings and possessions including house, that were acquired before marriage remain in the possession of the original owner and negotiation only taking place where there are children involved or where there has been a dependency from one spouse on the other within a long marriage. In the case mentioned in point one, ownership of possessions acquired before marriage should NOT be included as the financial settlement especially if each person brought their own items and money to the marriage. Only items and money acquired during marriage should be negotiated and shared out accordingly e.g. on percentage division.

This second point raises the question of names on Title Deeds. Taking circumstances of the case above, if one person's name was added to the Deeds without any financial contribution made, the original owner of the property should have a right to request that the ownership be given back without financial implications and "simply on request". Only the profit from a house can be negotiated and negotiated according to the percentage of capital invested by each person.

If one spouse is left in financial hardship, without help from anyone else such as
friends or family members, then a negotiation is to be made from an "act of benevolence" and not in order to "meet their financial needs".

Circumstances before marriage should be taken into account to help determine each person's self-responsibility - since it takes two to make a divorce. Perhaps this would be more relevant in the case of a short marriage or where each person married later in life after they had already established a life for themselves prior.
ANSWERS TO LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS from Mr Justice Charles

PRINCIPLED REFORM

7.2 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?

Yes.

[paragraph 4.113]

7.3 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?

No, both concepts introduce conceptual problems and are best dealt with within an approach based on relationship generated need to effect a fair transition to independent living.

[paragraph 4.114]

7.4 In answering the question at paragraph 7.3 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.

The present approach to (1) to (4) is sensible and workable in practice to determine relationship generated capital and income need, and to factor in
the position of children. But, what has been mutually agreed expressly, or demonstrated by practice, in respect of the marital approach to such responsibilities and marital finances should be given more weight than at present in determining the award.

[paragraph 4.115]

7.5 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?

A reformed discretionary approach; which gives a discretion to depart from starting points and is directed to achieving defined aims.

[paragraph 4.116]

7.6 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?

It should be made clear that independent living is the aim, and so the result to be achieved on a discretionary basis. It could be made clear that if a party chooses not to work for reasons unrelated to a relationship generated responsibility he/she cannot look to the other party to make up the shortfall in income that results.

I try to explain this and more generally the approach to relationship generated need (and so the way in which relationship generated responsibilities are met) in G v G [2012] EWHC 167 (Fam) and McFarlane v McFarlane [2009] EWHC 891 (Fam)

[paragraph 4.117]

7.7 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?

New statutory criteria should be drafted. The relevant Government Department should do this after appropriate consultation. Care should be taken to ensure that the work and consultation is not dominated by existing
bodies such as the FJC and the relatively small group of solicitors, barristers and judges who do this work; although of course they have an important role to play in the consultation. The time scale should be as soon as possible.

[paragraph 4.118]

IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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;¹
   (b) the priority to be afforded to different elements of need.²

(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;³
   (b) the normal form of orders for periodical payments (term orders or joint lives);⁴ and
   (c) the financial arrangements to be made after short childless marriages.⁵

(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.

I have addressed much of this above.
(1) Yes, but choices made during the marriage and so autonomy should also be a statutory criteria.
(2) This should be by way of statutory provision
(3) (a) This should be by reference to criteria and purpose and is complicated by the mix of capital and income provision
(b) Term orders, which can continue after the term specified if this is agreed in writing. Periodical payments should end, or be subject to variation, on or by reason of co-habitation.
(c) The criteria should provide for a very quick return to independent living by reference to that enjoyed by each party before the marriage.
(4) It should be statutory guidance. Practice guidance from other sources causes unnecessary complications.
(5) An information hub and internet guidance is a good idea subject to the very important qualification that it must be accurate and complete.

[paragraph 5.62]

7.9 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.

I have tried to answer this above.

[paragraph 5.63]

7.10 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.

Yes.
It should also specify that if needs are addressed in a nuptial agreement then the level set therein should be a factor to be taken into account in setting the payment to meet needs.
Further, it should specify that if a nuptial agreement provides that certain assets / income sources are not to be taken into account for determining what should be paid to meet relationship generated needs that is also a factor to be taken into account in setting the payment to be made to meet needs.

[paragraph 5.70]
NON-MATRIMONIAL PROPERTY

7.11 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?

Yes I agree with some qualification to ensure that the part of it that represents the product of the marital partnership is included to meet needs (both capital and income).

[paragraph 6.41]

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

No. In many cases this will represent a significant non-matrimonial contribution by one party or his/her family and, if that is so, it should not be subject to the sharing principle.

[paragraph 6.50]

7.13 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.

No, subject to giving respect to autonomy and so the relationship choices of the parties to, in particular, a long pre-marital relationship.

[paragraph 6.59]

7.14 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?

Yes. 

[paragraph 6.77]
7.15 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?

**No, whatever is purchased the original source of the asset remains the same.**

[paragraph 6.87]

7.16 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?

**No, the source of the invested proceeds remains the defined non-matrimonial property.**

Both of the last two answers are subject to the impact of “marital choices” based on express agreement which should be identified as a determinative statutory factor in determining any conversion of non-matrimonial property into matrimonial property and vice versa.

[paragraph 6.88]

7.17 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?

I agree that this is a difficult area. But think that rules can and should be devised. My suggestion is at the end of this answer.

The present substantive law and practice has created a shambles that must be addressed. For example, the Court of Appeal decision in Jones is internally inconsistent and illogical and fails to have regard to commercial realities concerning private companies. It is also at odds with the Court of Appeal decision in Robson (in both I was the judge at first instance).

At the heart of the problem is the statutory direction to try and achieve a clean break and the non-discriminatory approach to be taken to the marriage partnership. I agree with the non-discriminatory approach but it does mean that some criteria have to be set for determining the approach to be taken to property that increases in value during the marital partnership and to property that increases or decreases in value after separation. This is not easy and the problems arise in respect of a large range of assets and an earning capacity.
The problems are made much worse by the approach adopted by many financial remedy specialists of:

(1) putting a capital value on all assets, and then

(2) seeking to achieve a clean break by the payment of a lump sum assessed as a percentage of the total value, without proper regard to whether the assets can or should be sold or the risks in raising loan capital or capitalizing an uncertain income stream.

This approach can be particularly unrealistic and unfair in respect of a private business that has always been an income source and in which one of the parties has spent his or her working life. It is likely to be very unfair to force a sale of such a business, its valuation is likely to be very inexact and often it will not have a market (or one if the relevant party does not give non-competition covenants).

In cases I regularly ask the valuers what the market for a company is and, sadly, the regular answer is that they have not investigated this.

This problem is not confined to pre-acquired assets but equally applies to the income producing assets created by joint efforts assessed on a non-discriminatory basis during the marital partnership.

There are many advantages for both sides in a clean break but the present approach of many is that it should be achieved even if this imposes very considerable risks and burdens on the payor.

In my view, change should be made to ensure that the nature of the relevant assets is taken into account and, in particular that when a business asset has been utilized during the marriage as an income producing asset (whether it was brought to or was created during the marriage) the starting point should be that absent agreement it should not be sold and should continue to be treated as an income source.

Next there is an urgent need for lawyers who have some experience of, and expertise in, commercial / company law to become involved in claims for financial relief. This would be encouraged by statutory criteria that require commercial issues, business realities and plans etc. to be taken into account.

In my view, it is probably impossible to identify a basis for putting a value on the “home maker’s” contribution to increases in value of pre-acquired assets. And this is confirmed by the attempts that have been made to do this in the cases, which also indicate that in both the calculated and the general approaches that have been adopted to reach the answer the decision maker may well be justifying the answer he first thought of.

As between the two approaches it seems to me that a general approach to the assessment of the percentages of an asset as at (i) separation (the end of the marital partnership) and (ii) the hearing that should be attributed to (a) its
existence at the start of a marriage, (b) passive and active changes to it during the continuance of the marital partnership and (c) further passive and active changes to it after the end of the marital partnership, is much better than any formulaic approach based on passive and active growth to a value attributed to the asset at the start of the marriage.

But both approaches introduce great subjectivity and uncertainty; and so potential unfairness.

So, it seems to me that, a formulaic approach against which the parties to the marriage can manage their affairs, including if they want to by making binding nuptial agreements (or declaring trusts or transferring or issuing shares) is likely to be preferable and seen as a fairer approach.

I suggest that a formula that provides that whether or not both spouses work in the relevant business or directly improve the value of non-matrimonial property, each year a percentage of non-matrimonial property will become matrimonial property.

This default rate of acquisition would end on the termination of the marital partnership (normally the date of separation) and not on divorce or at the hearing. This lack of further change addresses the difficulty of assessing how increases and decreases in value should be addressed after the marital partnership ends. So, as is generally accepted, absent waste or irresponsibility, decreases would be shared in the percentages set at the end of the partnership. And, the same would apply to increases. This would mean that, the person who was instrumental in bringing about any increases in value would know that that was the default position.

If this idea was accepted as a possibility more work would be needed to assess whether different classes of asset should be treated differently and how it would operate when non-matrimonial and matrimonial property merge. Generally, I think it should be confined to capital assets and that an income earning capacity should not be included and capitalized. Rather its product (i.e. future income) should be brought into account in assessing the amount and period of income that should be paid to meet relationship generated need (which could be capitalized).

[paragraph 6.100]
This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to:  propertyandtrust@lawcommission.gsi.gov.uk  or
by post to:  Law Commission
            Steel House, 11 Tothill Street, London SW1H 9LJ
            Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

**Your details**

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

No

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

No

As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
### PRINCIPLED REFORM

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<tr>
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<td>Absolutely, it is well in need of review.</td>
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**Supplementary Consultation Paper, Part 4, paragraph 4.113**

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<td>(2) seek to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution?</td>
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**Supplementary Consultation Paper, Part 4, paragraph 4.114**

Spousal maintenance should be for a limited time only (such as the Scottish system) so that both parties are encouraged to move on and not live off each other for the rest of their lives.
7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

No, it should be entirely transparent from the point of marriage what the level of spousal maintenance should be.

The only parties who benefit from the current lack of clarity is the solicitors.

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

A formulaic calculation for a fixed period of time. This makes sure both parties are aware of what will happen should they divorce.
7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

There should be limits on support.

7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

Consideration of the Scottish system and other countries in Europe who take a more progressive view of divorce.
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments

No, no one is entitled to anything if the marriage ends. Once people are divorced they should be helped to move on.
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?
7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.
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Supplementary Consultation Paper, Part 5, paragraph 5.70
NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50
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Supplementary Consultation Paper, Part 6, paragraph 6.59

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| Do consultees agree? |

Supplementary Consultation Paper, Part 6, paragraph 6.77

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| Do consultees agree? |
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LAW COMMISSION
CONSULTATION PAPER No 208

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

RESPONSE FORM

This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

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We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

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<tr>
<td><strong>Name:</strong></td>
</tr>
<tr>
<td>Rhys Taylor</td>
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<tr>
<td><strong>Email address:</strong></td>
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<td><strong>Postal address:</strong></td>
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<tr>
<td>Thirty Park Place Chambers, 30 Park Place, Cardiff, CF10 3BS</td>
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## PRINCIPLED REFORM

### 7.2 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?

*Supplementary Consultation Paper, Part 4, paragraph 4.113*

Yes, up to a point. Whilst clear and principled guidelines and/or a legislative steer would be a considerable improvement, I would not be absolutely prescriptive and go so far as saying that in ‘x case’ the answer *must* be ‘y answer’. However, if reform was on the basis that the clearer guidelines and/or steer were expected to be followed, unless it would cause undue hardship or substantial injustice, that would catch the odd factual scenarios which legislation may struggle to anticipate.

### 7.3 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?

*Supplementary Consultation Paper, Part 4, paragraph 4.114*

If only one choice I would say (2). However after very long marriages (e.g. 25 years plus) where the parties are, necessarily, older, I can see the argument for compensation for loss caused by relationship – if that would be a larger figure. It may be that after a long marriage it is far more difficult to unravel in any event, meaning that a higher compensatory award is the result of (2) in any event.
I would like to emphasise, from practical experience, the vulnerability of the 55+ wife who has stayed at home to bring up the family. To suggest she can go and retrain and/or get a job stacking shelves, when she has never worked is seldom realistic. It is almost impossible to unravel a lifetime’s worth of decisions.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

See some of my answer to 7.3 above.

Points (1) – (3) should be highly relevant in most cases.

(4) Depends. If occupation has been retained by wife because husband can easily rehouse himself with capital/income at his disposal, it is not a big issue. If the continued occupation of the FMH means that the husband has to rehouse out of scarce capital/income, then it is far more relevant. Capital and maintenance orders are like pieces of a jig saw and must be looked at together and cannot be viewed in isolation.
7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

Probably (1) due to the uncertainty of future factual scenarios.

If (2) then there should be an ‘escape clause’ for undue hardship and/or substantial injustice.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

I assume such ‘incentives’ would be to make support at such a low level or for such a short period of time that it practically forces those not in employment to seek employment. I would not be in favour of such incentives. Marriage changes the status of a person in law and, often, over time, alters their standard of living. Further,
decisions made in marriage may result in one party giving up or eroding an earning
capacity and/or up to date work skills. There is a debate about the use of ‘incentives’
in the context of welfare reform and that is controversial. However, unlike the welfare
context, the state is not being asked to provide support, rather it is a spouse who has
chosen to alter their legal status by deciding to marry. Whilst all accept the marriage
can be brought to an end, it would be wrong (in my view) to adopt an approach to
spousal support which would ‘embody incentives’ (in the sense in which the question
has been understood) to force independence more quickly than might otherwise be
reasonably achieved.

A realistic look needs to be given in a particular case as to how long it will take for
someone to achieve independence and, finance allowing, that should determine the
measure of spousal support.

I would not be against certain statutory assumptions as to the length of spousal
support (e.g. spousal support, whether substantive or nominal, will not be terminated
during the later of the child’s minority or finishing full time tertiary education) provided
they were realistic assumptions (falling short of presumptions), rather than
‘incentives.’

In parenthesis, in nearly all cases it is agreed by the court that responsibility for
children does not end on an 18th birthday (if anything these days it is likely to
increase if children go to university), but the statute encourages such post 18 support
to be seen as a parent’s choice rather than necessity. The law in this respect
appears out of touch – that is why I have suggested an assumption of support ending
on the later of the two triggers above.
7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

1. A committee involving the Law Commission, family academics with input from judges, specialist legal associations (Resolution and FLBA) and individual interested practitioners.

2. Involvement of specialist legal associations and practitioners may enable the academics/Law Commission to access greater statistical data which reflects practice in England and Wales, rather than a relatively small sample which can be easily accessed by academia alone. Once data received pilot in several different geographical areas.

3. 3 years?
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:

   - to live at the same standard as he would have lived during the marriage, and if so for how long?

   - to as much as he needs to relocate and to start again as a single person?

   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments

A. Graduated transition to independence for Michael.

B. In my experience you would calculate this need without reference to the capital value of the property, which would then be subject to sharing (although a large figure, the capital has been generated during the marriage and placed in the central asset of the FMH. The FMH has calibrated the parties' standard of living to an extent. Even though short marriage, Michael is entitled to his share for these factors). Michael's future income needs are a separate issue to the capital he has 'earned.' Given the shortness of the marriage, the length of support might be shorter than otherwise (I referred to statutory assumptions above, and, when children are not involved, it might be useful to articulate an express assumption that the shorter the marriage the shorter the term of maintenance will usually be. An assumption would give direction but would not have the force of a presumption, allowing discretionary factors to be given weight as necessary).

C. Pat is likely to receive some kind of state provision for adapted accommodation. Pat unlikely to object to rented accommodation as this is where she was before. I do not think that Chris has any responsibility to finance the purchase of freehold accommodation for Pat, but probably should have a responsibility, to such extent as is fair once more facts are known, to assist in providing accommodation pending state provision. Future support is far more difficult. Much depends upon what Chris’s income is and how far
short Pat’s income needs are, after state provision has been factored in. However, each altered their legal status upon marriage and, whilst the facts are stark (and apt to encourage ‘bad law’) I would not be deflected from saying that support should continue until independence has been reached. The deliberately provocative matrix in the question underlines why there would need to be an escape clause in any system based upon a formulaic approach.

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. Tricky, as some may find helpful and some frustrating. Much depends on personality and disposition of the parties to imagine an answer.
   a. On balance I suggest helpful to have a guideline.
   b. Despite voluminous authority to say that there is no rule, many lawyers (judges and practitioners) would be starting with Sarah having one third of joint net income (i.e. CSA taken out of equation as it can be assumed this will be spent on the children, and also ascribing Sarah an earning capacity if she is not about to seek work or making a judgment, for this family, as to how long it is reasonable for her to remain at home) and looking to see if adjustments need to be made.
due to need and/or affordability issues.

c. Overall, I would not be surprised to see Ian having to pay 40% of his net income when adding CSA and spousal support together.

d. A big practical problem in my experience is that one very rarely sees a carefully prepared and honest outgoings schedule. They are either thoughtlessly prepared and miss out on obvious items of repetitive expenditure which any household will have in a year, or are an over exaggerated wish list prepared in the wrongful belief that this will maximize a claim – the reverse is often the case, leaving a judge having to guess, as he has derived no assistance from the schedule.

e. In calculating what it costs to live it might be helpful to have access to guidance in the form of a range of template schedules of outgoings as to a range for what people should and can live on. I assume such data may already be available in another context. It might usefully be presented in At A Glance or similar document.

E. The law could have assumptions (which are not as strong as presumptions) which guide but can be derogated from when applying discretionary guidance. E.g. assumption that carer should have support until completion of tertiary education. If no children an assumption (which can be departed from if discretionary factors require) that there is one year’s support for every year married (or 6 months per year married).
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

F. The longer the marriage the more enduring the support should be, if needs require it:
   a. Sarah and Ian not much affected as fact of children overtake the argument about length of marriage.
   b. Sophia and Michael makes a little difference, they have shaded from a shortish marriage to the bottom rung of a medium length marriage.
   c. This is a difficult case which would call for a discretionary determination, exiting any assumptions or formula. Support probably required for a long time, notwithstanding the shortness of marriage.

G. No one should, as in most cases (i.e. non big money) there is simply not enough money to make this a reality, whatever the aspiration. Even Sophia’s income is likely to be largely eaten up by costs of repurchasing and living in Central London and paying some support to Michael.

H. Continuing responsibilities are important but it is important not to double count Sarah’s entitlement here, as the CSA is already providing Ian’s determined level of support.

I. Sarah, yes – as she has the children.
   a. Tough luck on Ian.
   b. Sophia, depends if she can buy Michael out, if not sale and divide proceeds.
   c. Ian needs to make way for the care of his children.
   d. Michael cannot afford to remain.
7.8 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 finishes 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

   (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

   (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

   (c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).
(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

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<th>Bearing in mind the controversy which normally attaches to family law reform, interim statutory amendment, may not be the most realistic way of achieving an interim change in the law.</th>
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<tr>
<td>Why has a “Kemp &amp; Kemp” not emerged in the field of family finance practice? Many Kemp cases are low value and decided at DJ level. By having a range grouped together one gets a feel for a likely range of award. Such a tool would ‘shame’ the regional variations we all know exist and encourage consistency.</td>
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<tr>
<td>In the family context there would need to be caution about the anonymity of published fields of data (s.25 factors) and account would have to be made for regional house prices and income disparities. However, with regional differentials ironed out it might be a useful book/website/resource, but would take a few years to establish.</td>
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<tr>
<td>Why not have a Judicial College guidelines booklet for spousal support, as in Personal Injury? Might Judicial College be regarded as more authoritative than Family Justice Council and/or information hub?</td>
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Supplementary Consultation Paper, Part 5, paragraph 5.70

A more responsive document, rather than a statutory definition of needs, would be guidelines published pursuant to a statutory provision, which should be followed save for good reason. This would enable periodic review as to how well the specified level of needs have been working.

NON-MATRIMONIAL PROPERTY

7.11 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

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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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

Yes

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

Family home should be excluded from the definition but if purchased with non-matrimonial property, subject to an additional statutory consideration of “the source of the capital.”

7.13 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.
No – premarriage cohab very common and now treated, to all intents and purposes, as part of marriage in most cases.

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Do consultees agree?

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

How many trips will it take to the Supreme Court to work out the terms “has been bought for use by the family” and “save where the substitute property is of the same kind as the property sold?”

My personal feeling is that this idea will be very hard to capture in a statutory provision. It may be easier to simply have “source of capital” additional factor and/or a consideration that “if needs are met the court will usually be expected to restore non-matrimonial property or its current value (to the extent that its current value can be ascertained) to the person to whom introduced it to the marriage unless it has financed the parties primary home.” If needs are not met then the court falls back on the steer of weighing “the source of the capital.”

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

As above
7.17 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?

**Supplementary Consultation Paper, Part 6, paragraph 6.100**

Very difficult!
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Your details

Name:
Nicholas Way

Email address:

Postal address:
Director General
Historic Houses Association
2 Chester Street
London SW1X 7BB

Telephone number:

Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
Yes, as above.

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
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7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

1. The Historic Houses Association (HHA, [www.hha.org.uk](http://www.hha.org.uk)) welcomes the Law Commission’s initiative to explore the scope for Marital Property Agreements, referred to in the supplementary consultation paper and below as Qualifying Nuptial Agreements (QNAs). The circumstances of inherited historic houses are such as to make QNAs a potentially important means, in the event of divorce, to conserve these historic places for the future, in the interests both of the families that have built, acquired and conserved them, and for the wider public, who can enjoy the particular characteristics of a lived-in historic house. We therefore support the aims of: establishing a legal framework for QNAs; defining non-matrimonial property; and proposing a rationale for when non-matrimonial property should be left outside the calculation of needs and the sharing of property to meet those needs.

2. The HHA’s response to the original 2011 response ([http://www.hha.org.uk/our-policies/policy-submissions.html](http://www.hha.org.uk/our-policies/policy-submissions.html) - scroll down to page 4, 8 April 2011), set out our approach to what are now termed QNAs and explained the particular circumstances of historic houses and the relevance of those circumstances to this exercise.

3. In regard to this exercise our response focuses on the parts of the supplementary consultation that relate to non-matrimonial property. We do not enter into the debate on the handling and calculation of needs, although we do accept the principle that QNAs should not contract out of meeting needs.

4. As we explain in paragraphs 10 - 13 below, we believe that in the circumstances of a historic house there is a strong case for regarding the house - together with chattels associated with the house and property held to support the maintenance of the house - as non-matrimonial property, separate from any calculation of needs or exercise in sharing property on divorce. We believe that this approach is widely understood by those who enter into marriage where a historic house is the inherited or pre-acquired family home.

5. We expand on this rationale in our responses to the specific questions in the supplementary consultation on non-matrimonial property, but first we set out our locus for responding.

6. The HHA has an interest, and locus, in this consultation because:

   i. The 1,500 historic houses, castles and gardens in the membership of the HHA throughout the UK constitute a hugely significant part of Britain’s unique, privately owned heritage, and are owned, in very many cases, by people who are married

   ii. It is in the interests not only of the families who live in these historic places, but also the nation as a whole, that historic houses, their historic contents and surrounding landscapes remain as entities, because it is the lived in character of these places and the continued presence of their historic contents (art, ceramics and other objects, wall and floor coverings, furniture, archives) that makes historic houses, castles and gardens so appealing and interesting, and the most often cited reason for tourists to visit our shores.
iii. The 500 or so HHA properties open to day visitors attract 13 million visitors a year; HHA houses, castles and gardens host 300,000 educational visits; HHA properties support the employment of at least 30,000 people, and their tourism activities alone inject at least £1.6 billion into the wider economy, through related activities (such as retail in the surrounding area) as well as through the gate.

iv. The viability, as well as the historic character, of historic houses, depends upon the estate being kept together; this objective is as important as ever in owners’ decisions on securing the succession of their properties.

v. Owners of historic houses see their own tenure as being but one link in a continuing chain, to maintain the house, its contents and land and, if possible, to enhance its character through improvements or acquisitions. They rarely wish to sell or otherwise dispose of the property.

vi. However, the costs of maintaining Britain’s historic houses are high, and increasing. Despite spending £140 million per year on maintenance, HHA owners have seen the backlog of urgent repairs at their houses grow by 50% from 2003 to 2009, from £260m to £390m.

vii. 1 in 8 owners has had to sell a work of art in the last ten years to fund major repairs; once valuable contents are dispersed from historic houses they rarely return, and the cultural value of the property, and its interest to visitors, declines if contents have to be sold or the estate diminished.

7. We therefore approach this consultation from the perspective of the scope for QNAs to support the long term conservation of the integrity of these unique and much loved historic places.

8. The 2011 consultation was conducted in the light of the Radmacher v Granatino case. The HHA welcomed that consultation because it opened up the possibility of marriage partners being able to agree in advance of a marriage – or in principle afterwards – that there may be property in the ownership of either party, such as a historic house and some or all of its historic contents, that is not part of the marriage and to “ring fence” it in a binding QNA, as non-matrimonial property. The purpose for a QNA in these circumstances would be to secure the future integrity and, it is hoped, viability, of the historic property.

9. The HHA notes that there is international precedent for QNAs, with safeguards, not least to ensure that each party goes into a QNA properly advised and with their eyes open. We also note that in Scotland (where there are some 250 historic houses within the membership of the HHA) the law provides that inherited fixed property is not included for consideration in a divorce settlement. Thus there is already a precedent for the recognition of non-matrimonial property within the UK.

10. Whilst we accept that a QNA should not contract out of meeting the needs of the individual parties, we stress that in the case of historic houses it is not uncommon for the house – even if it is the family home – to be regarded by successive generations of owners as an inherited asset of which the current incumbent is the steward, rather than the outright owner.

11. Where the house is inherited property, the owner would not expect to sell, but to bequeath the house to the next generation. In these circumstances it would not be appropriate to regard the historic house as matrimonial property, available to be split up or sold in the event of divorce. At the time of marriage, both parties will be conscious of the imperative to provide sufficient resources not only to meet their needs, but those of the house itself.

Continued…
12. It follows that the historic house should be seen as non-matrimonial property, separate from any calculation of needs – those must be met from other resources. A QNA, including the historic house as non-matrimonial property, is consistent with this approach and should be permissible under any proposed reform.

13. It also follows to apply this approach to other inherited, or pre-acquired, or indeed subsequently acquired property that belongs as part of the historic house, such as associated objects (art, ceramics, furniture, fabrics), or is owned in order to provide an income, or capital, to support the maintenance of the historic house – rather than for the personal needs of either party.

14. We therefore support the preliminary conclusion of the supplementary consultation set out in paragraphs 127 – 129 of the Comprehensive Summary:

Para 127: “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 introduce a broader definition of non-matrimonial property, which may or may not be shared at the court’s discretion, again subject to provision for needs…”

Para 128: “…Arguably a continued discretionary basis, even if hedged around with some extra guidance, will not provide any increased certainty. The current uncertainty is troubling because it may amount to a disincentive to marriage…”

Para 129: “…So we favour a rule that non-matrimonial property is not to be shared unless it is required to meet needs. With that view goes a relatively uncontroversial 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.”

15. And in particular we agree with the proposal in Paragraph 130:

“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.”

16. For the reasons given above (in particular our paragraphs 10 – 12) we do not agree that the family home should be excluded from the definition of non-matrimonial property. As is recognised in the Comprehensive Summary:

Para 133: “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…”

Para 135: “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.”

17. We therefore agree with the provisional conclusion in paragraph 149 of the consultation:

“**We provisionally propose that non-matrimonial property should not lose its status as such merely by virtue of having been used by the family.**”

Continued below…
NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

We agree. See our paragraphs 10 – 14 above.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

We disagree. See our paragraphs 10 -12 and 16 above.

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

“Non-matrimonial property” would appear, on the surface, to apply to the situation of marriage. However, the law does not yet grant the same rights to cohabiting partners as to married partners. Whilst the HHA is not concerned with whether owners of historic houses should marry their partners, we would be concerned if the law were to give cohabiting individuals increased entitlements to the property of their partners, given the rationale of allowing QNAs to treat historic houses and associated property as outside the partnership.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

We agree. See our paragraphs 16 – 17 above.
7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

**We agree. The final qualifying phrase is all important**, as non-matrimonial property may be sold in order to fund the purchase of other property which is equally tied to the historic house at the centre of the portfolio of non-matrimonial property.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

**We agree.**

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

**Yes, in principle.** The calculation will need to take proportionate account of the relative investment by each of the parties, i.e. if the investment has been made predominantly by the owner of the non-matrimonial property, then the predominant part of the growth in value of that non-matrimonial property should remain within the non-matrimonial property. For example, if the owner of a historic house that is treated as non-matrimonial property in a QNA invests money in the restoration of the house, thus increasing the value of the house (or limiting a decrease in value that might otherwise have occurred), that increase in value should remain non-matrimonial property.
# MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

*Supplementary Consultation Paper (SCP) (Part II)*

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a response by

**Men’s Aid**

 to

Law Commission Paper No. 208

## Your details

<table>
<thead>
<tr>
<th>Name:</th>
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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

| Yes, Men’s Aid | (see address above) |

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

| Not applicable |
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Confidentiality in not requested

PRINCIPLED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

**Answer:**- Most certainly and immediately. Proper reform and not ‘tinkering’ is essential.

We congratulate the authors of the Consultation Paper in their summing up the situation, re: Para 4.107, namely that:

“... the current law, based as it is upon a mix of mutually inconsistent principles, is not a sustainable policy choice for the future.”

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

**Answer:**- In our opinion, a very limited choice is being offered. We are concerned that the choices “obvious” to the Law Commission” may not be the only alternatives worthy of assessment, which the Commission itself accepts at Para 4.105.

With due respect, there may be other alternatives which might be more obvious to others who have lived through the machinations of the present law. As users and innocent victims of the law they may be able to present a range of viable options and desirable principles in this regard which the Law Commission may have unwittingly overlooked and will thus undermine.

We can only speak confidently of exchanges of information with other English-speaking jurisdiction and nearly all of them suffer from ‘hazy’ definitions of spousal support aggravated in many instances by judicial discretion.

Canada, we understand, has attempted “advisory” guidelines have found they are little more than an illusion of legal legitimacy. Criticisms of the Canadian basis appear to stem from its arbitrariness within which courts still continue to act in the same arbitrary manner.

Across the border in America the *American Academy of Matrimonial Lawyers* (AAML), is wrestling with a formula without rationally-connected principles.
If, as the Law Commission here in the UK has noted, “solutions must follow principles”, then arguably this question is inopportune given the absence of underlying statement of first principles.

There still exists in our opinion a failure of many countries to provide a rational approach to spousal support which strongly suggests that the fundamental and largely universal jurisprudential foundations of “needs, compensation, and sharing” needs to be critically re-examined - with a view to removing redundancy and contradictory principles.

The American Law Institute’s (ALI) formula, which was brutally disparaged by the AAML among others, provides a case study of the fallacy of defining spousal compensation without rationally-connected principles.

We would therefore support the Law Commission if that is what it has in mind when it states at Para 4.22: “What is wanted is a fresh policy direction for the law on spousal support.”

Confidence in this process would be instilled if the Law Commission could point to one or all of the proposed theories having been subjected to quantitative analysis in order to assess its prospects and merits.

We would like to see a start begun on a final phase to eradicate spousal support. It is a concept long passed its “sell by” date. We agree with the Law Commission which at Para 4.69 states there no longer exists a rationale for its retention:

“The problem was similar to what occurred in the US and is familiar here: 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. “

Having been brave and far-sighted in the text the options now suggested above run away from the obvious.

Having concluded firstly that continued spousal ‘compensation’ is a relic and idiosyncratic, to then secondly opt for compensation to cover ‘unravelling costs’ is equally quaint and eccentric. In other words, we are not pulling ourselves out of the mud by opting for change but because we are familiar with mud, we are deciding to sit down in it.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

Answer:-

Theoretically the length of the marriage has been a salient factor in all ancillary hearings and divorce settlements generally. We ask “Why”? Even in cases where the marriage has been void ab initio because of a technical of fundamental breach of law on behalf of the wife, the man (‘husband’) has been order to pay maintenance etc, as if legitimately married for that time.
The duration of marriage is but one factor in an era where most women go out to work and indeed, believe they have a right to a place in the labour market. Given that the “marriage wage” has been abolished and two incomes are needed to a reasonable standard of living and meet basic living costs among the middle and lower orders respectively, why should divorce reverse matters into the 1950s?

Currently no adjustment appears to be made for the enhanced Standard of Living (SOL), wealth creation and wealth accumulation enjoyed by the spouse seeking a divorce usually the woman. The assumption – which is wholly unrealistic - is that she is entitled to the same SOL after divorce. If this means – as it often does - leaving the fathers with 10% of gross assets and the former wife with 90% this appears to be considered “fair” by the present regime.

A more comprehensive lit of factors would perhaps include discounting awards, i.e. down- sizing, for the above (i.e. SOL enjoyed); relative economic contributions made (until now accepted but only as lip service); pre-relationship earnings and earnings during relationship;

It appears to us that the division property is the primary culprit (and deterrent to a stable society), followed by division of portable wealth. In our view it is property that causes the greatest sense of injustice and disrespect for the law. Under the previous fault-based divorce laws a sense of proportion and consequences was imbued. This has failed to happen with the post 1969 era. Couples were allowed to reach financial settlements without being a ‘drain on the state.’ Any new law, we suggest, would be wise to accept this basic premise (known to work), and limit judicial interference.

The present regime still appears to be based on the out-dated heritage model of the husband going out to work and the wife staying at home and thus she is totally at sea when totally out of the blue her husband divorces. This is unconnected to today’s reality. More wives divorce their husbands than vice versa (perhaps the reason is the guaranteed financial ruin for the latter and the potential financial gain for the former ?). Lower earning spouses expect and depend on their other spouse having an earned income. As a consequence a fair division for each of the spouses is, of necessity, created. We have yet to be convinced that this Supplementary Paper has taken on board the economic dynamics.

“Poverty” is now officially defined but how often does the legal profession examine its contribution to the spread of widespread poverty? In the past it is the legal profession that has helped set the economic and fiscal parameters. In any other area of life we would suggest that the best able, i.e. economists and tax accountants would be asked to set the rules. The result is that the consequences have not been as intended and the SOL has crashed in the past decades and been compounded by the post 2008 financial crisis. With the rug of assumed per-capita consumption and wealth creation snatched away the consumption based definition of SOL has vanished and rates of return – presently at 1% on invested savings – make a mockery of purely legal minds settling this discourse.

We were very interested that notice had been taken of the “double-dipping” phenomenon but we were not entirely satisfied that the response put to rest our concerns.

As stated above “poverty” has now an official definition but it is one that is a moveable feast - based as it is on a percentage of average incomes. And while it is critical (for this paper’s purpose) to define “standard of living” appropriately in order to reach equitable preconditions and consideration it would be reassuring to use standard financial mechanisms as the criteria. In too many judgements, especially at County Court level where budgets are
tight, no appreciation of a Net Present Value (NPV), lump sum plus, or accumulated net worth (i.e. assets minus liabilities), is visible by either legal representatives or the presiding judge.

Having reached the desired adjudication status outlined above, we would suggest it be applied to the following situation.

* **Property Division** - spousal support, and child support are interrelated components that must be calculated as an integral whole at dissolution. They are currently under review by the DWP with proposed powers being delegated to the couples involved.

* **Financial calculations** – these we suggest should be done in accordance with methodologies widely accepted in business rather than the arbitrary valuation too often displayed.

* **No-fault divorce regime** – the characteristics in all ‘No-fault’ divorce regimes is that one party, often the innocent one, is left with no redress. Where else in English law is this viewed and accepted as ‘reasonable’? Damages for breach unlike “criminal conversations” and the pre-1969 off-setting of obligations payable (and/or the amount) are now no longer obtainable in any form. The value, therefore, of matrimony cannot be expressed in terms of residual values and rights attributable to an on-going relationship “status” but must be assessed solely as a terminating “contract”, i.e. the marriage is worth nothing until it is terminated at which time the values can be crystallised. This seems an illiterate methodology to adopt.

The items listed above are, we believe, the self-evident disadvantages of the structure created by many attempts over 30 years to reach an ideal but as yet undisclosed goal.

We would propose a much more tax efficient and financially even-handed approach which would allow ‘lump sum payments’ (but post-tax), or contractual settlements as possible options (with the above provisos of ‘affordability’ for the party).

In our opening reply we agreed with the Commission (see Para 4.22) that, “What is wanted is a fresh policy direction for the law on spousal support.” Later, at 7.3, we went on to state that we look forward to the “final phase to eradicate spousal support” being achieved. A ‘fiscal cliff’ is not what we are looking for but rather a tapering-off of the present regime. This would tie in with the Commission’s ambitions of seeking “...a fresh policy direction for the law on spousal support.”

The first stage could, in our estimation, incorporate flexibility regarding the two components of a lump sum / equitable property settlement and the privatisation at least in part of the welfare component which might parallel the re 1969 system of financial compensation between spouses.

**7.5 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?**

**Answer**: It would be a welcome change for any approach to this question - be it principle or formula based- to have ‘transparency’ and for it to be accepted by the public at large before any of them are obliged to enter the mysterious world of secret family courts.
The ‘discretionary’ approach has, after 40 years, been totally discredited - while a formulaic approach runs the risk at first sight of being too rigid. So in effect there are no choices at all.

If we are dealing with money, property and items of intrinsic value - which we are - the obvious reaction would be to not ask a lawyer who only knows the law. If you have a leaking roof why phone for car mechanic?

Our strong preference, with the caveat above, would be for a formula based approach of some description which would be open to scrutiny, openly developed and ‘certified’ by an accounting body as being appropriate. Why should these aspects stay hidden?

We are confident that as with all matters these days it would not take long for this process to be computerised so that it could be used by lawyers and/or accountants.

If pre-nuptial contracts are to figure in our matrimonial landscape then there is no reason why a “financial statement” or settlement should not be similarly incorporated. This would be of immense assistance to family business where valuations can be devastating, forcing a closure and redundancies.

We suspect a ‘reformed’ discretionary approach would serve only to perpetuate the present unfairness of the current approach. It would not have public support. The challenge, as we see it, is to define appropriate principles.

Given that the state encourages and does not impede no-fault divorce the question arises as to whether there is a legal and moral obligation on the individual to finance the consequences of decisions made by the state. The question of separation of spousal support into equity and private welfare components is, therefore, a moot point given the contradictory opinions.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

Answer: We would be strongly opposed to a discretionary regime - reformed or otherwise. We wholeheartedly agree that any new regime, formulaic or not, should embody incentives towards independence by placing limits on the extent of support by the other spouse that might be under consideration by the committee.

It makes utter sense that in the nation’s current strictures and effort be made to off-load (i.e. downsize) the state’s welfare obligations. Equally, the onus can no longer continue to be placed on the individual to make up for any perceived shortfall as would have been the case in the past. We would point out that standard unemployment benefits, e.g. job-seeker allowance, already includes an element for spousal support and child care obligations (ref. Hockenjos v Sec. of State, 2000) it also contains an element for retraining.

If the state sponsors no-fault divorce it must fund no-fault divorce (as was intended in the 1970s).

7.7 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?
Perhaps the most appropriate vehicle would be a multidisciplinary group (held on the same basis as, say, a Public Inquiry for instance, and open to the public). It would include delegates from economic backgrounds, business leaders and accountancy bodies. Once appraised of the problems and the ambition set to seek a fairer outcome across the income range they would produce a Report. This might also include ‘Public Policy’ issues, equity in social equality matters and discussion of post-dissolution government support for spouses to reintegrate with the labour force. On completion the Report that could then be handed to lawyers for interpreted into legislation with input from judges (a stage 2).

The third and final stage would be to hand these publicly discussed recommendations to the government for consideration.

We would be strongly opposed to purely judicial involvement due to the lack of trust engendered which is due, in the main, from apparently unprincipled and inconsistent use of case law.

This has not been asked for but it might prove a revelation for the legal profession to have an analysis of historical settlements made. When CAFCASS was first mooted in 2000, this was the intention of their computerised system so that they could ‘self-evaluate’.

Creating a historical database of property division and settlements, spousal support, child maintenance, legal costs indexed by spousal earnings, duration, gender, regional court, etc. would ‘ground’ the legal profession and serve to raise standards.

Concurrently it would allow statistical models to be created and the full meaning of statistical significance and for example ‘regression analysis’ portrayed on a monitor. This would enable more accurate “impact assessments” to be made.

Polling - the surveying of the public’s attitudes and preferences towards policy alternatives has been used since the days when the Ministry of Justice was the LCD. This should also be used for this exercise in reform

Public Consultations – these are key as indicated above but also key is that the result of the Polling just mentioned is also made widely known.

Time limit – unless stipulated these issues can drag on. We suggest an eighteen months period to prepare a Report for government.

Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Please note: We have not responded to these separate sections since, in our estimation, they depend on configuring the existing regime in an effort to better fit current aspirations (which after a dozen attempts or more we do not think is possible).

This, we believe is not the route to take, harking back as it does to the “appeasement” era epitomised by the Chamberlain years and the fiasco of 1938. Appeasement buys time - it does not buy a solution.

Lending the faces of Michael, Chris, Sarah and Pat etc, to the situation deliberately inhibits radical solutions and rational thinking.
If the state wishes to have constitutional authority over the regulated forms of human relationships then it is obliged as part of that obligation and duty to provide comprehensive and consistent relationship dissolution rules and the means to calculate them. In the absence of such consistent, fair, comprehensive and acceptable framework it should not intervene in any shape of form.

IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

Answer:-

(1) We fail to see the reason for this caveat, i.e. “reasonable period . . . that [independence will be impracticable] . . . until the children . . . or civil partnership finish their education.” It is inequitable to burden one party so excessively. Put another way, if 93% of custody awards were made to fathers (and not mothers) would we even discussing whether spousal provision should be made for fathers' reintegration into the labour force?

No, it is a contradiction in the modern era for Society’s stated aim of equal treatment to be abandoned when it suits. The commission must separate out ‘equity’ from ‘need’, and the reason it keeps falling into this trap is because it has not defined its core principles.
May we suggest that as marriage is increasingly considered only one of a range of permanent unions it be treated as a contract which would normally come with ‘penalties’ for the party breaking said contract, e.g. leaving the matrimonial home and taking the children away from that home. Given net worth of the couple there should be no difficulty in appraising equal shares, minus discounts for conduct as itemised by penalties above. This worked satisfactorily in the pre-1969 era with any award of a lump sum (if any) being eligible for an automatic bank loan guaranteed by the state or its conversion into an annualised spousal support payment scheme if that would assist ‘cash flow.’ It is this lack of flexibility that has helped divorce courts drag down living standards for the ordinary working man.

A fundamental decision has to be taken and the bullet bitten. Are we going to continue to confuse ‘need’ with ‘want’, not only for this paper's purposes but for the entire Welfare State and all of the benefit system? It was only in the 1970s that entitlement based on ‘contributions’ was supplanted by ‘needs’ criteria – and without public discussion.

Where future spousal settlements are absolutely unavoidable we suggest that they be very short term and limited in value. If the state wishes to eliminate “need” from current family law it must provide the wherewithal to do so and not expect others to do its dirty work. Defining the state’s responsibility would be a good start.

(2) See also (1) above. Consideration of assessments of need as spelt out in the Supplementary Consultation Paper is overly complex and requires solid first principles – which are lacking. The Commission must avoid inadvertently utilising old assumptions and building on the old foundations which are known to be a failure and unstable (see our comments above re: ‘appeasement’).

(3) We had assumed, perhaps wrongly, that the modern trend was for less not more state interference, e.g. the new CSA scheme proposed in a Green Paper by the DWP. Statutory amendment to existing laws and rules would be repugnant to those involved in court proceedings. They would feel they have had more than enough of “authoritative guidance”

(4) Certainly not. If the reforms (statutory or otherwise) were to be introduced along the lines suggested in this response then no further guidance would be required. Any as ex-spouse deemed to be “in need” would apply for existing state benefits.

(5) We would only comment that publishing any Guidance which might result on a publicly accessible website would be a good thing.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

Answer:- See our responses in all the above sections.

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70
“Liberty” requires that individuals have as many choices as possible. Therefore, there should also ways be the unfettered right to contract out of any provision of a pre-nuptial agreement but equally there should be no impediment to forming and adhering to a pre or post-nuptial contract.

We have gone to the extent of taking legal opinion on this issue. Initially upon hearing the news of the proposed legalisation to legitimise pre-nuptial agreements we believed it possible for those with least resources, i.e. the ordinary working man, to be better protected should he have divorce imposed upon him. However, as presently constructed it would only be the wealthy and the above-average income couples that could possibly afford and benefit from this new arrangement.

Until this option is available to 80% or 90% of the population any comment would, we feel, be superfluous. Limiting its use to the wealthiest 10% is of no interest to us and given the financial resources available to parties this question becomes a non-issue. The stumbling block remains the MCA 1973 and sect 22 to 25 (and the inoperability of the ‘hardship rule’ for respondent).

NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

Answer: - Oh, wonderful. Yes, yes, we agree.

This might put us roughly in line with the American ‘Community property’ system which would be more equitable to divorcing parties than our own current regime. Ideally we would like this thinking extended to all real ownership per se.

7.12 We ask for consultees' views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

Answer:- In our view the matrimonial (family) home should technically be excluded from non-matrimonial property. However, it should be treated in the same way as in Q. 711, above, if it was acquired before marriage or purchased by one clearly discernible person.

Yes, if acquired prior to the marriage or civil partnership it should remain in the same person(s) ownership. There is plenty of time and scope subsequently to then transfer it to a joint ownership if needs be, or let inheritance take
its course. Such a move would open up enormous taxation benefits, free up entangled assets and up-lift SOL in many instances.

Again, business valuation techniques and tax planning might usefully be utilised even for the most modest of income earners.

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

Answer:- We fear that once again ‘good intentions’ are muddling the waters. Confusing the premise for marriage and cohabiting is, we believe, at the root of much confusion and muddled thinking.

Marriage is demarcated by its public acknowledgment of a lifelong commitment to one other person and no other. It is a contract with the state. Cohabitation is none of these things. It is simply a ‘contract of convenience’ between two adults for the pleasure of each other’s company without time limit or greater obligations.

The practicalities are that cohabitation can, yes, certainly last for many years but the overwhelming majority last for less than 2 years. Everyone thinks because of media coverage that cohabitation is on a massive scale in Britain today but only 11% of households are defined as cohabiting,

In an optimistic case scenario a cohabitee may separate 2 or 3 times between the ages of 20 and 45. If he were to lose 50% of his real estate and money at bank on each occasion, he would soon be in no position to re cohabit. Inversely, a female would financially gain immensely at each regeneration.

The worst case scenario – breaking up every 2 years doesn’t bear thinking about in financial terms.

Then there is the problem of “public policy.” Pareto’s “efficient economic allocation” equation tells us that, “no one can be made better off without making at least one individual [or class] worse off.” To legitimise cohabitation and award it the same status separation 'benefits' as married spouses would detract from spousal association.

Then there are the rights of free choice and free association. Cohabitation is intrinsically the vital repository of these human rights. Legitimise cohabitation by an act of the state and immediately liberty, free choice and free association are all snuffed out.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

Answer:- If non-matrimonial property has been acquired during the marriage then it should be deemed community property and divided up.

If non-matrimonial property has been acquired before the marriage it should only be shared where this is expressly stated by the “owner”.
This would take power out of the hands of the court and into the hands of the parties and their negotiators.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Answer:- On the face of it this proposal would seem reasonable. However, unless explicitly agreed between the parties beforehand we can see complications arising in some instances.

We would need clarification. Would this proposal apply to non-matrimonial property purchased or acquired before the marriage but replaced during the marriage? Or apply only to assets (non-matrimonial property) purchased or acquired during the marriage and then replaced? The value of the substitute property bought might be significantly greater or grow over time to be more valuable. How is this intended to be treated? Would there be any discount for fiat currency inflation?

The term “bought for use by the family” needs to be defined because as it now stands it is a catch-all phrase (all of the family, some of the family, used every Sunday, occasionally or what? And to benefit who?).

Would these assets (substitute property) be outside the scope of capital gains?

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Answer:- The difficulty with this idea is similar to the one above. Does one allow an asset to become a dead asset simply to avoid its co-mingling as joint property?

We suggest that non-matrimonial property and any of its subsequent reincarnations should retain its original status. (unless agreed otherwise between the parties).

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

Answer:- As we pointed out earlier this question is addressed to a minority of 10%. Roundabout 80% of divorcing couples will not have share portfolios or investment to concern them.
We would not like to see “one rule for the rich and one rule for the poor” (as per being able to bring a case involving liable laws), but nor would we want to see double standards where the rich are penalised.

In conclusion, this Supplementary Consultation Paper, welcome though it is, is compromised from the very start by its wish to appease all those it thinks it might appear to be dealing harshly with. It cannot be all things to all men and nor can it allow matters to remain where they now stand. Tough choices have to be faced and in adopting those tough choices a new era can begin.

E N D
This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

[www.lawcom.gov.uk](http://www.lawcom.gov.uk)

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk  or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

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PRINCIPLED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

Yes, definitely. I draw on my personal experience. I was divorced in 1997, entering into an agreement with my ex-wife to give her all the equity in the marital home, enter into a joint mortgage for a new home for her and our 3 sons, (but in which I had no ownership) provide maintenance payments (for the benefit of my children) until all had left tertiary education, or the age of 21, the agreement set to end in 2012. I received no legal advice at that time. This financial support amounted to over 50% of my income for a number of years. Over the last 5 years, as my circumstances have changed I have sought to amend these terms and have been to the (same) county court on a number of occasions, representing myself in some cases, and represented by a solicitor in others.

Throughout my dealings with the court, the lack of any definitive guidance on what I might expect as an outcome has been extremely frustrating, and costly in terms of legal advice. I consider myself to be well educated (with three degrees) though am not legally qualified. I looked up a number of divorce cases to try and understand the law and its application. None of it was particularly clear for the lay person. And while very general approaches could be discerned, my overriding impression was that it ultimately depended on the view of the judge in a particular court. This was reinforced by my solicitor, who could guide me on the general points of the law, but could give little help in saying what the outcome of a hearing might be or what weight a judge may give to any particular issue. And no two judges were likely to make the same judgement on the same set of facts. The serendipitous nature of decisions on important financial matters creates too much uncertainty and confusion. In my view it can also lead to much wasted use of court time by encouraging ‘repeat’ visits to try and obtain a different outcome, to say nothing of the costs incurred in obtaining legal advice.

During this year, as my children have all graduated, I have tried to reduce and/or end the payment of maintenance to my ex-wife. I engaged legal advice, including counsel. I had been unemployed for a year but obtained a new job in April. The lack of any guidance at all on when I might be expected to stop providing any financial support to my ex-wife means that I have been unable to plan my own financial future.
with any degree of certainty (I am now 57). At a hearing in June 2012 my counsel advised that, as I now had a job, it was likely that a judge would continue spousal maintenance, but I had no idea at what level this might be set. At the hearing I entered into an agreement with my ex-wife on the basis that I was dealing with figures that I could set, rather than take the risk that the judge might set a higher level of support. I resent that I was faced with what appears to be a ‘catch 22’ situation and that there appeared to be no chance of a time limit being set after which the financial relationship with my ex-wife would be finished. The thought of providing support on an indefinite basis, without further recourse to the courts does not seem right or equitable.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114
7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

A formulaic calculation would give more certainty and clarity from the outset of any proceedings.
7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

I think financial independence should be encouraged as much as possible. The aim should be to allow both parties to move on with their lives, with neither one being responsible for the other beyond a defined period. If there are children from the relationship then it seems reasonable to set a tapering period when the youngest reaches the age of 18. It would be open to the parties to agree support over and above this.

It is patently unfair when one party remains financially dependent on the other for an indeterminate period- as now, for joint lives. This may result in one party being forced to work to provide for the ‘needs’ of the other, many years past their divorce. It does little good either, for the payee to be dependent for so long, and can certainly lead to fractious and acrimonious relationships between the parties.

7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?
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<th><strong>Our case studies: the factors that affect levels of support</strong></th>
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<td>We ask consultees to focus here on factors that might make a difference to levels of support. In particular:</td>
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<td>F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?</td>
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<td>G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?</td>
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<td>H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?</td>
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<td>I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?</td>
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**Comments**
### IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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:
   - the considerations involved in an assessment of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);
   - the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

3. Provision about the following either by way of statutory amendment or in the form of authoritative guidance:
   - the time within which independence is to be expected (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);
   - the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and
   - the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

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.

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I agree with all of the above; and suggest that the Family Justice Council produce the guidance. The key thing is that something is needed sooner rather than later, with better information available to the public, in plain language.
7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70
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(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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

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Supplementary Consultation Paper, Part 6, paragraph 6.59

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Do consultees agree?

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Do consultees agree?

Supplementary Consultation Paper, Part 6, paragraph 6.87

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88
7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100
Matrimonial Property, Needs and Agreements: A Supplementary Consultation Paper (The Law Commission, 2012)

Response by Dr Rob George, Faculty of Law, University of Oxford
10 December 2012

This response stands as a supplement to my earlier response to the first Law Commission Consultation on nuptial agreements. As well as addressing many of the questions posed, I have a few general comments about the issues raised by the specific details of the Supplementary Paper with which I deal at the start of each section. I would say also that I have been rather pressed for time these last months, so there may be places where my thoughts are not expressed quite as clearly as they should be.

PART 3: THE CASE FOR REFORM

As I said in my previous response,¹ I am not at all convinced that there is a problem requiring action regarding matrimonial finance law, and I found the Commission’s explanation of ‘the case for reform’ less than compelling. In particular, the discussion leading to the conclusion that there is a case for reform appears to take no account of the advantages of the present system.² How can the Commission make a case for change without assessing the advantages of the present system, and without subjecting the alleged deficiencies to more critical deconstruction?

Perhaps of greatest concern, the Commission seems not to think that an argument can be made for the current law already having a principled basis. I disagree. It is important to understand that having a principled basis does not necessarily require a single principle to be

¹ I said last time: “I stress that I am far from convinced that there is widespread dissatisfaction with the present state of the law. All that can be said is that some people are very vocally dissatisfied; but let us not assume that those who shout loudest have, for that reason alone, the better of the argument. The research evidence that the Law Commission has previously collected indicates that, in the population at large, 80% support equal division of finances in divorce. That would seem to be a better basis for judgment than the cries of those who seek change, who are therefore motivated to shout; those who are content have no reason to complain.” (Footnote omitted.)

² I do not explain fully what those advantages are here. Partly, that is because such an analysis requires information which I do not have to hand, and partly it is because they are explained more fully elsewhere. Some of that analysis is found in my academic work, primarily:
  - R George, P Harris and J Herring, ‘Pre-Nuptial Agreements: For Better or for Worse?’ [2009] Family Law 934
  - R George, Ideas and Debates in Family Law (Hart, 2012), Chapter 6 (and, less directly, Chapter 5).
I have also had the advantage of reading, in draft, the submission made to you by Mr Peter G Harris, who explains this point more comprehensively. I agree with his response to the consultation, and respectfully incorporate his discussion into my own reasoning on this point.
applied: so long as principles do not conflict, it is possible to have several. That is what we have. The principles which emerge, perfectly clearly, from White v White are:

- **Fairness** in the division of resources between the spouses, where fairness has to be assessed on the facts of the case, and with an acknowledgement that there is an extent to which “fairness ... is in the eye of the beholder”.3
- **Non-discrimination** as between spouses and the kinds of ways in which they may contribute to the life of the family; in particular (though not exclusively) this means that home-raising and child-rearing are of equal value to money-making and other financial contributions.

Then, since those principles are difficult to understand in the abstract, the courts explained in Miller; McFarlane that there are three ‘strands’ of analysis which should be drawn on when calculating a fair, non-discriminatory result:

- needs (broadly understood, given the lifestyle of the people involved)
- compensation (for relationship-related losses, both past and future)
- sharing (though note that this may or may not mean equal sharing, depending on the case).

In some cases, it does not much matter the order in which those three are taken, though I think that the better way to understand them is in the order given: meet needs, compensate losses, then share the surplus.4 (In a long marriage, the sharing will usually be equal sharing; but that is not always the case, and indeed will often not be so in a shorter marriage.) These three strands offer a coherent means to achieve the principled end – we are aiming to untangle the parties’ affairs in such a way as to give them an equal chance on the road towards independent living. That does not necessarily call for equal outcomes either immediately or in the long term – every case is different, that difference is the reason why we cannot do better than to seek a fair, non-discriminatory outcome.

The existing principle of the law, together with its benefits, seems to be given no weight in the Commission’s analysis. Against that, the difficulties with the law are accepted rather uncritically.5 It may be true that there is a lot of noise being made by some people – mainly wealthy men – calling for change, but that in itself is not a reason for reform. Indeed, the Commission’s statement that “for some people, the law is fundamentally flawed” (para 3.39) could probably be applied to almost any area of law that you care to name, both within and beyond family law. I appreciate that the same paragraph of the Paper paraphrases my point that those who are unhappy are likely to shout loudest,6 but in this context they seem really to be driving the debate to a degree which I find concerning. At present, we have a law which is broadly supported by 80% of the general population (according to the Law Commission’s

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3 *White v White* [2000] 2 FLR 981, p 984.
5 I accept that there may be some difficulties – my claim is not that there are none, just that they are not so great as is claimed, and that when they are off-set against the benefits the current system has much merit.
6 See my comments from my first consultation response, quoted in footnote 1.
research a few years ago) and which successfully settles 95% of cases (see para 1.22, footnote 15). Those two facts seem to me to combine to indicate a remarkably successful law, but little indication of that was seen in the Commission’s discussion.

The Commission sets out, in para 2.6, a key explanation of the ‘problem’, so called. The Supplementary Paper says:

“Whilst a family law would be able, in any given case, to predict, within a range, what sort of outcome the court might order, the lawyer can only do so because of his or her experience, along with knowledge of the case law.”

I find it difficult to see this statement as evidence of a need for reform, because the same is true of absolutely all areas of law when we think about the final stage of litigation, i.e. the remedy given. For example, a personal injury lawyer can only predict, within a range, what sort of outcome his or her client might get, and can do so only because of the lawyer’s experience and knowledge of the case law. The lawyer can say “if you prove these facts, you will get damages”, but when asked to quantify those damages, surely all he or she could say would be “it would probably be in the range X to Y”. That seems both obvious and uncontroversial, yet no one makes the claim that tort law needs reform to make it more predictable because of this fact.

Family law is just the same as any other area of law: there is the law itself, which is certain, but uncertainty exists, inherently, because the law has to be applied to the individual facts of any given case. Those facts are usually contested, and no sensible lawyer will pre-empt the fact-finding power of the judge by making an exact prediction of the outcome when all that he or she has to go on is his or her own client’s version of events, untested in evidence. Now, of course, the lawyer can also then assess the chances of his or her client proving whatever is claimed, based on other evidence and so on, and from that the lawyer can predict a likely range of orders which can then be used as a negotiating framework. This seems to me to be entirely normal lawyer behaviour, in all areas of law, and I confess to being unclear as to why the Commission has taken the view that this is somehow unacceptable in family law.

I am also sceptical as to the likelihood that we will find any alternative approach which is not open to exactly these same criticisms. In fact, I note in support of my view (i.e. that the existing range of outcomes predictable under English law is both acceptable and normal) that the Canadian approach (the SSAGs) produces a range of possible outcomes as guidance, within which a negotiated and / or judicial settlement is then reached. Moreover, as Professor Rogerson explained at the Nuffield Foundation seminar on 4 December, many cases require a lawyer to use the SSAGs, because the range of issues involved is too complex for an individual spouse to do without advice. Consequently, it seems to me that formulae or guidelines might well turn out to be another road to much the same place that we are in

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7 Cf below, and my surprise that 13.6% of respondents to the Resolution survey were willing to say that they can “always” predict the outcome achieved in court.
already, and therefore that the exact same criticisms might be advanced against those systems as are advanced against ours.

Moreover, many of the alternative approaches seem to me to be likely to be open to the far more serious criticism that the outcomes being achieved are fundamentally unfair (which is not usually a complaint made about our law). The Supplementary Paper seems to agree that the outcomes which we have now are more or less right, since it warns about the risks of “results that … divert dramatically from the outcomes achieved under the current law” (para 4.109). This is a case where the basic structure of the law, and the principle informing it, “ain’t broke”, and so fundamental reform seems misconceived. These complications make it all the more disappointing that the Commission seems not to have engaged in a full cost-benefit analysis of the present system compared with the alternatives.

**PART 4: PRINCIPLED REFORM**

To start with, I have a few preliminary points arising from this section, though they are perhaps not the most pressing aspects.

The first point, which I appreciate is somewhat outside the Commission’s control, is my view that addressing individual aspects of the current law (needs, non-matrimonial property, agreements) in isolation belies the extent to which they are entirely interconnected, not only with each other but, more importantly, with other parts of the law. For example, as the Supplementary Paper notes more than once, there is real interaction between needs on the one hand, and compensation and sharing on the other. The idea that we can resolve the problems of the law (if there are such problems) by tinkering with one area seems to me to be optimistic, and to be inviting unforeseen complications further along the line. The Commission is, of course, well aware of that; but the conclusion which I draw from it conflicts with the Commission’s view (para 1.32) that improvements can be made by making changes to the limited areas identified in this Paper. By contrast, I consider that, without a clear idea of how the system as a whole works at the moment, it is risky to pull at any of the threads lest we do more harm than good.

Another point, arising especially from paras 2.18 and 4.25, is that I am not sure that I share the Commission’s understanding of the ‘compensation’ strand of *Miller; McFarlane*. Again, I recognise that this is somewhat away from the core of the current focus. I may be misunderstanding what is meant, but it seemed that the Commission’s view is that compensation is to be calculated by comparing the claimant’s position with the counterfactual situation of the compensatee not having married at all. While that may be one aspect of the compensation strand, I do not consider that the claimant necessarily has to demonstrate that she would have been (financially) better off if not married. I see it as compensation for ‘losses’ incurred (in a very broad sense) because of decisions taken by the spouses as a
couple about how to organise their lives together, rather than compensation for having married. One aspect of it might well be lost income from a labour market career which has been damaged by, for example, giving up work to care for children; or because the husband’s career was prioritised such that the couple relocated away from the place where the wife’s work was based. That might be thought of as a quasi-tortious compensatory element. Another aspect is compensation in the more contractual sense, of the party with the money ‘compensating’ (remunerating) the other party for (unpaid) work done in the past or to be done in the future. Consequently, I think that this aspect has potential to be rather important, and broader than the Commission implies.

Finally, as a matter of preliminary comment, I am a little cautious about the Commission’s claims as to what we know about how the three strands (needs, compensation, sharing) are actually used by the courts (e.g., the Paper asserts that it is “rare” to make a claim for compensation, in para 2.18). Is there evidence to support that assertion? We know what is said in reported and appellate cases, but they are the tiniest and most unrepresentative sample one could possibly imagine. I certainly know of no research which sheds light on the question. I am not even sure that the work now underway by Miles and Hitchings will answer this question, because outcomes (even detailed outcomes) may not give many clues as to reasoning process. That does not necessarily undermine anything said in the Paper (though it may), but it makes me wonder whether we are really in a position to know what is going on, and therefore how to reform it at the moment.

I turn, then, to your questions.

4.113 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?

While recognising that much work will have been put into formulating the questions asked in this Paper, I dislike the way this question has been phrased. It seems to me to carry the implication that anyone who disagrees with the premise is therefore in favour of an unprincipled approach which leaves key questions unanswerable. That is unfortunate, and indeed may risk skewing the responses that are received. I would prefer to say that there is another option, namely that we should identify more clearly (or, as I actually think, articulate more clearly) the existing principled basis for the current law.

Consequently, for reasons explained more fully in my comments on Part 3 of this Consultation, I do not agree with the central argument. There is already a principled basis underpinning the current law, and (as best we can tell in the absence of research addressing this question) it is working as well as can be expected in practice. The case for reform has therefore not been made out.
4.114 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?

The second of these is to be preferred. It seems to me to be both morally superior and (by happy coincidence) a reasonably accurate reflection of what the law is already doing. The Commission’s lack of analysis of the working of the current law, and its benefits, makes it hard to assess, but I think that the second of these is entirely consistent with what I think the principle of the law to be already, and with the way in which it works in practice.

Within that, I have no difficulty with the further sub-issues which are identified in para 4.115 being accommodated within the principle which I prefer, though I am a little concerned that the labels offered will suggest a homogeneity of facts in what is really a very variable area of people’s personal lives.

1) **length of marriage**: other things being equal, it is highly likely that the parties’ lives will become more intertwined as the years pass. Consequently, the extent to which any disparity in position which occurs on divorce / dissolution is attributable to the way in which the parties lived in their marriage will increase. At the same time, marriage is a public claim of entering a partnership which is, prima facie, intended to last for life, so even in a short marriage there will usually be some amount of ‘balancing’ to be done. The difficulty that some people seem to have here is with cases where there is a significant disparity of wealth, but I think there to be no real difference in principle based on that. The reason for this, within the principle identified, is that the parties will have planned and lived their lives on the basis that the wealth will be shared; consequently, while the economically weaker party is not entitled to rely on that wealth in its entirety nor for life, she is entitled to be eased gently back towards independent living within her own means.

2) **the marital standard of living**: I do not share the Commission’s apparent difficulty with ‘needs’ (or any other part of the financial assessment) being assessed by reference to the parties’ previous standard of living. Everyone assesses their needs according to their circumstances. To take an example, whether I ‘need’ a car or not depends on where I live, why I need to travel, and my available resources. If I work as a travelling sales rep, not only do I need a car, but I can probably be reasonably said to ‘need’ a reasonably new, reasonably expensive car, because the image that I present on arriving to see a client matters as part of my work. Conversely, if I work as an academic in Oxford, I in no way ‘need’ a car –the town is small, there is nowhere to park, and when I travel for either work or leisure it can easily be done using the good public transport links in the area. In everyday language, we use the word ‘need’ in a contextual way, and I see no difficulty with the law doing so in the law either. Lady Hale described this as “need (generously interpreted)” in *Miller; McFarlane*, and I think that we mean the same thing. I might have said “need (broadly interpreted in the context of the case)”, but I think that in practice it amounts to the same thing.
3) the way that joint responsibilities have been shared during the marriage and will be shared after its ending: these kinds of issues are addressed by a combination of needs and compensation. They are primarily part of compensation, both compensation going backwards for ‘work done’ or losses incurred by one as a result of the joint decisions of the parties about how to discharge their responsibilities. However, in calculating the compensation due for both of those aspects, an assessment should be made as to how much of that compensation has already been awarded as part of needs. As Joanna Miles rightly says, it is important to avoid double-counting – but there is no reason in principle why that should occur, so long as the decision-maker understands what is happening properly.

4) the occupation of the former matrimonial home following divorce: I do not have any particular comments on this aspect.

4.116 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?

I do not favour reform for reasons already stated, but insofar as there is to be reform then my answer is, in short, (1) a reformed discretionary approach. If the ‘reform’ in question is a re-articulation and clarification of what is happening anyway, then I have no difficulty with describing that as a reformed discretionary approach, though I think that the amount of practical reform (rather than reform of the way the process is explained) will be – and should be – minimal. Insofar as I understood that to be what Joanna Miles was suggesting in her talk at the Nuffield Foundation on 4 December 2012, I agree with her – we can articulate the principles which underpin the discretion more clearly, and therefore most likely narrow the range of the discretionary outcomes without removing the discretion itself, which I view as an essential component of achieving fairness in this context.

4.117 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?

While I can see the value of placing limits on the support in this way, particularly for shorter marriages, I have one general and two specific concerns. The general point is that I am not sure that I see the need for this, given the way that I think the principle works and is being applied. The clean break principle more or less does this in cases where it is feasible, because the deferred clean break is, in many cases, acting to achieve much the same thing. However, I do not see any difficulty with articulating that point more clearly, and in a more nuanced and specific way.
Turning to the specific concerns, one is that there will come a point where there cannot be a limit without causing unjustified harm to one party; so after a certain length of marriage, it seems to me that there could be no limit set.\(^8\) The other is that people have a habit of living their lives in unexpected ways, so I would strongly favour a get-out clause in any proposed limitations, saying something like: “Support may be extended beyond the normal time limitation if, in the opinion of the judge based on all the evidence and facts of the case, and bearing in mind the general policy aim of limiting the duration of spousal support, that limitation is likely to cause undue hardship.” However, such get-out clauses will open the way to move litigation and complexity, making any reformed system just as open to the complaints of indeterminacy and unpredictability as the current law is alleged to be.

4.118 What preliminary work would be needed to research and pilot a new approach?

I can think of two studies which would be helpful in working out the details of any reform and / or re-articulation of principles.

1. ‘Court decision-making’ study

One useful piece of preliminary work would be a study of what is now being done, intellectually and practically, by first instance judges (and unreported appeal judges, especially Circuit Judges who hear appeals from District Judges in the County Courts). The work that Miles and Hitchings are doing with court files is a great start in informing that work, but their interest in outcomes will not answer my questions about the process which leads to those outcomes. My proposed study, of course, would look only at the 5% of cases where the issue is contested, though the study could ask judges about not only the decision-making process but also their function in reviewing consent orders (thus bringing in a large swathe more). What benchmark(s) do they use to assess whether the proposed order is acceptable or not?

That can be triangulated with a study like that done in Canada, looking at a large body of decided cases and working out the patterns. That will allow us to compare what is happening statistically with what the decision-makers think is happening, both of which seem to me to be important.

I would think that a research team including lawyers and statisticians would be required, possibly others. The time-scale would be fairly lengthy, depending on the availability of institutional support (e.g. MoJ, Judicial Office, etc).

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\(^8\) See, by comparison, the Canadian SSAGs – after 20 years, there is no limitation.
2. ‘Mapping the road to independent living’ study

Another useful piece of work would be to follow up what happens after divorce with much more detailed information about the provisions of the financial arrangements (i) during the marriage, (ii) on separation, and (iii) at various time points thereafter. We have some great general economic data about what happens to people, but as far as I know that analysis does not have access to the specific information required to tell us in detail what happens when the financial arrangements look like this, that or the other. This would be a huge and ambitious study, requiring a large sample of people providing detailed financial information. I would propose doing it by getting two cohorts, made up of people who divorced, say, 5 and 10 years ago (so, all post-White). For both of those, I would seek as much detail as possible about the terms of their financial settlements, ideally supported by paperwork (from them or their solicitors?), and then compare that with what has happened to them since.

This would require a research team involving lawyers, experienced qualitative interviewers, statisticians and economists. Again, the time-scale would be fairly lengthy because of the time required to recruit a sample large enough to draw any meaningful conclusions.

In terms of piloting any new approach, one idea comes to mind:

1. ‘Case studies’ study

Once new principles and / or a re-articulation of principle was drafted, a series of case studies could be drafted (much like the Commission’s examples for this Paper) and then a sample of judges and lawyers could be asked to apply the principles to the case studies. I would be helpful – probably essential – to create a baseline comparison by having another group of practitioners apply the existing law to those samples. (The two studies would ideally be done contemporaneously, to ensure that they were working in the same legal climate, and so that the extent of any differences that the change would produce could be accurately assessed.)

With the right institutional support, this study would be reasonably quick to conduct (once the new principles and / or re-articulation is drafted!). A small team of experienced socio-legal scholars could do this work easily enough.

PART 5: THE LAW RELATING TO NEEDS

As with much of this project, I am unconvinced by the underlying premise of the consultation, i.e. that there is a significant problem requiring action.
A further difficulty is that there are places where the Paper identifies a problem as being about the law on ‘needs’ and financial provision, but which is really a much bigger problem of broad social policy. For example, in para 5.45 the Paper says:

“even clients who receive comprehensive legal advice struggle to understand why they might ‘need’ a pension”.

No doubt that is true, but it is also true much more broadly, and has little to do with matrimonial finance law or its alleged deficiencies. The Department for Work and Pensions, and the European Employment Directorate, are highly concerned about the lack of understanding of the importance of pensions, and are working on ways to address that issue. I am not saying that because it is a bigger problem therefore we should not think about it and try to make improvements, but this societal ignorance is not caused by family law, and there are limits to what we can expect family law to do to solve it.

Regarding the Resolution survey, there are serious methodological flaws in this research which go so far as to undermine the data. To start with, the small sample size ought to be noted. I am very aware of the difficulty of getting lawyers to respond to questionnaires, and 366 responses is not a terrible sample – but we should bear in mind that Resolution has something like 6,500 members and, while not all do family finance work, a great many more than 366 do. So we might want to be aware that the data, although possibly interesting, are limited by the response rate.

A more serious point, though, arises from the substance of the questions asked, and from the use that the Commission is making of the survey data, which is especially apparent in para 5.24. I refer here to the question about how often lawyers are able to predict the outcomes of court cases. The question asked by the survey was, with respect to the question drafters, wholly inadequate. The three options given to respondents (rarely, sometimes, always) were inappropriate, and have created response data which are so flaccid as to be useless. They are worse than useless, in fact, because they are open to being mis-used, as I would respectfully suggest has happened in the Supplementary Paper.

Let me expand on that point. From the findings, 6.4% of respondents\(^9\) said that they “rarely” were able to predict court outcomes, 80% said “sometimes”, and 13.6% said “always”. But what does this tell us? I would say, almost nothing, because the question is so inadequate. First, the two end-points of the scale are not equivalents: “rarely” is not the equivalent of “always”. (Frankly, I am amazed that as many as 13.6% of respondents were willing to say that they can “always” predict court outcomes – their professional aversion to risk ought to make them more cautious.) Second, the “sometimes” category is so large and so vague that the responses coming from the question are meaningless. The “sometimes” option could incorporate everything from 10% to 90% or more, especially since the only higher option was “always”, and we do not know how people might have interpreted “rarely”. What we needed was a properly defined scale, probably something like:

\(^9\) Note that it is a percentage of respondents and not, as you say, a percentage of solicitors surveyed.
- never or rarely (less than 20% of the time)
- sometimes (20-40% of the time)
- about half the time
- often (60-80% of the time)
- usually or always (more than 80% of the time)

I am surprised that the Commission feels able to put any weight at all on the findings of the survey, given these major deficiencies in its methodology.

However, the problem in fact goes further, because the use that is being made of these data in the Supplementary Paper is actually rather misleading. The Paper says:

“The majority of solicitors surveyed by Resolution claimed that they can “rarely” (6.4%) or only “sometimes” (80%) predict how the court will quantify their client’s needs.”

But you could equally have said:

“The majority of solicitors surveyed by Resolution claimed that they can “always” (13.6%) or “sometimes” (80%) predict how the court will quantify their client’s needs.”

It gives the same data a totally different spin, and it seemed to me that the data were being presented so as to prop up a pre-determined position, rather than the position coming independently from the data. Indeed, as I said, the data are so flaccid as to be useless, and certainly cannot legitimately be used to support the kinds of claims that the Commission apparently wants to make with them.

5.62 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.

I can see the point of this suggestion, strengthening the statutory guidance from a question to an aim. However, I am cautious about it, and overall I think that I would not favour it.

At a purely practical level, I am not sure that it is likely to have much effect on the practice of the courts (because I suspect that, once the caveats are in place, it will turn out that the courts already have this aim). However, that in itself would not put me off the idea, because it might well help the 95% of cases which are not judicially adjudicated, if done carefully.
My bigger concern is that there will be a temptation to go beyond what is said in this question about the length of time we are thinking about. If we stuck to “within a reasonable period” then I would think it reasonably safe.\textsuperscript{10} My concern is that we will risk taking a very general idea which I support (independence within a reasonable time period) and try to turn it into something specific. That in turn risks removing the nuanced approach which we currently have in the overall search for fairness.

It seems to me that, in this context, we are asking ourselves an inherently ambiguous question and we should not then be surprised that the answer is unclear. When the Paper asks, in para 5.7, “at what point can the former spouses be financially independent of each other?”, and again with this consultation question and again below, I wonder what kind of answer could possibly be produced. It is rather like asking, “how long is a piece of string?”. The answer depends on the context, and the only abstract answer that we can come to, in my view, is something like: “when it is fair on the facts of the case” (or, as you put it, “within a reasonable period”). Any individual answer depends on many variables – the length of the marriage, the ages of the parties, their wealth and the source of that wealth, the presence of children and the children’s ages, the likely necessary expenditures, and so on. I do not see that a single, specific answer could be given in the abstract which did not serve to create very significant injustice. I therefore think that we should not attempt to answer this question, and I warn that I think attempting to answer it may well produce significant difficulties.

\textbf{(2) an authoritative source of guidance for the courts and for members of the public about}

\textbf{(a) the considerations involved in an assessment of need;}

One worry that I have about this suggestion, insofar as it relates to the public at large, is that we need to be very careful to avoid information overload. When I read para 5.51, in particular, with its “bank of examples” and “wide and representative range of examples”, I wondered what effect it would have in practice. Bearing in mind that the whole experience of separation is stressful and unpleasant for people, and bearing in mind that many people find talking about money and finances (especially things like mortgages and pensions) both embarrassing and impenetrable, we have to ask how long the average person is going to spend perusing this site, searching by keywords in order to develop the kind of nuanced understanding that a lawyer would bring if one could be afforded. My guess is that the more likely approach is that a person will be to skim bits and pieces, find it all rather hard and complex (because it is), and come to a very rough and ready understanding which may have

\textsuperscript{10} That said, I would want to add further qualifies at the end – it is not only minor children that makes independence unlikely, and in particular long traditionally-structured relationship which end when the parties are middle aged or older may really never be restructured into fully independent post-divorce lives
no more resemblance to the law as it actually is than they have already. I might be giving people too little credit – I speak only from my own experience of things like mortgage lender websites which I struggled through despite having extensive legal training. So I think that there may be some real value in this idea, but I wonder whether we need to be reasonably modest in our aims insofar as they relate to the public at large.

With that caveat in mind, though, I like the idea of creating a list of possible factors. I largely agree with the analysis in paras 5.43 to 5.48. We might well want to include a few ‘pointers’ about why something might be needed, or what kinds of things to think about within each factor. (The pension example is a good one to illustrate this point, as well as the question about bedrooms for the children to stay in with a non-resident parent where applicable.) It might also be worth dividing up into ‘core needs’ which all or most cases have (housing, transport, food) and ‘broad needs’ which are the kinds of things which might come up but which will not be relevant to all cases.

(b) the priority to be afforded to different elements of need

As to prioritisation, though, I am less convinced. Are we sure that there is any standard order of priorities? For example, while I sympathise with the point being made, I thought that para 5.49 was rather patronising, when it told parents – really, mothers – with dependent children that they were “wrongly” prioritising having somewhere to live over having a pension in, say, 25 or 30 years. It is one thing to say that pensions are important, and to explain that rates of female poverty in old age are always higher than rates of male poverty, exacerbated significantly in the case of divorced older women; but it is quite another to say that the parent with dependent children is “wrong” to prioritise housing over a pension. While one might think that a poor decision, it depends on the facts and there is an extent to which personal judgment comes into play here (as long as it is reasonably informed). I worry about sending messages which might be seen as (or actually be) further castigating single parents and telling them how to live their lives in areas which are open to debate.

(3) Provision about the following either by way of statutory amendment or in the form of authoritative guidance:

If we are going to do this, I have no strong preference as to method, though I note that teething problems are quite likely and therefore that guidance may have the advantage of being more easily amendable to account for lessons learnt as the guidance gets put into practice.

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(a) the time within which independence is to be expected

I have addressed this point previously. In short, I do not think that any single answer to this question can be formulated which goes beyond “independence is to be expected within a timeframe which is fair given the facts of the case”. Anything more precise will lack nuance and be likely to create significant injustice.

(b) the normal form of orders for periodical payments (term orders or joint lives)

Given my concerns expressed already, I am not sure that there can be a single ‘normal form’ for these orders. Should there be a ‘normal form’ for orders in all divorce cases? The category seems so large and the kinds of facts we are presented with so variable that I am not sure I would expect there to be any one form which is standard. The form should be whatever is most appropriate to the facts of the case.

It is fair to say, though, that we might create greater judicial consistency if we made clear the kinds of facts which might typically lead to one or the other type of order. Whether that can be done in a meaningful way, without creating new problems, I am not sure.

(c) arrangements to be made after short childless marriages

I am not sure why this category of case is thought worthy of particular attention. The courts already treat them differently as a matter of fact from the ‘typical’ divorce case when applying the existing principles, and it seems reasonably clear that orders in these cases are relatively modest, often working to put the parties back in the position they were in before the marriage more or less. But the variation that we see is a result of the fact that our law is presently alive to the fact that every case is different, and can accommodate the infinite variations in the outcomes ordered.

I do not see it as desirable to create different rules for cases based on what is essentially an arbitrary distinction. The CSJ’s three-year limit is entirely arbitrary, and so would be any other limit. If there are different rules, or different guidance, it will risk creating injustice where like cases are not treated alike, as well as creating bizarre incentives for spouses whose relationship is not going well to seek divorce sooner (or later) so as to benefit from more ‘advantageous’ guidance. Insofar as we are trying to reduce arbitrary variation between cases, we should a fortiori seek not to add new arbitrary distinctions to the law.

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12 A marriage of 2 years, 11 months plus 13 months of pre-marriage cohabitation is really no different from a marriage of 3 years and 1 month plus 11 months of pre-marriage cohabitation.
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?

It is possible that the FJC might be an appropriate body to produce this guidance, if guidance is the right approach, though see next paragraph. However, even if it is, I do not think that what is produced could appropriately be described as ‘practice guidance’. The questions that we are considering are not questions of court practice; they are questions about how a judicial discretion should be exercised, and therefore go to the substance of the law. Practice questions are about the procedures to be followed, and do not tell the judge how to assess different factors when making a substantive decision.

My question about the FJC goes to the legitimacy of the exercise. We are talking about a quasi-legislative activity here, especially if the exercise goes beyond creating a list of factors and starts to prioritise them. If that is to be done, and we are expecting courts, lawyers and divorcing spouses to consider and apply the guidance, then one might ask whether a group of lawyers, medics and social care experts has any legitimacy to perform the task.

Depending what the task being undertaken is, I wonder whether judicial guidance might be a possibility. If the right selection of cases were heard together on appeal, together with expert reports, before a strong, specialist panel of judges (the President plus two other family law specialists in the Court of Appeal, say), could we deal with the matter in that way, as happened with domestic violence in child contact cases a few years ago? The status of the guidance would then not be in doubt, and its provenance would be clear. The down side, of course, is that the judges might not do what we want them to do! But then, since I suspect that ‘what we want them to do’ is probably a rather contested thing anyway, maybe that is not such a problem. After all, the FJC might not do what we want them to do either.

Publication of that guidance on the information hub to be provided in response to the Family Justice Review

Since the Commission’s Paper was published, that website has gone live. Everyone I know who has looked at it is agreed that it is a complete shambles – confusing, vague and, in places, positively misleading. Those may be teething problems, but it leads me to think that we should not put too much hope in a website. We should, though, endeavour to get any guidance that is produced hosted on as many advice websites as possible, depending on where the guidance comes from and its ‘status’ in law. That is another reason why a court judgment may be a good way to produce this guidance – it is authoritative and the relevant parts of it could be widely distributed. There would be no difficulty with asking people like the CAB, charities and lawyers to host the relevant parts of the judgment on their website, because they would not be open to being sued or criticised for misleading people by so doing.
PART 6 – NON-MATRIMONIAL PROPERTY

My comments on this section are more general, though I think that I address most of the specific questions along the way.

The Supplementary Paper rather grudgingly concedes that one might not accept the idea of there being a separate category of ‘non-matrimonial property’ (para 6.15), before going on to make a case the other way. However, I am not convinced by the rationale offered (para 6.18) for what differentiates non-matrimonial property, so called, from any other property. The Paper says that the source of the asset is the key differentiator, because that source is “unrelated to the marriage”. I do not find that terribly compelling. Those words can be used to mean more or less anything. Why should property be seen as anything different from any other tangible or intangible asset? If A receives a house as an inheritance, why is that different from receiving money as an inheritance? And why, if A uses that money to buy a house before the marriage, is that different from if A simply holds the cash and buys a house later, after the marriage? To take a different example, if A trains as a doctor and is highly qualified and in a good job before meeting B, does it follow that A’s salary is “unrelated to the marriage”? I find this entire line of reasoning bizarre, and liable to create arbitrary distinctions. I consider it to be wrong in principle, but also very hard to explain in practice.

Since the Commission is minded to recommend that there be qualifying ante-nuptial agreements, I can see a good argument for individual items like a particular piece of realty or personalty being well suited to being identified within that agreement as not to be shared. I do not favour ante-nuptial agreements at all, but if we are to have them then that seems like the right sort of use for them. But without such an agreement, I do not accept that one party is entitled to say that they want to marry, to enter into a partnership, but to keep particular pieces of property such as those listed in para 6.17 separate from the marriage. It would be a nonsense for the law to say that if A buys a house a year before the marriage then it is non-matrimonial property (whether or not used as a family home) but if A buys the same house a year after the marriage it is marital property.

Looking to some of the examples given, I would say that the person with the rare book collection or the musical instrument ought not to lose it in a property settlement if there are sufficient resources to make that luxury possible; but that is not really what happens under the current law. Our law on ‘sharing’ is not so blind as to try to divide every asset. What we

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13 See my views on the nature of marriage, as set out in my previous consultation paper response and, with some expansion but more polemic, in chapter 5 of Ideas and Debates in Family Law (Hart, 2012).

14 I see these questions are very ‘luxury’ issues, which is partly why I do not think that they merit as much time in terms of my response as the other parts of this Consultation. It seems to me most likely that almost all the cases we are talking about involve reasonably substantial or very substantial assets, and so the real question is not whether the thing itself should be sold or shared (because there is enough money to avoid that having to happen, though things like family farms are perhaps different in that regard); the real issue is whether person A gets to exclude the value of the thing from the total asset pool so as to justify person B getting less overall, and I am not sympathetic to their desire so to do.
look to is the value of the assets, and then share out that value in a fair way; and there is no reason why the value of the thing should not be taken into account when assessing i) the total assets available and ii) the fair distribution of those assets. As to people who regard it as important to be able to bequeath things to their children, my sympathy is rather limited; if they really think that their children’s inheritance is more important than their marriage, then they either should not get married or, I suppose, in the world of nuptial agreements, they should agree that to be the case in the manner which the law will lay out. For one person to be able to foist it onto the other by asserting, at the point of divorce, that this property which the couple has been using all these years is non-matrimonial property seems to me entirely unjustifiable. That is especially true of the matrimonial home (question at para 6.50). Again, I do not say that the property itself would have to be shared, but the value of the property should not be excluded from the overall asset pool being divided up on divorce.
Part 3: The case for reform

Fundamental to the exercise undertaken in this consultation paper is making the case for reform in Part 3. In attempting that assessment, the paper makes little attempt to identify and weigh the advantages of the current law against its alleged disadvantages, much less against the alleged advantages and disadvantages of the five options for reform canvassed in Part 4. Simply basing the case for reform on the alleged disadvantages of the current law makes it impossible to assess the desirability of that law in itself or in comparison with alternatives to it. In addition, given that all the five alternatives, even on the limited critiques made of them in the paper, have disadvantages, it would follow that if anyone of them were adopted as the law and subjected to a similar one sided critique, they too would likely be found wanting and in need of reform. With respect, this risks rendering the whole exercise absurd.

All options, including maintaining the status quo, have costs and benefits. What arguably is needed is a structured study which identifies the costs and benefits of each option in a way that allows them to be compared. In the absence of such an analysis, the exercise risks simply substituting a novel set of advantages and disadvantages for the current set not because on balance they are to be preferred but simply because the current law is not perfect. Such an outcome might be seen as reflecting the old political saw, namely “Something must be done!”: “This is something”: “Then we must do it”.

The case for reform appears itself to be based on the questionable assertion that nothing has replaced the repealed statutory objective in the original section 25 of placing the parties in the position they would have been had the marriage continued. Hence it is argued, what is needed is “Principled reform”. That assertion appears to ignore the fact that White and subsequent cases have arguably supplied a clear objective, underpinned by a coherent set of principles and/or guidelines. Broadly that objective is to achieve fairness through the redistribution of the family assets. In doing so, the courts, to the extent that they are relevant, are currently required to have regard to

- the needs of the parties;
- the requirement to compensate a party for any economic loss generated by the marriage and
- the parties’ claims to a share in any residual property.

with the overall objective of giving each party an equal start on the road to living separately from one another. By way of added guidance the courts have created a range of presumptive principles or guidelines such as that, subject to the overriding requirements of fairness,

- contributions by way of domestic services to the life of the family are of equal value to those of the bread winner;
• certain categories of property do not fall to be redistributed and
• such family assets as do fall to be redistributed should be equally divided between the parties.

**Part 4: Principled reform**

The failure of the paper to undertake a comprehensive and comparative costs/benefits analysis of all the options, including the current law and policy, has resulted in the paper underplaying if not ignoring the arguable advantages of the current law and some of the possible disadvantages of the proposed options for reform.

**Five examples of the arguable comparative advantages of the current law and policy** which the paper fails to acknowledge or to give much weight are

• **the flexibility** of the current objective of fairness and the discretion involved which arguably maximises the chances of achieving individual justice and minimises the risks of hard cases and unjust results which are inherent in options that increase legal certainty. That advantage is achieved by accommodating the reality that the extent to which any principle or guideline is relevant to a particular case and what weight should be given to it, as opposed to other material principles and guidelines, will depend on the facts of the case, including perhaps the parties own views about what is fair and how they intend to conduct their post-divorce life. Hence, in some cases ‘need’ may be the overwhelming or the only relevant consideration with no possibility or requirement to consider ‘compensation’ or the sharing of residual property in order to achieve a fair outcome. In others, ‘compensation’ may loom large as against ‘need’ and ‘sharing’. In others, simply sharing out the assets will make questions of compensation and need irrelevant to achieving fairness. In others still, all three elements may be relevant but require to be given more or less weight as against each other. Or again, while demerging over time may be a fair and practical solution in many cases, in many others it might not be a practical possibility without inflicting real injustice one of the parties;

• **the incentive to settle and the disincentive to litigate** which arguably result from the current law and from legal uncertainty more generally. The fact is that under the current law the vast majority of cases result in a nuptial agreement between the parties about how to arrange their financial resources, albeit that those agreements may be ante-nuptial, nuptial or post-nuptial, the latter of which are often incorporated in a consent order. Arguably that settlement rate is driven in part at least by the fact that, faced with advice that it is not possible to predict what a court will likely do, the parties’ only means of managing the risks involved and thereby achieving some control over the outcome is to negotiate a settlement;

• **the minimising of the incentives to pursue expensive ‘forensic and legal expeditions’**.
Under the current law it is alleged that there is no means of readily predicting what the
court will do if certain facts are proved or points of property or other law carried. To the extent that that is true, that state of affairs must make it difficult for the parties to decide whether it is financially worthwhile their undertaking expensive investigations into the existence and value of property or income streams or to establish property rights. Hence there is a disincentive to pursue such ‘expeditions’;

- that while greater legal certainty may reduce the costs of discovering what the law is it may in practice be relatively easier for a litigant in person to understand and make their case in terms of fairness under the current law than to have to discover, analyse, marshal and present the facts in ways that address stricter guidelines or allow a formula to be operated. For example, a formula or guidelines which as a matter of law require different treatment of income and capital may give rise to complicated issues in high value cases about whether payments are being derived from income or capital (vide the complicated revenue cases on this issue). At the other end of the scale, if a formula requires an exact income to be established, those faced with ex-spouses who are self-employed or active in the black economy may face difficulties which are currently dealt with by the judge using ‘soft evidence’ to form a view of what is fair; and

- the broad discretion in the court under the current law to achieve fairness denies parties the opportunities to game the system that a more legally certain, and especially a formulaic law might provide.

As will already be apparent from what is said above, examples of the disadvantages of the options for reform canvassed in the paper include the obverse of the examples of the arguable advantages of the current law set out above, namely that with the greater legal certainty that those options seek to achieve would come:

- increased inflexibility as compared with the current law and with it an increased risk of unfairness and of hard cases;

- especially with the introduction of a formulaic approach, greater incentives to litigate and disincentives to settle simply because the parties would be better able to calculate what financial benefit would flow from winning a particular point of law or establishing a particular fact and be incentivised to litigate where the risk of the costs involved were outweighed by the chance of success and the financial benefit that success would bring;

- an increased incentive to embark of expensive “forensic and expeditions” where the predictable financial benefit of such expeditions outweighed the risk in costs;

- the risk of increased difficulties for some litigants in person if the option required them to analyse, marshal and present their cases in a form that addressed strict or stricter guidelines or principles or to establish precise facts in order to operate a formula; and

- the risk of parties gaming the system especially if a formula were adopted and
A further disadvantages of the options for reform which a comparative cost/benefit analysis might need to take into account is the risks of complicating, prolonging and encouraging litigation by relying a ‘let out’ clause or mechanism to enable the court to deviate from the strict rules or guidelines where applying them would cause hardship or unfairness. At present the incentive to settle provided by the legal uncertainty arises immediately. In future it might not arise until the stage at which the court decides that the application of the strict law would result in injustice. In individual cases where that happened the costs and the burdens on the parties might be hugely increased.

**Part 6: Non-Matrimonial property**

As with the options canvassed in Part 4, Part 6 lacks a full and comparative costs/benefit analysis which would enable respondents to judge the comparative overall advantages and disadvantages of the current law and the various options for reform. Many of the examples given above of the arguable advantages of the lack of legal certainty in the current law and the possible disadvantages of making the law more certain are relevant to the issues raised in Part 6. In particular, the prospect of more certainty about the treatment of matrimonial property would carry the risk of unfairness and hard cases. It would also arguably in some circumstances increase the incentives to litigate and decrease the incentives to settle precisely because it would enable the parties to calculate the risks in costs against the predictable benefit if they succeeded. For the same reason, such increased legal certainty might encourage expensive forensic and legal expeditions. More legal certainty in respect of the treatment of non-matrimonial property clearly also raises the increased possibility of parties gaming the system. Further, if reform put a greater focus on property law it might worsen the position of litigants in person whose ability to deal with questions of property rights is likely to be limited or in most cases non-existent. In addition, the concern expressed above about the way in which ‘let out clauses’ might prolong, complicate and encourage litigation would also be relevant to a full costs/benefit analysis comparing the current law with options for reform.

**General comments**

While the claims for legal certainty are at their strongest when the law is specifying in what circumstances a citizen may become subject to the coercive powers of the state, they are at their weakest when it comes to determining how the state should then exercise its powers, be it in sentencing in a criminal case, in quantifying damages in a tort action or in determining questions of who should get what on divorce. When ‘quantifying’ rights and obligations the need to take individual circumstances into account is vital to achieving justice. In the case of financial provision on divorce, the rules specifying when a citizen may become subject to the coercive powers of the state are very, indeed unusually clear, namely when there has been a marriage or civil partnership followed by divorce or judicial separation. It would arguably be odd if, in the name misplaced orthodoxy, family members were to be subject to a more legally certain and hence arbitrary regime
in ‘quantifying’ their rights and responsibilities than say are criminals facing sentence or injured parties seeking compensation in a tort action.

There is a tendency for legal certainty being seen as ‘a good thing’ and as a shorthand for encouraging more and cheaper settlements and ensuring that like cases are treated alike. However, it is easy to postulate circumstances where legal certainty can have the opposite effect in increasing the incentive to litigate and decreasing the incentive to settle. In addition, legal certainty, as well as creating hard cases, may also result in cases which are materially similar being treated very differently simply because a chance fact, of otherwise no importance, is present in one case but not in another. An example would be where two cases were factually identical save that in one property was inherited a minute before a marriage was concluded and in the other a minute after a marriage was concluded with the result that one spouse would have a right to share in the property and the other not. While on a full appreciation of the balance of costs and benefits that might be an acceptable disadvantage within a new scheme, it demonstrates that legal certainty is capable of ensuring that cases which the public might see as being materially identical are dealt with wholly differently under the law. It follows that is assessing the case for reform, policy makers need to be be careful not to assume that legal certainty of necessity will encourage settlements, reduce costs, achieve higher levels of justice or be easier for litigants in person to administer. Whether it will not depends on the individual circumstances of the cases involved.

The purpose of the law is to achieve compliance, albeit there has to be the prospect of a resort to the courts where compliance is not achieved. In that broader context, requiring the parties to reach financial arrangements which are fair given their circumstances is arguably to be preferred in policy terms to requiring them to adhere to some stricter principles or guidelines or to a formula which apply irrespective of their relevance to the particular circumstances of the case, unless, say, one of party can demonstrate some substantial degree of hardship or unfairness. Arguably, eroding fairness to achieve legal certainty could only be justified in this area of law if solid and significant practical advantages that outweigh the claims of equity could be demonstrated.

Finally, it may be worth recognising that the attachment of lawyers and judges to legal certainty may in large part be accounted for by the fact that it reduces their professional risks of “getting it wrong”. Legal certainty also has attractions for policy makers and politicians whose attachment to simplicity and ‘tidiness’ as a means of reducing the difficulties of formulating public policy is powerful. The harsh and hard fact, however, is that individuals’ and families’ lives are complex, infinitely variable and plain messy and the belief that tidy or certain law can provide a ‘silver bullet’ that will supply simple solutions to difficult and complex circumstances is both naive and dangerous.

In conclusion, the Commission may conclude that until they have carried out further research followed by a full and comparative cost/benefit analysis of all the options, including maintaining the status quo or a tidied up statutory version of it, it would be premature to seek changes in the legislation.
LAW COMMISSION
CONSULTATION PAPER No 208
MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS
RESPONSE FORM

This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

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Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

**Your details**

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<thead>
<tr>
<th>Name:</th>
<th>The Family Law Bar Association</th>
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<tbody>
<tr>
<td>The Family Law Bar Association (‘FLBA’) represents the interests of barristers who work in the field of family law in England and Wales. It has a membership of over 2500 people. It is the second largest specialist bar association in England and Wales. Its members represent a broad range of parties (e.g. parents, local authorities, children, the Official Solicitor) across the entire spectrum of family law proceedings: from financial relief in divorce proceedings to child abduction and care proceedings. On behalf of its members the FLBA actively strives to represent the interests of the family bar and more broadly to promote the enhancement of family justice to the Government and those influential in matters of public policy concerning family law and the family bar, through responses to public consultations, the commissioning of research and other forms of engagement and dialogue.</td>
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<td>Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):</td>
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PRINCIPLED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

We understand the rationale for the conclusions reached by the Law Commission to be:

(1) The current law in respect of the obligations of one spouse to support the other after divorce is poorly defined, inconsistent and subject to variation both regionally and from judge to judge. Specifically, there is no accepted definition of needs upon which to base any objective assessment of the likely quantum or duration of periodical payments.

(2) It is impossible to discern from the existing statutory provision any objective that financial provision is designed to achieve. The ‘bus driver’ is simply directed to drive the bus to a reasonable destination.

(3) The current law is, therefore, said to be ‘inaccessible’ even to those who have the benefit of expert advice. It is all the more inaccessible to those who, following the withdrawal of public funding for the vast majority of financial remedies applications, will be expected to navigate resolution of their financial claims by themselves.

(4) The Law Commission is likely to propose that qualifying nuptial agreements will be binding, subject to meeting the parties’ needs. Without a proper definition of ‘needs’ such agreements are unlikely to provide the desired certainty.

We do not disagree with this rationale, but would ask the Law Commission to consider the following positive factors which support the existence of a system which
retains a significant discretionary element:

(a) the current discretionary exercise means that each decision is fact specific and tailored to the individual circumstances of the parties.

(b) thus, the current system is generally perceived as being fair.

(c) the current system strives not to discriminate – whether for or against husbands or wives, breadwinners or homemakers.

(d) the current system is flexible in that judicial interpretation of the Matrimonial Causes Act 1973 has allowed the law to adapt to changing social norms and expectations. The survival of S.25, in particular, for almost 40 years shows the real benefit of a common law system of judicial interpretation of the primary statute.

It would be a mistake, in our view, to conclude that the present system fails to promote settlement. On the contrary, our experience as advocates who deal with these cases on a daily basis is that the vast majority of financial remedies claims settle either without the need for litigation or as part of the highly successful FDR process. One reason for this is the flexibility inherent in the judicial process. Any agreed financial remedies order will have a number of different components e.g. capital award, income, term order, pension share. Each of the parties will have their own priorities e.g. a wife may seek an enhanced capital award to provide her with financial security, a husband may seek a clean break to ensure that he alone benefits from the success of his business in future years. Any proposal which reduces the current flexibility in favour of a prescribed or formulaic approach in relation to some elements of the award reduces the scope to reach agreements which meet the priorities of each of the parties. Under the present system there is scope for parties to arrive at a form of settlement that suits everyone in each case.

We acknowledge the quest for a statutory objective but question how much difference this would make – save in respect of promoting independence (see below). The objective since White has been expressly to achieve fairness and it is not clear to us how much further a statutory objective would take matters. For example, under the Inheritance (Provision for Family and Dependants) Act 1975 the objective in respect of a spouse is that an award should make ‘reasonable financial provision’. Such an objective does not seem to us to add much certainty to the exercise of the court’s discretion.

Similarly, whilst we agree that in the vast majority of financial remedies cases needs is the dominant factor, giving greater clarity to the definition of needs (whether in
capital or income terms) may be difficult and may not necessarily lead to a fair outcome. The concept of needs has to be elastic so as to include a low income family as well as those whose incomes are well above the national average. A higher income family may see pension provision, holidays, entertainment, school fees etc as an essential part of day to day expenditure. A lower income family may not. Housing needs may range from £50,000 to £5 million depending on the wealth of the parties.

So whilst we accept there are weaknesses in the existing law, it is difficult to see how a principled basis to spousal support can be achieved without at the same time risking potentially unfair outcomes in those cases which do not fit comfortably into whichever model has been employed. The principle that each case turns on its facts is what drives the essential fairness of the process.

We do see merit, however, in setting out more clearly the potential bases or principles under which spousal support might be justified, and asking applicants (and courts in contested cases) to identify which basis leads to an order being made. Good advocates and judges will do this as a matter of course but we acknowledge some do not at present. In some cases, a maintenance order will be justified on account of relationship generated need; in others, on account of unravelling the merger over time. In other cases spousal support may be justified on account of some other duty said to be owed by one party to the other which should endure beyond divorce (which might be how some people would justify ongoing support in case study 3). Compensation may also have a part to play. A list of factors which may justify ongoing financial support may add clarity to the process and assist those without legal representation to marshal their arguments and reach fair settlements.

Finally, we would add this. It is very important, if the perception of unfairness is to be avoided, that if radical changes are to be introduced, consideration is given as to whether their introduction is to be applied retrospectively – i.e. to marriages contracted at a time when the parties’ perceptions of likely outcomes in the event of divorce was very different. There has already been something of a seismic shift in the way in which the courts consider financial remedy cases (following the House of Lords decision in White in 2000). For there now to be a further significant departure in a different direction for marriages already contracted might undermine the public’s perception of the fairness of the judicial system in this area of law.
7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

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<th>There may be a number of factors which can properly justify ongoing spousal support. These are but two examples. As set out above, we prefer an approach which articulates a number of reasons which may justify ongoing support rather than the identification of just one. Case study 3 is clearly a difficult case. Long term ongoing support would be difficult to justify under (1) or (2) above. Some may say that where the need for support is clear, the rationale becomes less important if the resources are readily available to meet that need. Might the answer be different depending on whether Chris earns £1,000 pm, £5,000 pm or £20,000 pm?</th>
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<td>We do not agree that (1) can be the sole basis for spousal support. There are many cases where spousal support is necessary without there being any relationship-generated disadvantage. There is also the difficulty in establishing the historical factual matrix. Such an approach would encourage the parties to look backwards rather than to the future. For all the reasons that the courts have largely eschewed ‘compensation’ based claims (the need for detailed historical evidence, playing out of ‘what if’ scenarios etc), we do not consider that spousal support should be so limited. Indeed, the sudden rise of compensation based claims following the decision in MacFarlane was, if anything, entirely unhelpful in fairly resolving the majority of those cases in which the claim was made.</td>
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<td>In our view there is more merit in (2) but this is not perfect, and it does not provide a complete answer to case study 3. Nevertheless, it has advantages. Unless there are other factors giving rise to ongoing dependency (e.g. children), it can provide a reasonable rationale for needs based support, particularly in short marriage cases, both as to quantum and as to duration. It would also provide some better clarity in variation cases. At present, the case law makes it clear that a payee is entitled to seek an upward variation in maintenance where the payer’s fortunes improve after the original order, even if this would elevate the payee’s standard of living to one greater than that enjoyed during the marriage. The unravelling of the merger over time, if it could be expressed in a legislative framework, would surely have led to a different result in North v North [2008] 1 FLR 158, where a payee successfully applied in 2004 for an upwards variation of a nominal maintenance order made in</td>
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Nonetheless, we favour an approach that lists a number of different factors, including those mentioned, which may justify ongoing spousal support.

7.4 In answering the question at paragraph 7.3 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.

In our view, all these factors are relevant to how the merger over time should be unravelled. They are relevant as to whether spousal support is to be awarded at all, the quantum of any award and the term. A short marriage will, unless one party has an ongoing dependency on account of childcare or care for a relative, ‘unravel’ over a shorter period. The marital standard of living will be relevant to the amount the applicant might expect to receive by way of maintenance, and may also help to provide greater clarity in variation cases (see above).

The difficulty, in our view, is that these are not the only potentially relevant considerations. What about disability (e.g. case study 3)? What about compensation where one spouse has given up a potentially lucrative career?

7.5 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?

We recognise, as set out above, that the present system of spousal support is highly discretionary, both in terms of quantum and timing. This has been explored most recently in *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam) by Mostyn J. Such a discretionary approach creates flexibility (a bespoke approach in each case so as to achieve fairness) but also uncertainty.
We maintain the view that it is essential to maintain a degree of flexibility, particularly in relation to quantum. The court currently analyses the reasonable income needs of each party, looking at necessary expenditure going forward. It is difficult to imagine how this exercise could be undertaken within the rigidity of a fixed formula scheme. The end result of such an approach would inevitably be unfairness – cases where one party’s needs, however reasonable, may not be met, or where the payments may be set at too high a level.

Of the two alternatives, we favour a reformed discretionary approach. We see merit in providing, for example, guidance as to whether income should be shared beyond that required to meet reasonable needs. Presently, as can be seen from B v S (above), there is very little guidance available on the approach to be taken in sharing income as an asset of the marriage.

The difficulty with a formula is its rigidity. There are many factors which may impact on the quantum or duration of an award. For example, an income order may be used to compensate for the depletion of matrimonial capital, or as an alternative to a pension share, or as a means of sharing a previously jointly held business interest. None of these would be possible with the application of a strict formula.

For the reasons expressed above, if Parliament decided that a formula should be introduced we would caution against making it retrospective. Some of the perceived unfairness would be avoided if the provision only applied to marriages contracted after the law had been changed.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

We do agree that the present formulation of S.25A and its interpretation does not always operate so as to provide incentives towards independence. Whilst we would not wish to see any absolute limit on the extent of the support to be given, some enhanced emphasis that the court should strive to achieve to achieve independence would be of assistance. A formulaic approach would, however, go too far, in our view, particularly in respect of marriages contracted many years ago when a very different set of norms and expectations applied to the marital relationship. A reformed discretionary approach could however include specific factors that the court must take into account in considering whether financial independence is practicable. In
many cases these are matters that the court would take into account at present. Ultimately, in our view, this issue is closely linked to the question of how long any term order should last. At present, the period over which a periodical payments order is to run is often the most important issue when considering independence. It provides the receiving party with some financial security for a period of time and the paying party with the opportunity to plan for a future free of this financial obligation. Again this is an issue which could be considered in relation to a reformed discretionary basis and we could not support a formulaic approach. Any such scheme would need to recognise there are some cases in which independence is not appropriate, practicable or fair. Again, prospective as opposed to retrospective legislation might avoid some of the worst iniquities.

7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

It is very difficult for us to answer this question, as the work needed would depend entirely upon the route taken. All we would say is that proper research and piloting would be essential to ensure that any new approach does not put in jeopardy the benefits of the current system which include perceived fairness, a bespoke solution for each different factual situation and incentives for the parties to agree their own resolution of financial issues, without their replacement by benefits of discernably greater value both in terms of public perception and professional practicality. At the very least, extensive examination of comparable systems of provision in other jurisdictions would be necessary to determine how the imposition of such a system, or parts of it, would be received or applied here.

The difficulties (and expense) of grafting new elements onto an existing system would be much reduced by a ‘blank sheet of paper’ approach, which might be suitable in the event that an early decision was taken to apply any changes prospectively only. If a prospective formula was being pursued, then the Law Commission, aided probably by the Money and Property sub-committee of the Family Justice Counsel, would seem to the appropriate authors of any scheme.
The prospect of having a new set of rules applying initially only in certain courts but not others would create terrible problems of national, as opposed to international, forum shopping, and so should be avoided.

**Our case studies: the basis of support**

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

**Comments**

A. In Case Study Two Michael will leave the marriage with the benefit of considerable capital. A periodical payments order is likely to be relatively short term, to enable him to adjust without undue hardship. Thus this seems to us to be a case for a graduated transition to independence, with some income contribution from Sophia for a short period of time, say 12 months.

B. No. The obligation to pay periodical payments arises largely through the disparity in the parties' earning capacity. It should, therefore, be paid out of income not capital.

C. Pat has no current earning capacity and is likely to be reliant on state care, perhaps residential if he has no family member able to look after him. Chris has only
a very modest earning capacity if he is working as a secretary. It seems to us unlikely in these circumstances that Chris has a responsibility to provide for Pat’s care. The situation may be different if Chris had a much larger income but even then we are of the view that any ongoing financial contribution from Chris ought to be modest.

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We see little merit in rules which provide an absolute time limit for maintenance or seek to circumscribe the discretion of the court. That said, we are in favour of an enhanced emphasis on the need for the system to promote independence as below. Clearly within such an emphasis, the presence or absence of children, and therefore the joint ongoing responsibility to parent such children, is likely to remain an important factor in determining whether there should be any order for ongoing spousal periodical payments and, if so, for how long.

Comments

D. The answer to this is probably both, which highlights the difficulty of a formulaic calculation. Inevitably a formula trades flexibility and fairness for certainty.

E. We see little merit in rules which provide an absolute time limit for maintenance or seek to circumscribe the discretion of the court. That said, we are in favour of an enhanced emphasis on the need for the system to promote independence as below. Clearly within such an emphasis, the presence or absence of children, and therefore the joint ongoing responsibility to parent such children, is likely to remain an important factor in determining whether there should be any order for ongoing spousal periodical payments and, if so, for how long.
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

F. Clearly the length of the marriage / civil partnership will be an important factor in determining both the level of ongoing financial support and, in particular, the term of any order. It will make less difference in a case where there are children (Sarah). In Michael’s case it should, in our view, have a greater effect on the length of any ongoing periodical payments order rather than the level at which such order is set. In Pat’s case a much shorter relationship should substantially strengthen the argument that no ongoing periodical payments order is justified.

G. As now, the marital standard of living should simply be one factor to take into account. In some cases it may be possible for the parties to maintain a similar standard of living to that enjoyed during the marriage but in most the need to provide for two households will render that an impossible objective. More broadly, where there is a long marriage or there are children, it is not an unreasonable aspiration (finances permitting) for the financially weaker party to seek a level of spousal support akin to that enjoyed during the course of the marriage. In the case studies Sarah’s argument to be able to maintain the standard of living during the marriage is the strongest. As we have agreed above, the order in Michael’s case should provide for a graduated transition towards independence. In Pat’s case the standard of living during the relationship is probably irrelevant due to the modest income available to the parties and Pat’s disabilities being a significant additional consideration.

H. Yes, continuing responsibilities, particularly where a party has ongoing care of
children, should make a difference to the level of support.

I. It is simply impossible to say on the information provided whether it is reasonable or practicable in any of these cases for one party to remain living in the family home. In our view the wish of one party to remain in the home (often said to provide a sense of continuity and stability particularly where there are children) should carry little weight in determining financial outcomes. The family home is an asset like any other and families often have to move home for a variety of reasons e.g. work related, the need to care for elderly parents, choice of schools etc. The breakdown of a marriage always results in one party having to leave a home where he or she has made a financial and emotional commitment. The other party has no greater claim to remain there. If there are children then the accommodation provided has to be suitable to meet their needs but not necessarily at the same level as that enjoyed during the marriage. If it is possible for one party to retain the family home then that is to be encouraged but the court should not in our view skew the result of any financial proceedings to enable that to happen.

IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint
(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

(1) We consider that the introduction of a statutory provision which aims to ensure that a payee spouse is enabled to become independent within a reasonable period of time would represent an improvement on the current formulation found in section 25A of the Matrimonial Causes Act 1973 and the case law that interprets it. We agree that the current requirement for the Court to do no more than consider whether such termination of dependence on the paying spouse would be “appropriate” provides insufficient direction for the Court, and insufficient guidance for the litigant.

In our view there should be a simply enacted reform, whether as an amendment to S.25A or a wider reform of S.25. The effect of such amendment should be readily understandable (even in a continuing discretionary arena), not only to professionals in this field, but just as importantly, to litigants in person. Its impact would be to recalibrate the Court’s compass in such a way that it pointed towards an increased recognition that (per Baroness Hale in *Miller v Miller, MacFarlane v MacFarlane* [2006] UKHL 24 at [144]) the “…ultimate objective [in making an award for ancillary relief] is to give each party an equal start on the road to independent living.”

By elevating the drive towards independent living in the hierarchy of factors to be considered, this would, of itself, indicate to those Judges exercising their discretionary powers under the Act that this objective was worthy of more than just, as at present, consideration.

We wonder, however, whether the inclusion of the rider suggested (“…while bearing in mind…”), risks complicating an otherwise straightforward statutory encouragement by elevating the very existence of children to a circumstance which would come to be seen as a factor which prevents the imposition of a clean break. The existence of young, pre or primary school children, may well act as a fetter in some cases on the progress of the caring spouse to independent living. But in other cases household
economics will permit no such delay.

It is important to bear in mind that social norms have changed significantly since the Matrimonial Causes Act was enacted. According to the Office for National Statistics, at the end of 2010, 29% of Mothers worked full-time (up from 23% in 1996) whilst 66% of Mothers were in some type of work, either part-time or full-time. In June 2012 the percentage of houses in which both adults worked was 53 per cent. Any statutory reform that takes an unrealistic view of the relationship between parenting and the need for financial independence is unlikely to retain the confidence of the wider population. In some cases financial independence will be achievable – and necessary – when children are still of school age; in others the relative affluence of the parties will mean that that a primary carer can delay returning to the work place a little longer. In many cases, teenage children will not impede the development or utilisation of parental earning capacity. This will uniquely be a matter for the discretion of the Judge. The imposition of a fixed time frame within which to achieve independence would go too far and risk real hardship in a sizeable minority of cases; but the exercise of that discretion will be more easily comprehended if it takes place against the backdrop of an enhanced statutory goal of financial independence.

In some cases, such independence will not be achievable, for a raft of reasons, not all of which could be capable of being foreseen and recorded in statute (or non-statutory guidance). However, in our view that does not detract from the desirability of a clearer statutory drive towards independence.

(2) and (3); The quest for an “authoritative source of guidance” for the courts and members of the public (whether statutory or non-statutory) is in our view likely to prove illusory and will potentially add to the complexity and confusion in this area of law. It would risk creating the illusion of certainty in a field in which, at present, the discretionary powers of the Judge are the best route to a fair outcome. That discretion – whilst it precludes the certain outcome that a formulaic approach would result in – provides a bespoke solution to the problems thrown up by a myriad different factual scenarios, rather than an off the peg solution which would provide certainty at the expense, in some cases, of fairness.

It is important to recognise that this area of law has evolved – and continues to evolve – to reflect changes in society. It seems doubtful to us that a gloss on or interpretation of the existing factors set out in section 25 of the Act of 1973 is either necessary or helpful. The recognition of the nature and quality of pre-marital cohabitation, the equating of the contributions of the breadwinner with that of the
home maker, the recognition that the resources built up during the marriage represents the fruits of the marital partnership, all reflect changing societal perceptions over time – and all have been accommodated within an evolving judicial interpretation of section 25. By attempting to add further clarification of what needs means, or how quickly independence can be achieved, or what should represent a “normal form of order” for the term of a periodical payments order, the capacity of the Court to craft a custom built solution for the litigants before it risks being severely curtailed – whilst further fettering the ability of the court to respond to changes in popular perceptions of what fairness means.

What is more, needs – like fairness – means different things to different people. It is a more elastic concept than any other, and best established either by the parties themselves, or by the Court in the light of the parties’ evidence. External proscription of a universal definition of needs is a recipe for unfairness. Why should pension provision neglected by the parties during their marriage, immediately become a priority on dissolution? Likewise, mortgage free housing, or debt repayment?

As we have stated above, the discretionary element of the law does not, in reality, act as a break on settlement for the vast majority of separated couples, who are able to navigate through the financial consequences of dissolution of marriages and civil partnerships by reference to their own moral compasses and appreciation of what, in their relationship, is seen as fair – and what needs means.

The complexities of parties’ relationships (the merger over time, the expectation loss / the reliance loss / the differing roles of the parties in respect of child care / the interplay between income, capital and pension share orders), in our view, render any strict formulaic approach potentially capable of creating unfairness in a significant number of cases. It would be hard to justify introducing now a formula which provided a significantly worse outcome to W1, but significantly a better one for W2, in circumstances where both have been married for sometime already and understood their broad entitlement under the existing legislation. Again, we would acknowledge that prospective legislation might mitigate this particular iniquity.

For some of us however, there may be some justification now for a more restrictive exercise of the Court’s powers in the case of short, childless marriages. These cases may become bitterly and disproportionately contested and can give rise to the greatest feelings of unfairness, with allegations of “gold-digging” leveled against Husbands and Wives. Here, it seems to some of us, that the implementation of some variant of the recommendations of the Centre for Social Justice in its 2009
“Every Family matters” report may represent an improvement on the current state of the law. A return to pre-marital financial positions following sharing of marital assets and absent “significant injustice” could provide certainty without unfairness in such cases. The application of such a rule – by way of statutory reform – to marriages where the marriage and the preceding cohabitation did not exceed 3 years would, for some of us be an improvement on the current law.

On the other hand some of us consider that these cases too have their complexities and it may be difficult to be prescriptive. For example, even in a short marriage there may be relationship generated disadvantage e.g. one party may have given up lucrative employment to support the career of the other.

It must also be said that there is a danger that any form of piecemeal tinkering with the existing legislation risks creating hard cases where (for example) the marriage has lasted 3 years and a day. The more radical the proposed change, the more important it is that parties getting married understand the likely consequences for them and their future or existing children of any future breakdown.

(4) We have some difficulty with the concept of practice guidance issued by the FJC and how such guidance would fit in with our common law system of statute and case law precedent. Would such guidance be treated as if it were statute, or as a rule or practice direction? Would it be binding on the Court of Appeal and Supreme Court? In any event, such guidance would be ‘fixed in time’ and in due course may fail to reflect changing social norms and expectations as set out above.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

Two issues have, in our view, caused judges to tend more recently towards the making of joint lives periodical payments orders. The first is the limited distinction between term orders and term orders with a s.28(1A) bar following the Court of Appeal decision in Fleming. In our view the requirement for ‘exceptional circumstances’ before a court will extend a term order is an impermissible gloss on the wording of the statute. Perversely it seems likely that this decision has had the opposite effect to that desired. Rather than emphasising the importance of the parties striving to achieve financial independence it has reduced the range of options available to the financial remedies judge. Rather than risk an absolute cut off date for
maintenance, often many years ahead, the courts have tended to prefer the ‘safer’ option of a joint lives order. Restoring the proper option of a term order, with the receiving spouse able to make an unfettered application to extend the term, would encourage the courts to make term orders. In turn, such orders would reverse the onus. Whereas now the onus is on the paying party to apply to be relieved of such an obligation, it would be for the receiving party to apply and demonstrate why there should be an extension of the term.

The second issue is the removal of child maintenance from the jurisdiction of the court. The FLBA has never been in favour of the creation of the CSA (now CMEC) and repeated attempted reforms have demonstrated how poorly the system operates. Parents and judges simply have no confidence in the ability of the CSA to obtain a clear and true picture of the financial circumstances of the non-resident parent and no confidence in its powers of enforcement. In those circumstances judges are keen to leave open the issue of spousal periodical payments where there are children to enable an adjustment to be made if the CSA assessment does not provide a fair and proper level of child maintenance.

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

We are of the view that whilst it should not, in most cases, be possible to contract out of provision for needs by means of a qualifying nuptial agreement; statute should not specify the level of needs for that purpose. In the view of some of us, the exception would be the short, childless marriage cases considered above, where those practitioners consider that statute should require, or qualifying nuptial agreements permit, the fact of need to be disregarded, absent “significant injustice.” Their reasoning mirrors the thoughts of the Commission at paragraph 5.68 of its report¹. However, the FLBA remains divided whether it is right to distinguish short childless marriages in this way.

¹ “…..needs, as it has developed in the current law, cannot be captured by a statutory description, let alone by a definition, because it embodies inconsistent principles and a number of uncertainties. Moreover, we do not think that those preparing qualifying nuptial agreements would advise their clients to attempt to set out specific future payments on what they thought would equate to the level thought to equate to needs. To do so would risk underestimating the future circumstances and needs of the parties. It would also risk exposure to changes in the general law of needs, and in particular to fundamental developments along the lines specified in Part 4.”
### NON-MATRIMONIAL PROPERTY

7.11 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 above statement broadly reflects the existing position in respect of the case law following the Court of Appeal decision in *Jones v Jones*. Although currently there is some uncertainty whether the correct approach is to exclude the non-matrimonial property entirely (*Jones*) or to adjust the overall division to take into account the unmatched contribution (*Robson v Robson*).

Some on the FLBA favour enacting a statutory provision along the lines of that proposed by the Commission. As the Commission have noted there remains some uncertainty in this area, the definition of non-matrimonial property may be unclear and there is no firm guidance to assist where property changes over time. Clearer guidance, they consider, is also probably required in relation the question of when and how non-matrimonial property may, in whole or in part, be ‘matrimonialised’ – a matter which takes up considerable time and expense in cases involving the sharing principle at the moment.

The others acknowledge that discretion can be expensive but caution against an approach that accepts as its premise that it will create unfairness. In their view the uncertainty of the current situation in fact promotes settlement. There are simply no right or wrong answers which means that a factual determination on a single issue (e.g. the source of particular savings or assets) is unlikely to prove determinative. Creating a binary system – a particular asset is either wholly excluded from the sharing exercise or wholly included – thereby creates an issue which is worth litigating and may not be amenable to settlement even with the assistance of an experienced FDR judge.

The real difficulty in (all) our views is in creating an acceptable definition of non-matrimonial property. We were all sympathetic to the general proposition and indeed,
as stated above, it largely reflects the existing position. Our difficulty arises as we worked our way through the various scenarios in the questions which follow. We cannot agree a simple workable formula which fairly determines the various scenarios posed. The difficulty is not only that we do not agree on some issues (e.g. should property acquired during cohabitation be treated as matrimonial or non-matrimonial) but also because any formula, however well crafted, inevitably creates potential unfairness in individual cases, especially where retrospectively applied.

Our view therefore, on the basis that the current discretionary scheme remains otherwise in place, is that:

(a) any definition of non-matrimonial property should not be too strictly defined and should permit the operation of flexibility and discretion.

(b) parties should not be encouraged to litigate heavily on retrospective issues e.g. the source of property, and how that property was treated during the marriage.

(c) the court should be left to deal with issues of intermingling / change in nature of non-matrimonial property on a case by case basis.

(d) needs should remain a separate consideration (as proposed).

Overall, whilst some of us do support an attempt to provide a broad statutory definition of non-matrimonial property, the majority do not support any change in the existing position, which, on the basis of the case law, already has as its starting point the exclusion of non-matrimonial property from the sharing exercise save to meet need, but has the flexibility to prevent hardship in individual cases.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

If there was to be a statutory exclusion of non-matrimonial property from the sharing exercise then we agree that the family home (whether or not held in joint names) should be excluded from the definition of such property.

However, even here there is some complexity. It cannot necessarily follow that such property should be shared. In a shorter marriage, where the pre-acquired or inherited wealth constitutes a large proportion of the value of the property, where the investment in the family home is recent and / or where there are extensive
matrimonial assets outside of the family home, fairness may not necessarily be achieved through an equal sharing of that asset. In our view there must be capacity as now for the exercise of discretion so that each case can be determined on its own facts.

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

There are a range of views within the FLBA on the issue of whether property acquired during cohabitation should be treated in the same way as property acquired during marriage. Some agree that it should. Judges often treat cohabitation which seamlessly becomes marriage as extending the length of the parties’ marriage for the purpose of s.25 MCA. This reflects the view within society that marriage should not be seen as the only way in which property rights and the right to maintenance should be created. Same sex partners can now enter into civil partnerships and there is strong pressure (supported by previous Law Commission recommendations) for cohabitation to create rights.

On the other hand, the law does not currently equate cohabitation with marriage. The Law Commission’s proposals have not been accepted by successive governments and cohabitation is not treated as re-marriage for the purpose of bringing to an end a spousal periodical payments order. Currently no property rights are created during cohabitation and the fact that assets are acquired by one party during cohabitation should not necessarily be treated in a different way depending on whether or not the parties subsequently marry.

The difficulty here, again, may be that the answer to this question is ‘it depends…’. We do not, on balance, consider it is possible to have a hard and fast rule, let alone a rule that can be applied retrospectively. Much may depend on the length of the cohabitation, of the marriage, and the overall financial position of the parties. Our view is that it is better for the courts to retain discretion in these matters than to have a hard and fast rule that risks unfairness.

7.14 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?
**Supplementary Consultation Paper, Part 6, paragraph 6.77**

Again, it is difficult to form an absolute view about these issues. A property acquired by way of gift or inheritance may be used twice by the parties in 20 years or may have been used each weekend. That property may form a small proportion of the parties’ overall assets or may be a large proportion. In our view a binary system would not be a fair way of deciding these issues.

**Supplementary Consultation Paper, Part 6, paragraph 6.87**

7.15 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?

Again, we do not agree that it is possible to form an absolute view about this. If mere use by the family is not sufficient to transform non-matrimonial property into matrimonial property, we do not see why property derived from non-matrimonial bought for the use of the family (albeit with a saving exception) is sufficient to transform its character from non-matrimonial to matrimonial. In our view, this ignores a fundamental aspect of non-matrimonial property: value. Even if property is bought for the use of the family, part or all of its value still derives from non-matrimonial property and this ought to be recognised. It would not necessarily be fair to treat the property as matrimonial property, which, presumably, would be equally shared.

If the new property were purchased in joint names, that would probably constitute a sufficient reason for treating the property as matrimonial property (or at least give rise to a presumption that it should be shared equally) as that evinces an intention to share ownership equally. Use of the property during the marriage – even intended use of the property, however, is not, in our view, sufficient.

We recognise that a legitimate alternative would be for property to be treated as “partly non-matrimonial”. That perhaps would strike a fairer balance between recognising the contribution of value derived from a source external to the marriage and the parties’ treatment of the asset during the marriage.

In any event, we do not accept the premise that the proviso should be limited to substitute property of the “same kind”. It is not obvious why if a substitute painting is purchased that would remain non-matrimonial property, whereas if a classic car was purchased with the proceeds of the painting that should lose its character.
The intricate variety of possible scenarios in response to this question amply demonstrates why a bespoke system does achieve a fairer result in the majority of cases, and why retrospective legislation to redefine boundaries is almost certain to create hard cases where outcomes would be demonstrably less fair. In addition, we are of the view that any prospective legislation would need to be widely promulgated and discussed before its imposition.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Again we do not agree that it is possible to have a hard and fast rule. We consider that this proposal pays insufficient regard to the fact that value has been contributed to the assets, which value has derived from a source external to the marriage. We do not agree that it is appropriate to infer from the mere fact of investing in matrimonial property that the contributor intends that his or her unmatched contribution should no longer receive (full or at least some) recognition.

We think it unlikely that many couples will enter into marital agreements prior to making such decisions during the marriage and therefore we do not consider that the fact that the parties are free to express terms in a qualifying nuptial agreement is a sufficient reason for introducing this rule. If the marriage has already been subsisting for some time, decisions may have already been taken which render the making of such an agreement anyway impractical or unfair.

Logically, the most appropriate solution may be for the property to become “part-matrimonial and part-non-matrimonial”. Such an approach would require the court to maintain a discretion to decide how, in fairness, that property should be divided.

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

This is an exceptionally difficult issue and reinforces our view that it is impossible to create absolute rules in this area. However, we recognise that it is an important and
highly relevant issue when considering non-matrimonial property and the present uncertainty makes outcomes difficult to predict.

We do not have a unified view on this issue. There are some who favour leaving the matter entirely to the Court’s discretion. There are others who favour a more structured approach through a guided discretion, not least because the courts have yet to identify the detail of how this issue is to be addressed in practice (for instance, the selection of an appropriate index to measure passive growth is fraught with difficulty as is the concept of a “springboard”).

However, even those that favour a structured approach have difficulty conceiving of a system of rules that could achieve a fair outcome, especially on a retrospective basis. The problem is exacerbated by the fact that the situations in which this issue arises are so varied. At one end of the spectrum is the spouse who continues to run his pre-owned business. At the other, is the spouse who barely manages a pre-existing portfolio. Thus, if there is to be further guidance, realistically, it probably has to take the form of guided discretion rather than rules.

As to the values that should be expressed within any guidance, plainly passive growth should be included. However, it is much harder to be definitive beyond that. One consideration may be the amount of involvement that the parties have had. However, this is not free from difficulty – for instance, where is the dividing line between active growth of a non-matrimonial asset (which should not be divided) and the fruits of marital endeavour (which should be divided)?

An alternative consideration may be some form of restitution if work has been done by the non-owing spouse, although it is not clear whether this restitution should be quantified by reference to the increase in value or by the loss incurred.

There is also a particular problem in relation to business assets, Although the Court of Appeal in Jones has commended the approach of treating the increase in value (subject to passive growth and, possibly, a springboard for latent potential growth) as matrimonial property, is this necessarily fair? Is the increase in value genuinely the product of matrimonial endeavour merely because it occurs during the currency of the marriage? Or is that increase partly due to the endeavour during the marriage and partly due to the ideas and efforts deployed prior to the marriage? If the latter, there is an argument that it is unfair to treat the growth as matrimonial property simply because it occurs during the marriage. Ultimately, any guided discretion can only be in general terms and the eventual outcome of each case will be fact specific.
One view is that any rules in this area, if sufficiently clear and unequivocal, could not be said to be unfair if they are applied prospectively only, so that throughout any marriage to which they applied, both parties can be said to have understood the position, and cannot later complain about their outcome. This might seem to be the least unfair environment in which to introduce any new concepts and principles. In other jurisdictions with a more formulaic approach, the impact of any potential unfairness is greatly reduced by the fact that parties understand the system when they get married in the first place. There is no obvious reason why the same approach would not apply here.
This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
Your details
Name: Helen Shipsey

Email address: [redacted]

Postal address: Legal Department, 16, Belgrave Square, London SW1X 8PQ

Telephone number: [redacted]

Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):
The Country Land and Business Association

The Country Land and Business Association (CLA) welcomes the opportunity to respond to this consultation exercise. The CLA has some 34,000 members in England and Wales engaged in all aspects of rural land ownership and the rural economy. Some own estates, some farm and some run small or medium sized businesses that are concerned with the use and management of land in some way. The CLA is a membership organisation, which is comprised of committees across the countryside where members can express their views and share their experience. In addition the CLA also provides a central advisory team where members can discuss individual legal and land use problems. This direct access along with the breadth of the membership allows us to give an informed view on matters affecting the rural environment and economy.

We have limited our comments to the section on non-matrimonial property.

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

PRINCIPLED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114
7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116
7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?
IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

   (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

   (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

   (c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.
7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70
NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

Yes the CLA does agree with this. Our overriding concern is safeguarding the integrity of the business/generator of income which for our members is often in the form of inherited land/properties. Once this is compromised the ability to generate income and provide for dependants will be diminished.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

The CLA would suggest that depending on the circumstances there will be many instances when it should remain in the definition of non-matrimonial property. In particular if it generates an income for the family or is the hub of the farm for instance.
7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

We would argue that it should be included in the definition of non-matrimonial property.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

Yes.
7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Again in the situation where the business is a farm it is far harder to keep the distinctions of property and business separate but it will be in the interests of all the parties to ensure that the assets are not divided in such a way that the generation of income will be impeded. Therefore we would argue that the fact the property has use by the family does not necessarily mean that it should become matrimonial property in these circumstances.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Once the rules are established then it could be an option for the parties to take action such as this provided they understand the consequences. Until that point and for such action that might have taken place before any such rules come into effect it should be a matter for discretion according to the circumstances.
7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

The extent to which the asset has grown due to investment of a particular party should be available to that party if:

a) to meet needs and

b) can be extracted without damaging the ongoing viability of the enterprise.

The values should be fairness and proportionality and not diminishing the capacity of the business and income generation.
Why agreements to arbitrate family financial disputes should be treated comparably as 'qualifying nuptial agreements'¹

1. In an article published in 2008¹, voicing support for family arbitration, Lord Justice Thorpe stated, '...the advantages of arbitration can only be assured if arbitration rests on a statutory foundation that prevents a party rejecting the arbitrator’s award.'

2. Thorpe LJ’s approach then developed a, as manifest in Lykiardopulo v Lykiardopulo [2010] EWCA Civ 1315, [2011] 1 FLR 1427 where at [69] he observed:

   ‘...I see no public policy objection to parties opting for an arbitrator or what is now known as “private judging.” Resolution have presented a strong case for the introduction of binding arbitration in ancillary relief. The abstraction of cases from the family justice system, whether for alternative dispute resolution, collaborative practice or non-binding arbitration is generally to be welcomed.’ [Our emphasis]

¹ This Discussion Paper has been prepared for the Board of IFLA, for submission to the Law Commission, by Sir Peter Singer and Rhys Taylor (with helpful input from Sir Hugh Bennett, Tim Scott QC, Gavin Smith, David Hodson and Grant Howell).

It has been circulated in draft to all current accredited IFLA arbitrators, and the following have stated that they agree with its content and recommendations:

Lyn Ayrton, David Balcombe QC, Roger Bamber, Ann Baptist, Matthew Barry, Paul Beevers, Sir Hugh Bennett, Bruce Blair QC, Lisa Boileau, Andrzej Bojarski, Patrick Bowe, Andrew Breakwell, Duncan Brooks, Mark Chapman, Jonathan Cohen QC, Liz Cowell, Elissa Da Costa-Waldman, Jane Drew, Elizabeth Edwards, Judith Fordham, Nicholas Francis QC, Stephen Foster, Fiona Glenday, Jenny Goldstein, Oliver Gravel, HH Judge Victor Hall, Richard Harris, Michael Hayes, David Hodson, Grant Howell, Christine Hughes, Paul Infield, Peter Jones, Margaret Kelly, Peter Kent, Suzanne Kingston, Valentine Le Grice QC, Simon Lillington, Frances Lindsay, Nicholas Longford, Martin Loxley, Marian Lynch, Stephen Lyon, Katie McCollan, Lord Marks of Henley on Thames QC, Derek Marshall, Judith Mayhew, Diana Parker, Ian Pattinson, Kathryn Peat, James Pirrie, Christopher Pocock QC, Michelle Potts, Hele Proops, Pauline Purcell, Fiona Read, Tony Roe, David Rose, Mena Ruparel, Tim Scott QC, Nicola Shaw, Felicity Shedden, Nigel Shepherd, Dennis Sheridan, Sir Peter Singer, Gavin Smith, Judith Speed, Michael Sternberg QC, Marilyn Stowe, Margaret Styles, Jonathan Swift, Deborah Taylor, Rhys Taylor, Clare Thornton, Andrew Todd, David Walden-Smith, Claire Webb, Bradley Williams, Denise Woodward
3. The established judicial view of nuptial agreements (or, perhaps more accurately, its earlier manifestations) changed dramatically in 2010 with the case of Radmacher v Granatino [2010] UKSC 42, [2011] 1 AC 534 (see especially paragraphs [2], [3], [75] and [78]). In particular at [78] it was stated:

The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely contingencies of an uncertain future.'

4. In this Submission we invite attention to the possibility that the time is now ripe for statutory provision to be made, alongside the Law Commission's recommendations concerning nuptial agreements, for acceptance, encouragement and enforcement of the binding agreement into which disputant parties enter when they opt to submit financial issues to arbitration by accredited and regulated family law expert arbitrators, such as those who are Members of the Chartered Institute of Arbitrators and who offer their services under the IFLA Scheme.

5. We question whether such changes could only be achieved by legislation, or whether an acceptable and appropriate framework can be arrived at through amendments to secondary legislation and statutory instruments. This Paper gives consideration to each route.

The IFLA Scheme

6. In February 2012 the Institute of Family Law Arbitrators ('IFLA') launched a Scheme which provides for the arbitration of financial family disputes. The detail was developed over a lengthy period of gestation, and the senior family judiciary were kept informed about the development of the proposal. The Scheme Rules and application form for IFLA arbitration ('Form ARB1') are accessible from the IFLA homepage at ifla.org.uk. Further detailed annotations to the rules and explanatory documents, such as a Procedural Summary, Checklist and an Introduction to the Arbitration Act 1996 ('AA96') are to be
found in the 'key information' section on the family arbitration resource site FamilyArbitrator.com.

7. Article 3 of the Rules establishes as a fundamental tenet of an IFLA arbitration that it will be conducted in accordance with the law of England and Wales, thereby setting this Scheme apart from religious or other social organisations, such as the Beth Din or Sharia Councils. Moreover, arbitrators accredited to arbitrate in accordance with the Rules (some 60 at present but likely to be 120 or so by early 2013) are all experienced family practitioners who have qualified as MCIArb arbitrators, and are thus subject to the Chartered Institute of Arbitrators’ code of practice and disciplinary procedures.

8. The Scheme is limited to financial disputes between separating or separated couples (including civil partners), and encompasses both family disputes (including those arising in relation to inheritance) and civil disputes such as those commenced under the Trusts of Land and Appointment of Trustees Act 1996 ('TOLATA'). The scope and limits are established by Article 2.

9. Submission to an IFLA arbitration takes place, once a dispute has arisen, by the parties each signing the Form ARB1, where they describe and define the scope of the dispute they agree to arbitrate. Form ARB1, very importantly, contains certain important declarations that the parties have understood and been advised upon the step they are taking. These include paras 6.4 and 6.5:

   6.4 We understand and agree that any award of the arbitrator appointed to determine this dispute will be final and binding on us, subject to the following:

   (a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;

   (b) insofar as the subject matter of the award requires it to be embodied in a court order (see 6.5 below), any changes which the court making that order may require;

   (c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award;

6.5 If and so far as the subject matter of the award makes it necessary, we will apply to an appropriate court for an order in the
same or similar terms as the award or the relevant part of the award. (In this context, ‘an appropriate court’ means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.) We understand that the court has a discretion as to whether, and in what terms, to make an order and we will take all reasonably necessary steps to see that such an order is made;

10. IFLA forward the ARB1 to a nominated arbitrator or, if they so wish, the parties may allow IFLA to nominate an arbitrator. (There has been discussion amongst interested professionals as to the circumstances in which an agreement to submit disputes to arbitration should they arise at a later date, contained for instance in a pre-nup, constitutes an 'arbitration clause' which the courts should uphold and enforce, and that separate situation is addressed in outline later in this Submission.)

11. The arbitration commences once the arbitrator having agreed terms with the parties sends them a formal letter of acceptance.

The relationship between an arbitral award and the court

12. Section 1(c) of AA96 provides that 'in matters governed by [Part 1] the court shall not intervene except as provided by [Part 1].' Part 1 provides a legislative framework for the judicial support and judicial supervision of arbitrations.iii

13. Section 9 of AA96 provides for the court to stay its proceedings in the event that their subject matter is or becomes the subject of arbitration, 'unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'. This stay provision is mandatory, and is the means whereby the court enforces the arbitration agreement in the event that either party seeks to bypass it.

14. Awards can be the subject of AA96 challenges under s.67 (want of jurisdiction), s.68 (serious irregularity leading to substantial injustice) and s.69 (appeal on a point of law).iii These are the court's main supervisory mechanisms.

15. On occasion an arbitree can also look to the court to support and indeed to reinforce their arbitrator's orders or directions, and for other ancillary supportive orders, such as the issue of a witness summons.
for attendance at the arbitration\textsuperscript{iv}. Thus the court process and the arbitration process are symbiotic.

16. Some awards in respect of TOLATA claims, making a declaration or quantifying beneficial interests in real property may be enforceable summarily under the s.66 procedures established for civil claims by the Arbitration Act, as if they were an order or judgment of the court. Even in that context, however, the need for the court to exercise a discretion can arise: for instance when the decision-maker must evaluate the checklist of factors set out in s.15 of that Act and choose between making or not an order for sale or for the taking of an account.

17. In the context of family financial disputes, most governing provisions (MCA 1973 s.25 being but the most obvious example) require the court to exercise its discretion before making an order, which at present is also the case when the order is sought by consent. Under the current legislative scheme summary enforcement under s.66 AA96 does not seem possible, and the court rightly retains both the power and the duty (when appropriate) to amend any order which the parties jointly invite the court to make to reflect and indeed to give effect to the award. This conceptual and legal matrix is given appropriate emphasis by Article 13.3 and 13.4 of the Rules, reflecting paras 6.4 and 6.5 of ARB1 (\textit{supra}), thus:

\begin{quote}
13.3 Once an award has been made, it will be final and binding on the parties, subject to the following:

(a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;

(b) insofar as the subject matter of the award requires it to be embodied in a court order (see Art.13.4), any changes which the court making that order may require;

(c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award.
\end{quote}

13.4 If and so far as the subject matter of the award makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part
of the award and will take all reasonably necessary steps to see that such an order is made. In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.

18. Such considerations however do beg questions, on the assumption that the court will retain the option, perhaps only in specified and maybe closely statutorily defined circumstances, to disqualify a nuptial agreement:

- Should there be provision to deal with any who seek to unshackle themselves from their prima facie binding commitment to accept an arbitral award, comparable to the defined 'let-outs' which we assume will empower the court (in the case of a pre- or post-nup) to absolve a party from being bound, although the norm may be to require parties to adhere to a qualifying nuptial agreement; and

- If there is to be no such legislative provision, how should family judges be guided to approach the task of approving or rejecting applications for orders sought to reflect arbitral awards, with or without opposition from one of the parties.

19. There may well be a wide range of views about what should be the wording of any 'get me out of this straitjacket' escape clauses from a pre-nup. We do not propose to contribute to that debate here, but assume that, in the arbitration agreement context, something along the lines of the court being persuaded that the arbitrator has failed to apply the relevant law and/or that the award is manifestly perverse might be the approach recommended.

20. In the absence of any primary legislative provision, however, guidance (perhaps by way of amendment to the FPR and PDs) would seem to be the obvious and preferred route.

21. The conversion of an arbitral award into a court order would be essential for certain types of order (for example a pension sharing or attachment order or a clean break award), and desirable in any event should future enforceability ever be in issue, for an arbitrator, in whatever species of dispute, has no powers to enforce the award.

22. If both parties are at one as to the form of consent order they seek, we hope that the decision (in relation to the collaborative law process) of Coleridge J in S v P (Settlement by Collaborative Law Process) [2008] 2
FLR 2040, providing for speedy listing of consent applications, might be taken a stage further to permit the application seeking such an order, accompanied by appropriate supporting documentation, to be placed before a judge as box-work. That would not of course derogate from the judge’s ability to call for explanation, or correction of technical defect, or attendance by the parties and/or their legal advisers. The position would therefore be almost entirely analogous with an application for a consent order arrived at in the course of negotiation or mediation, where the parties simply apply on paper for an order.

23. If however one party is recalcitrant, then we anticipate that the other would issue an application for him or her to show cause why an order should not be made to reflect the arbitral award, with a summary hearing to follow.

24. There would seem to be no reason in principle, however why a contested application should not be dealt with on precisely the same basis as a consent application, and what that basis should be is the topic of the propositions which follow.

To what extent should the court scrutinise the merits of the award

25. *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467 involved an application to show cause why the terms agreed in a pre-nup should not, without full enquiry, be conclusive of the outcome of one spouse’s application for more generous relief. Thorpe LJ registered his reaction in trenchant terms:

‘If ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case.’

26. The decision of Eleanor King J in *S v S* [2008] EWHC 2038 (Fam), [2009] 1 FLR 254 takes a similar approach, holding [as summarised in the headnote] that:

‘...in circumstances in which there was a factor of such magnetic importance that it must necessarily dominate the discretionary process, the vehicle of a notice to show cause could appropriately be considered as the proportionate and just route by which to determine the extent to which that factor should be determinative of the action; [and at [88] that:]’
this is one of the category of cases identified by Thorpe LJ in Crossley v Crossley where there is a factor of such magnetic importance that it must necessarily dominate the discretionary process.'

27. We suggest that the 'magnetic factor' perspective provides an appropriate analogy and shows the way how applications (whether or not by consent) for orders to reflect an IFLA award should be viewed by the court: through the wrong end of a telescope rather than through a wide-angle lens. Such an approach respects the court’s jurisdiction, but gives full force and effect to party autonomy by treating the parties' agreement to be bound by the award as the magnetic factor which should lead to a reflective order.

28. The essential scheme of the FPR 2010 is supportive of alternative dispute resolution. FPR 2010 rule 1.4(2)(e) places a duty on the court, if it considers that alternative dispute resolution appropriate, to 'encourage[e] the parties to use an alternative dispute resolution procedure' and to 'facilitat[e] the use of such procedure'. By Part 3, and in particular rule 3.2, the court is required to 'consider at every stage in proceedings, whether alternative dispute resolution is appropriate'. It would be manifestly inconsistent with the philosophy of the Rules for the court then to treat the outcome of an alternative dispute resolution, such as arbitration, as other than a final and binding result, albeit one subject to review by the judge in what (we hope and expect) would be rare and exceptional circumstances.

29. Clearly, awards outwith the broad ambit of an arbitrator’s reasonable discretion could and should not survive such an application without amendment, an outcome which the IFLA rules clearly envisage. Although the procedure would properly be summary and robust, it would nevertheless adequately enable the court to intervene in a case where the family judge might conclude that the arbitrator has failed to apply the relevant law and/or that the award is manifestly perverse.

30. There are two noteworthy pre-Radmacher decisions which support the proposition that a properly conducted IFLA arbitration should be summarily endorsed by the court.

31. In X v X (Y and Z Intervening) [2001] EWHC 11 (Fam), [2002] 1 FLR 508 at [103], Munby J (as he then was) summarised the effect of a number of the post-Edgar v Edgar [1980] 1 WLR 1410 line of authorities. At [103] he said:
The court should be slow to invade the contractual territory, for as a matter of general policy what the parties have themselves agreed should, unless on the face of it or in fact contrary to public policy or subject to some vitiating feature of the type referred to [in Edgar] by Ormrod LJ, be upheld by the courts.

The mere fact that one party might have done better by going to court is not of itself generally a ground for permitting that party to resile from what was agreed.

The court should bear in mind the undesirability of stirring up problems with parties who have come to an agreement: on the contrary the court should if possible, and consistent with its duty under s. 25, seek to bring about family peace and finality.

32. Then in L v L [2006] EWHC 956 (Fam), [2008] 1 FLR 26 Munby J (as he still then was) drew together citation from previous authorities in a passage at [68] to [73], very apposite for their commentary on the degree of assiduity a judge should deploy before approving (or indeed rejecting) a compromise or settlement. They deal with the court's function when invited to approve an ancillary relief consent order. Munby J commenced with some observations of Balcombe J (as he then was) in Tommey v Tommey [1983] Fam 15 at 21:

'A judge who is asked to make a consent order cannot be compelled to do so – he is no mere rubber stamp. If he thinks there are matters about which he needs to be more fully informed before he makes the order, he is entitled to make such enquiries and require such evidence to be put before him as he considers necessary. But, per contra, he is under no obligation to make enquiries or require evidence. He is entitled to assume that parties of full age and capacity know what is in their own best interests, more especially when they are represented before him by counsel or solicitors. ...' [Our emphasis, here and below]

33. Munby J then underscored observations of Waite LJ in Pounds v Pounds [1994] 1 FLR 775 at 779 that the effect of the statute and the rules:

'... is thus to confine the paternal function of the court when approving financial consent orders to a broad appraisal of the parties’ financial circumstances as disclosed to it in summary form, without descent into the valley of detail. It is only if that survey puts the court on inquiry as to whether there are other circumstances into which it ought to probe more deeply that any further investigation
is required of the judge before approving the bargain that the spouses have made for themselves.'

34. Then by way of conclusion Munby J approved observations of Ward LJ in *Harris v Manahan* [1997] 1 FLR 205 at 213 that:

'The realities of life in the Principal Registry and the divorce county courts are that the district judges are under inevitable pressure and the system only works because the judges rely on the practitioners' help. I would, therefore, be very slow to condemn any judge for a failure to see that bad legal advice is being tendered to a party. The statutory duty on the court cannot be ducked, but the court is entitled to assume that parties who are sui juris and who are represented by solicitors know what they want. Officious inquiry may uncover an injustice but it is more likely to disturb a delicate negotiation and produce the very costly litigation and the recrimination which conciliation is designed to avoid.'

35. The dicta Munby J selected are to be understood and applied in their context. In *L v L* ancillary relief proceedings had ended in a consent order made by a District Judge sitting in the Principal Registry. The husband later repented of his generosity to his wife and sought to escape from the order to which he had consented. He failed. The scope for backsliding, resiling and indeed any space for repentance should, we suggest, be just as narrowly confined where what is in question is an attempt to wriggle out of the binding effect of an arbitral award.

36. Post-*Radmacher*, of particular note is the judgment of Charles J in *V v V* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, at [36]:

'To my mind, this decision [*Radmacher*] of the Supreme Court necessitates a significant change to the approach to be adopted, on a proper application of the discretion conferred by the MCA, to the impact of agreements made between the parties in respect of their finances. At the heart of that significant change, is the need to recognise the weight that should now be given to autonomy, and thus to the choices made by the parties to a marriage (...). The new respect to be given to individual autonomy means that the fact of an agreement can alter what is a fair result and so found a different award to the one that would otherwise have been made.'
Judicial support for IFLA arbitration

37. Paragraph 62 of Ryder J’s key report Judicial proposals for the modernisation of family justice, published on 28 July 2012, has this, encouragingly, to say about the IFLA Scheme:

'The [Money and Property working group of the Family Justice Council] will also be asked to make recommendations about rule and practice direction changes to facilitate the determination of cases out of court; for example, where the parties have agreed to an arbitration conducted in accordance with the principles of English law by an accredited family arbitrator, including interim directions and whether special arrangements should be made for the expedition of the approval of consent orders to reflect arbitrated decisions.'

To summarise the current position...

38. The position so far presented in this submission can be summarised thus:

- Whilst the jurisdiction of the court cannot be ousted, the current state of the law offers some considerable support for a 'magnetic factor', robust and summary approach to the support of IFLA awards by their conversion into court orders. The Family Procedure Rules are likely (per Ryder J) to be amended to make arbitral business more easily transacted in the family courts.

- The arguments for the enforcement of an award pursuant to an ARB1 rest heavily upon 'nuptial agreement' case law, which is itself about to be overtaken by Law Commission recommendations in respect of qualifying nuptial agreements.

- It would appear quite illogical to give statutory footing to the parties' autonomous pre-marriage choices about the substantive resolution of a dispute (via a pre-nup entered into years prior to the dispute arising) without also respecting an autonomous election made by the parties as to their preferred procedural mode for resolution of an actual dispute, an election made at a time when the dispute is present rather than merely potential, and the issues can be clearly defined.

- The paternalistic argument in family cases does not, an arbitrator would suggest, outweigh the advantages of placing post-dispute ARB1 arbitrations on a statutory footing.
• Further, whilst civil proceedings such as TOLATA proceedings fall within the scope of the scheme, awards made within that context are sometimes also subject to the paternal jurisdiction of the court and therefore cannot all be summarily enforced under s.66 AA96 in any event.

• A note on the current position in relation to the allocation of applications arising from family arbitrations is, for completeness, appended.

A proposal for post-dispute arbitration agreements to be considered 'qualifying nuptial agreements'.

39. It is understood that the Law Commission’s broad proposal may be that nuptial agreements, to earn ‘qualifying’ status as ‘Q-nups’ should satisfy a number of requirements

40. For enforceability as a Q-nup, and thus to remove or limit the court’s supervisory discretion it would need to be established that before the agreement (the Form ARB1, in the context of an IFLA process) is signed and becomes binding (i) legal advice has been given to the parties (in this context as to the pros and cons of the process and concerning the binding nature of the submission); and (ii) mutual material disclosure has been effected.

41. A further pre-condition may be that the process has regard as an objective to the satisfaction (so far as practicable) of the parties’ (and no doubt their minor children’s) needs: that of course in the case of an IFLA arbitration might well be satisfied without more by the requirement that the arbitrator will apply the law of England and Wales.

42. We therefore invite the Law Commission to consider including the category of post-dispute agreements for family arbitration in any proposal for Q-nups.

43. An approach might be by statute to specify what additional minimum pre-conditions would need to be demonstrated before an arbitral agreement arising out of a family dispute could be treated as a Q-nup. The conditions would include that the arbitration agreement should only have 'qualifying' force if it provides that:
a) both parties shall have provided *material* disclosure of their financial circumstances to each other and to the prospective arbitrator (in the event that the Law Commission wishes to further explore ideas within this paper, it is suggested that it would be productive for there to be further direct discussion with representatives of IFLA to define the precise meaning of 'material' in this context);

b) the arbitration will be conducted in accordance with published rules upon which the parties to the arbitration have received legal advice before freely accepting to be bound thereby;

c) the arbitration will be conducted by a suitably qualified and regulated arbitrator;

d) the law of England and Wales will be the only law applicable by the arbitrator, and thus that the award will take account of the needs of the parties as would a court;

44. It may be observed that the IFLA Scheme in its present form requires the parties to describe the nature of their dispute in summary form, but does not require pre-agreement disclosure. Were the law in respect of qualifying nuptial agreements to be amended as envisaged, then it is recognised that amendments to the current Rules would be needed to 'qualify' the IFLA Scheme.

45. If a 'qualifying' family arbitration agreement can thus be brought within the scope of arrangements for the pre- and post-nup agreements hitherto envisaged as required for 'qualifying' status this would have the beneficial effect of providing a, family specific, statutory basis for the enforcement of the agreement by way of an automatic stay of any competing legal proceedings, in addition to arguments pursuant to s.9 of the Arbitration Act 1996 and/or the broad powers of conventional but discretionary case management under the FPR.

46. If a post-dispute arbitration agreement failed to meet the requirements of a Q-nup, it is suggested that this would not detract from any arguments which the parties may wish to advance under the Arbitration Act 1996 or pursuant to the ADR-supportive provisions of the Family Procedure Rules. The suggested treatment of a post-dispute arbitration agreement as a Q-nup, in defined circumstances,
would be *in addition* to the other mechanisms available to enforce the arbitration agreement.

47. It is suggested that parties wishing to secure 'special' Q-nup status for their arbitration agreement will be incentivised to provide the relevant pre-agreement material disclosure. Those who do not wish to make pre-agreement material disclosure (or those who say they are going to do so, and then mislead by failing to give material disclosure) are free to enter into family arbitration but would simply not be able to seek enforcement of the agreement as a Q-nup.

48. It should be noted in this context that statutory family arbitration schemes are in force in a number of other jurisdictions such as Australia, certain Provinces of Canada and, nearest home, Scotland. The Scottish Scheme is explained at [www.flagscotland.com](http://www.flagscotland.com)

**Pre-Dispute Agreements**

49. We also invite the Law Commission to consider the status of arbitration clauses in nuptial agreements, entered into by spouses (or prospective spouses, or civil partners) before the breakdown of their relationship. Anecdotal evidence suggests that agreements which commit the parties to arbitration are now being included in pre- and post-nuptial agreements. The advantages of arbitration over court procedures – in particular speed, confidentiality and the ability to choose the tribunal – are attractive to some people. As family arbitration comes to be better known the prevalence of such pre-election clauses specifying arbitration as the parties' preferred process option in case of dispute can be expected to increase.

50. If the substantive aspects of nuptial agreements are to become enforceable at least in some circumstances, it seems common sense that an arbitration clause in such an agreement should in parallel circumstances be equally enforceable. Some family arbitrators argue that an arbitration clause is enforceable under the present law, in the sense that a claim for financial remedies brought in defiance of such a clause in a nuptial agreement could be stayed pursuant to s.9 AA96.

51. The argument in favour of this approach is that an arbitration clause does not oust the jurisdiction of the family court, but only suspends the operation of that jurisdiction during the arbitral process to the extent that the parties have agreed this. However unless and until
that argument is tested in the courts the legal position is in doubt. We suggest that such doubts should be resolved as part of the Law Commission's overall recommendations.

**Other potential legislative developments**

52. Baroness Cox has introduced a Private Members' Bill in the House of Lords, entitled The Arbitration and Mediation Services (Equality) Bill. One amongst its aims is to control and indeed criminalise what purport to be binding family law arbitrations where the law applied is not that of England and Wales, but some other (and in many cases a religious and therefore personal) law. In some circumstances the pressures imposed and the outcome 'decided' by such processes are gender-discriminatory. Clause 4 of the draft Bill would amend the Arbitration Act 1996 to make it a criminal offence to seek to arbitrate a family or criminal law matter.

53. The Bill's Second Reading was on 19 October 2012. During the debate Baroness Cox explicitly accepted that the Bill should be amended to remove provisions that would outlaw all types of family arbitration. The Baroness announced: 

>'Let me here acknowledge valid concerns raised by the noble Lord, Lord Marks, and others, and say that I accept the need to amend the Bill to reflect recent developments in relation to family law arbitration. I intend to remove references to family law in the new criminal offence created by the Bill. Family law arbitration will therefore continue to be permitted. However, the non-discrimination provisions of the Bill will apply. Therefore, this will not be an obstacle to mainstream family law arbitration, but will reinforce the need to address sex discrimination in religious arbitration.'

54. The Bill does not, at this stage, enjoy government support. It remains to be seen whether it will receive the necessary further time for consideration at the Committee Stage, if it is to have any prospect of reaching the statute book.
Signed: [Signature]  
for the Board of  
IFLA/Director  
Dated: 10 December 2012
A (rather lengthy) Note on allocation and procedure

This Note is intended as a guide to the allocation of applications to the court that arise out of or relate to IFLA Scheme arbitrations. The appropriate procedure to adopt will depend upon whether an application is being made in 'Arbitration Act' proceedings or in the context of proceedings for family (or analogous) financial relief, or for an order in TOLATA proceedings. As noted below, Rule changes to simplify and streamline the position are anticipated.

(a) 'Arbitration claims' under the Arbitration Act

CPR Part 62 (and its accompanying Practice Direction 62) govern procedure in relation to 'arbitration claims' made in arbitration proceedings under AA96.

Rule 62.2 ('Interpretation') is in these terms:

(1) In this Section of this Part 'arbitration claim' means –

(a) any application to the court under the 1996 Act;
(b) a claim to determine –
   (i) whether there is a valid arbitration agreement;
   (ii) whether an arbitration tribunal is properly constituted; or
   what matters have been submitted to arbitration in accordance with an arbitration agreement;
(c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and
(d) any other application affecting –
   (i) arbitration proceedings (whether started or not); or
   (ii) an arbitration agreement.

So far as enforcement is concerned, in commercial cases an application under s.66 is the standard route whereby arbitral awards are summarily enforced, with the leave of the court, 'in the same manner as a judgment or order of the court to the same effect'. As 'arbitration claims' include 'any application to the court under the 1996 Act', a s.66 application is subject to the Part 62 procedure.

It will however rarely if ever be appropriate or indeed possible to make an application under s.66 seeking the summary enforcement of a family financial arbitral award, because that provision does not enable the court,
without more, to convert an arbitral award in a family financial case into an order within the scope of (for instance, and most obviously) the Matrimonial Causes Act 1973: say for a clean break, a pension sharing or attachment order, or indeed an order for continuing maintenance provision. But nothing in s.66, nor indeed in the other relevant provisions of AA96, requires that an application to obtain a court order reflecting an arbitral award be made under s.66. The (currently circuitous) path round this apparent obstacle is described in section (c) below.

It is therefore suggested that the only circumstances in which the 'arbitration claims' procedure set out in CPR Part 62 applies to family arbitrations are when the following powers under AA96 are invoked: to seek orders of the court in support of the arbitral process (e.g. ss.42 to 45); or to challenge the arbitration under ss.67 to 73 of the Act; or to apply to the court for any of the other forms of relief enumerated in rule 62.2(1) (there are a number of avenues, such as a s.24 application to remove an arbitrator, which in practice are unlikely often to be trodden).

The consequence is that, until new rules are introduced, a combination of section 105 of the Arbitration Act 1996, the Allocation Rules made thereunder (The High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996 No. 3215, as amended) ('the 1996 Order'), and (most accessibly) CPR rule 62.3 and para 2 of the Practice Direction to Part 62 (as to which see immediately below) will likely result in an Arbitration Claim Form N8 (available at this link) coming before a tribunal wholly unused to family business (but very likely well versed in arbitration law and practice): for the detail consult the White Book, volume 2.

The operative provisions of para 2 of the PD so far as applicable to the subject-matter of IFLA Scheme disputes are that the Form N8 'may be issued at the courts set out in column 1 of the table below and will be entered in the list set out against that court in column 2 . .

<table>
<thead>
<tr>
<th>Court</th>
<th>List</th>
</tr>
</thead>
<tbody>
<tr>
<td>Admiralty and Commercial Registry at the Royal Courts of Justice, London</td>
<td>Commercial list</td>
</tr>
<tr>
<td>Technology and Construction Court Registry, St. Dunstan's House, London</td>
<td>TCC list</td>
</tr>
<tr>
<td>District Registry of the High Court (where mercantile court established)</td>
<td>Mercantile list</td>
</tr>
<tr>
<td>District Registry of the High Court (where arbitration claim form marked 'Technology and Construction Court' in top right hand corner)</td>
<td>TCC list</td>
</tr>
</tbody>
</table>

In the meantime, the best course will be to seek transfer to the Family Division, with a direction that the application be referred to a District Judge of the Principal Registry for determination or directions. Such transfer is envisaged by para 6 of the 1996 Order, which reads:

'Nothing in this Order shall prevent the judge in charge of the commercial list (within the meaning of section 62(3) of the Senior Courts Act 1981) from transferring proceedings under the Act to another list, court or Division of the High Court to which he has power to transfer
proceedings and, where such an order is made, the proceedings may be taken in that list, court or Division as the case may be.'

That transfer process is indeed what article 13.4 of the IFLA Scheme Rules envisages when describing 'an appropriate court' as a court 'which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court'.

It is suggested that the present procedural position is akin to the Family Division's jurisdiction when considering bankruptcy matters. Whilst a Judge of the Division may determine such a matter, the FD Judge may only do so once the case has been properly transferred by the bankruptcy court (see Arif v Zar & Anor [2012] EWCA Civ 986).

(b) Applications to stay court proceedings in favour of arbitral proceedings

Stay proceedings, although falling within the meaning of 'arbitration claim', are in a separate category. Section 9, AA96, a mandatory provision, provides for the stay of legal proceedings on application 'to the court in which the proceedings have been brought.' CPR Part 62.3(2) reiterates that such an application 'must be made by application notice to the court dealing with those proceedings'. Section 9(4) provides that on such an application 'the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'. In agreeing to the IFLA Scheme Rules (and indeed explicitly in their Form AR81) the parties agree that they will not, while the arbitration is continuing, commence an application to the court (nor continue any subsisting application) relating to the same subject matter, except in connection with and in support of the arbitration or to seek relief that is not available in the arbitration (as, for instance, via ss.42 to 45, AA96: see next section); and that they will apply for or consent to a stay of any existing court proceedings, as necessary (Form AR81, para 6.2).

An alternative view is that a stay in such circumstances can and should ordinarily be ordered by the court pursuant to its case management powers and consistent with the philosophy underlying the FPR in relation to alternative dispute resolution procedures: see rr. 3.1 to 3.3.

But what in any event is clear is that, in a case where a family arbitration is being commenced, any application for a stay of extant proceedings for parallel relief must be made to the court in which those proceedings have been commenced.

(c) Applications to the court for an order to reflect or give effect to an arbitral award (not therefore a Part 62 'arbitration claim'): the current position

In the family context, applications to the court will routinely need to be made to reflect, or to give effect to, or as a precursor to the enforcement of an arbitral award. These most commonly will be made in tandem with divorce proceedings (but could also be in TOLATA or other proceedings), where the application will either be made in existing (stayed) proceedings, or to conclude with a consent order an application for financial relief launched for that purpose. So article 13.4 of the IFLA Rules provides:

'If and so far as the subject matter of the award makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award and will take all reasonably necessary steps to see that such an order is
made. In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.'

'The court' in both those (consent or disputed) situations will often be the PRFD or a divorce county court.

Thus it seems to the authors that in the context of family financial disputes (and taking the Matrimonial Causes Act as the typical contextual example) applications for reflective orders should be made, if by consent, in the conventional manner; and if for any reason opposed (other than via an Arbitration Act challenge) will most conveniently and appropriately be brought before the court by way of a 'show cause' application brought against the dissenting party.

(d) Facilitating the determination of cases out of court by arbitration conducted in accordance with the principles of English law by an accredited family arbitrator: the future

For the future, para 62 of *The Family Justice Modernisation Programme: Final report* recommends that the Money and Property working group of the Family Justice Council

'will also be asked to make recommendations about rule and practice direction changes to facilitate the determination of cases out of court; for example, where the parties have agreed to an arbitration conducted in accordance with the principles of English law by an accredited family arbitrator, including interim directions and whether special arrangements should be made for the expedition of the approval of consent orders to reflect arbitrated decisions.'

^ Column 1684, 3rd full para at http://www.publications.parliament.uk/pa/id201213/idhansrd/text/121019-0001.htm#12101923000438
1.1. Introduction and General Observations.

1.2. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

1.3. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.
1.4. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

1.5. This response is the official response of the Association to the Bar Council’s consultation on the Practising Certificate Fee (PCF). It has been written by Andrew Francis and Miranda Allardice.

1.6. The response of the Chancery Bar Association is of course of limited scope in view of the nature of the work undertaken by the members of the Association.

1.7. It is also recognised any substantial reform of the Matrimonial Causes Act 1973, will require wide consultation beyond lawyers. It is clear that society at large has a vested interest in the financial consequences of relationship breakdown. See *Hyman v Hyman* [1929] AC 610 Lord Atkin held that one reason for the prohibition of a spouse from contracting out of their right to apply to court was; “to prevent the wife from being thrown upon the public for support”.

2. In relation to Chancery work however, it is relevant to note the following points in addition to those made below where the questions in the Response Form and the terms of Consultation Paper No. 208 may have a bearing on Chancery practice:

(i) The corporate veil and sham trusts cases referred to below.

(ii) Offshore trusts and shares within companies held offshore and business assets.
(iii) Property held on constructive trust often held in the names of nominees for tax etc. purposes. Here for example, in buy to let properties there may be a need to ensure if not the property then the income is brought into account in the matrimonial context.

(iv) The “deemed divorce” test set out in section 3(2) of the Inheritance (Provision for Family and Dependants) Act; “the 1975 Act”. This is a difficult test to apply, even under the present law. See Francis, Inheritance Act Claims, Law, Practice and Procedure, Chapter 8. It is clearly important that any reform (as contemplated by the present consultation paper) accommodates the need to apply this “deemed divorce” test as one of a number of factors relevant in applications by spouses etc. under the 1975 Act. A recent example of the weight that can be given to the fiction is found in the case of Lilleyman v Lilleyman [2012] EWHC 821 (Ch). The enactment, or change in guidance in the law for a divorcing couple will, therefore, impact upon the provision that is to be made for a surviving spouse. This will, therefore, relevant in all the areas under consideration:

(a) Marital Agreements (b) Non-Matrimonial Property (c) Needs.

See further observations on the 1975 Act in the response to para. 7.11 below.

(v) Further the reform of the law relating to Financial Remedies for divorcing spouses will be relevant to family succession planning. Thorpe LJ in Radmacher [2009] 2 FLR 1181 Para 27 expressed the view that a driver for the introduction of marital agreements in second marriages, was a desire to
protect the children of the first marriage and allow “first family property” to pass to the children of the earlier marriage.

(vi) A clearer enunciation of the matrimonial law relating to non-matrimonial property, (with the same being ring fenced to some extent), may give the testator/settlor greater confidence to make an outright gift to their child. Currently in big money matrimonial cases, there may be complex trust arrangements, under which both or one spouse only are beneficiaries. Here the matrimonial law may conflict with the law of trusts, with the matrimonial courts giving “judicious encouragement” to trustees, to finance an award to the non-beneficiary spouse, see the case of Whaley v Whaley [2011] EWCA Civ 617. What is judicious encouragement in the Family Division may be perceived to be improper pressure on the trustees.

(vii) Quite apart from the wider questions of non-matrimonial assets raised in the Response Form assets held (for example) under constructive trusts may well be the subject of an attempt to either set aside those trusts or to bring them within the matrimonial jurisdiction for the purposes of relief. This also applies to estoppel cases where there may be an overriding estoppel over the property. There is clearly a tension at present between those assets which are held on constructive trusts or subject to overriding estoppels and the jurisdiction of the Matrimonial Causes Act 1973 (“MCA”) to bring those assets in to the assessment for the purposes of provision following divorce etc.

(viii) Under current law the MCA appears to trump any arguments as to constructive trusts etc between the married couple. The position will be
different if there third party interveners, whose beneficial interest has to be determined. However, if there is to be guidance on the treatment of non-matrimonial property, a number of potential problems need to be addressed. In particular, the apparent conflict between the legal ownership of a property; e.g. both parties on the title deeds of a holiday home (inherited by one party only). Which interest is to trump the other? The origin of the asset under the MCA, or recognition of the declaration in the TRI in which both have a beneficial interest?

(ix) No reference is made, as it seems to be outside the terms of reference in the Consultation Paper, to the fact that merely cohabiting parties are outside any form of statutory safeguard (compare the law in Scotland) and one of the questions which the Law Commission may have to consider (as it did in 2007) even within the context of the present Consultation Paper, is how far the questions raised in the Response Form should be considered alongside the interests of those who cohabit outside marriage or civil partnership.

The responses to the questions raised in the response form are as follows.

Paragraph 7.2

7.2 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?

Yes.
Paragraph 7.3

7.3 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?

Paragraph 7.3(2) is preferred.

Paragraph 7.4

7.4 In answering the question at paragraph 7.3 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.

All factors under sub paragraph 1-4 are relevant.

Paragraph 7.5

7.5 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?

Paragraph 7.5(1) is preferred.
Paragraph 7.6

7.6 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?

(a) There could be greater emphasis on the earning capacity of a party, e.g. in respect of welfare reforms a parent may be expected to work from the children attaining school age. Such a parent could be expected to either be in education to re-qualify or seek employment. There could be an attribution of an earning capacity built into any award, subject to the dependant spouse being able to show they had sought employment and failed to gain any.

(b) In arriving at a “fair” result the perception that the economically weaker party is at least contributing to their welfare in an important feature, for those paying periodical payments. The “meal ticket for life” may be perceived to be less offensive if the dependant spouse is contributing to her staple diet and requiring only top up sustenance

(c) Greater use of term orders where the dependant party bears the burden of bringing the matter back for a review, limited only to the issue of ongoing support.

(d) A tapered level of support e.g. 40% of paying parties’ net income in first 3-5 years and thereafter falling to 20%

Paragraph 7.7

7.7 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?

This is the responsibility of social scientists and not lawyers. It is suggested that organisations such as the Joseph Rowntree Foundation are approached to do the work and carry out the suggested research.

It follows that the case study on page 6 of the Response Form and the case study on page 7 on the Response Form is not something to which the Chancery Bar Association can usefully contribute. The same thing applies to the case study on page 8.

**Paragraph 7.8**

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);
(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

The Family Law Bar Association will be better placed to contribute. However the following observations are offered:

(1) **Statutory Provision.**

The inclusion of Section 25A MCA directing consideration of termination of periodical payments does not contain any guidance as to what constitutes undue hardship. The absence of any such guidance may have lead to the Section being applied *sparingly*.

(2) **An authoritative source of guidance for courts and the public**

Other jurisdictions e.g. in Crime the Sentencing Council and in PI the General Damages Guidelines have been used in preference to statute.

(a) **The considerations involved in the assessment of need**
The Law Commission has already identified that this is can be an elastic term e.g. in *Radmacher* a restrictive interpretation in the context of the recognition of agreements was adopted, whereas the phrase reasonable requirements was an expansive interpretation.

The problem for any comprehensive definition remains the context in which the definition is applied; i.e. the standard of living during the marriage S25 (c) MCA. There is a further difficulty as to how long this remains the relevant benchmark.

Further the evaluation by the parties of their needs, post separation, has to have regard to the fact that there may be one main income only to be apportioned. In compiling a Form E budget this feature is often ignored.

We would suggest that the work of the Joseph Rowntree Trust should assist in providing a comprehensive checklist of what particular constituent parts may make up the package of needs. The Joseph Rowntree Trust research on basic needs and wages may be of assistance at the cases where funds are very limited.

(b) The priority to be afforded to different elements

(i) Housing for both parties may be felt to be a central element in allowing separating couples and their children to make a difficult transition.
(ii) Prior to pension sharing, under the auspices of a Mesher Order, a wife often gave up her pension claim to secure a greater share of the bricks and mortar. However a strict application of the sharing principle in respect of different type of assets may in practice have reduced the availability of this useful order.

(3) Statutory amendment or guidance on the following matters.

(a) Time and independence.

Where one is dealing with children and/or long marriages a crude time frame may result in hard cases.

(b) Term Orders.

Term Orders would concentrate the mind of the dependant spouse on re-qualification or employment. The original order could contain what was expected of the spouse in terms of re-training etc. However, term orders would need to be able to be extended, if targets had been missed.

(c) Short childless marriages.

Either Statute or guidance could provide that for short childless marriages of up to 3-5 years an adjustment period of up to 3 years applied in the first instance (unless one party is disabled) or is without housing; e.g. by reason of loss of a secure tenancy.
(4) & (5) The Chancery Bar Association recognise the real concern of the Law Commission that the absence of public funds for divorcing couples requires the Guidance to be readily available to the lay parties.

Paragraph 7.9

7.9 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.

Other areas from where may need to be considered are in the following topics.

(a) To what extent should the corporate veil be pierced following the recent decision in *Petrodel Resources Ltd & Ors. v Prest & Ors.* [2012] EWCA Civ 1395; understood to be subject to a possible appeal to the S.C. (See also in the issue of piercing the corporate veil, *VTB Capital plc v Nutritek Intl. Corp. & Ors.* (S.C. ref. UKSC 2012/0167) where judgment is awaited from the Supreme Court after the hearing on 12th November 2012).

(b) To what extent should sham trusts be the subject of reform so as to allow assets lying within such trusts to be available for provision? See, for example, *A v A* [2007] EWHC 99 (Fam).

(c) How far should the existing anti-avoidance provisions in section 37 MCA be reformed; compare s. 10-12 1975 Act.

Paragraph 7.10
7.10 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.

The Law Commission make a charitable observation as to human nature that:

“Many of those entering into qualifying nuptial agreements will not be motivated by a desire to squeeze need to a minimum.”

Whatever the motivation, one of the main arguments for marital agreements it that it gives parties certainty in their financial affairs. Therefore in order to achieve clarity for those engaged in drafting marital agreements, it may be necessary to ensure that need is not to be interpreted in the way limited by Lord Phillips as “real need”. Rather that in determining whether the marital agreement amounts to a qualifying nuptial agreement, provision for needs will have to have regard to the standard of living during the currency of the marriage.

If a higher level of provision for need is to be endorsed then it should be made clear that any concept of needs within a marital agreement, should reflect the term as generally applied in matrimonial law outside the marital agreement arena.

**Paragraph 7.11**

7.11 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?
See the issues raised under paragraph 7.9 above.

No definite answer can be given as the question will require consideration of (a) needs and (b) what the application for provision should aim to achieve.

But in the context of the question relevant reference should be made to the jurisdiction under section 9(1) the 1975 Act, where the deceased’s severable share in jointly owned property can (to such extent as appears to the Court to be just in all the circumstances of the case) be treated for the purposes of the 1975 Act as part of the net estate of the deceased. This is in order to facilitate the award of reasonable financial provision under the 1975 Act. Note that purpose. So we suggest that the proviso above is crucial, but how “needs” are defined will be key question.

Note as regards the quotation in para. 3.3 of the Paper, that under the 1975 Act the “bus driver” is told where to drive the bus; i.e. to answer the questions in s. 1 of that Act as to whether or not reasonable provision should be made at the appropriate standard for the claimant and according to that claimant’s status under s. 1(1). Perhaps some form of approach under a reformed MCA will assist in defining the object of the application to be made under it.

**Paragraph 7.12**

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.
This is a fact-specific question.

There are clearly extremes which can arise on the evidence.

On the one hand, there are large landed estates in which the main family home is situated (e.g. often a Grade 1 Listed historic house with surrounding parkland etc.) but this is not reflective of the majority of cases.

The majority of cases are those where the family home is of relatively modest value. In such cases it is suggested that the family home (if within the definition of non-matrimonial property) should be excluded unless it is unjust to do so. It should, therefore, be brought in where, for example, it is necessary to do so in order to satisfy needs.

One question which may arise under this heading is whether the family home (if within the definition of non-matrimonial property) should be treated as within the matrimonial property from the start, or should be treated outside at the start and only bought in at the later stage where it is necessary to do so in order to satisfy needs etc.

**Paragraph 7.13**

7.13 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.

Where the parties remain cohabitees only, the current law respects property rights. The recent case law of *Stack v Dowden* and *Kernott & Jones* allows for the operation of a constructive trust as opposed to a resulting trust, but does not provide for the relationship per se to determine the outcome of a constructive trust case. The definition proposed at 6.41 of the Consultation Paper proposes that all property,
acquired prior to the marriage held in the sole name of the party, should not be subject to the sharing principle. As the definition stands property acquired in one party’s sole name during a period of cohabitation would be excluded, from the sharing principle save where it was required for needs.

There is a potential problem for same sex partners, where civil partnership was not available pre December 2005. It may be that specific provision would have to be considered to protect this group who had long lead in times to their civil partnerships.

**Paragraph 7.14**

7.14 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?

No.

This is because use alone should not be sufficient to alter the nature of non-matrimonial property to matrimonial property. Evidential questions will abound. For how long should the “family use” have been taking place? In what circumstances? How many “homes” are there which are owned by each party? What is “use”? The example of a holiday home is given. This type of non-matrimonial property is likely to attract arguments of improvement etc. by an active “DIY” homebuilder spouse and perhaps illustrates the problems of the MCA “trumping” constructive trust claims.

**Paragraph 7.15**

7.15 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?

Yes in broad terms.

The illustration at para. 6.82 of the Paper indicates a positive decision by one spouse to allow the mingling of assets. If there is a deliberate decision e.g. by placing the same in joint names, that decision should be recognised by the MCA. But not if the facts are otherwise. But as with para. 7.14 above, the evidential issues which will arise may be complex; e.g. over what is the “same kind” of property; e.g. one sports car for another, where the latter turns out to be far more valuable when the application if made. The same can apply to the example of the picture at para. 6.81 of the Paper.

Paragraph 7.16

7.16 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?

Yes in broad terms.

Here there is a further intermeshing of the non-matrimonial property into the family unit and interdependence. But as under 7.14 and 7.15 above, complex evidential issues can arise, as they do in tracing claims where (for example) the errant trustee is in breach of trust and the tracing remedy has to be applied to the funds used; see Snell’s Equity, 32nd Edn. 30-050 ff and see the entire Chapter (41) devoted to this complex
subject in Lewin, Trusts, 18th Edn. Any reform will have to tread carefully here and any rules will need to be precise and practical if they are to work.

It is recognised that matters at paras. 7.14 - 7.16 may all be the subject of a further regulation by the parties entering into a marital agreement. Therefore, those concerned to opt out of sharing any pre-acquired or inherited property are likely to be able to do so subject to the important caveat of satisfying needs.

**Paragraph 7.17**

7.17 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?

The case of *Jones v Jones* [2011] EWCA Civ 41 attempted by the use of forensic accountants to identify:

(i) The value at the time of the marriage

(ii) The value at the point of exit from the marriage

(iii) The economic passive growth using the FTSE

Wilson L.J. accepted that the result was somewhat arbitrary, but had the advantage of a transparent method being adopted.

It is agreed that the current case by case basis is not satisfactory, for devising a transparent mechanism and that guidance is needed.

As to tools one can use the RPI/CPI Tables (e.g. in respect of a pecuniary legacy) and other Indices in respect of house values and prices.
The more difficult issue is the values to be applied in either ring fencing or allowing access to the investments.

See also the comments at 7.15 and 7.16 above.

Andrew Francis and Miranda Allardice

For submission to the ChBA

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10th December 2012
MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS – AN OVERVIEW FOR LAWYERS – PAPER NUMBER 208

I respond to the questions for consultees as follows using the notation of the said paper.

68  
   (1) Spousal support should be restricted to the meeting of relationship generated needs.  
   (2) No.

73  Yes.

74  
   (1) Yes.

75  
   (1) Very relevant.  
   (2) Not so relevant.  
   (3) Relevant.  
   (4) Relevant.

76  
   (1) Yes.  
   (2) No.

77  Incentives should be given to move to independence.

78  Law Commission.

107  
   (1) Important.  
   (2) Yes.  
   (3) Statutory amendment.  
   (4) Yes.  
   (5) Yes.

136 Agree.

142 Yes – excluded.

158 Agree.

165 Agree.

166 Agree.
172 Yes – by guided discretion.

Regards.

Steven Jackson
This is a response on behalf of the Judges of the Chancery Division to

The Law Commission Consultation Paper No 208: Matrimonial Property, Needs and Agreements: A Supplementary Consultation Paper

Part 6 (“Non-Matrimonial Property”) only

General

1. The practical significance of formal codification of non-matrimonial property is limited for the Chancery Division, other than in applications under the Inheritance (Provision for Family and Dependants) Act 1975 (considered separately below), given that any new statutory rules or guidelines will be applied primarily in ancillary relief claims in the Family Division and in the County Court. Nevertheless it is important that the distinction between matrimonial property and non-matrimonial property is understood and applied consistently throughout the legal system.

2. The impact on Chancery cases is as follows:

1) The operation of the law of bankruptcy. What happens if after a divorce or dissolution one party becomes bankrupt? A family home is owned outright by H. If the home is recognised as matrimonial property, it is shared 50:50. If either H or W subsequently becomes bankrupt the trustee in bankruptcy may recover 50%. If the family home is non-matrimonial property however, and H becomes bankrupt the trustee may recover 100%. If W becomes bankrupt the trustee can recover nothing. Thus to change the status of the family home could significantly affect the position of creditors. The consequences should be considered.

2) The jurisdiction to bring into account assets held on constructive trust, or subject to estoppel, in ancillary relief claims. The authorities on constructive trusts (Stack v. Dowden [2007] UKHL 17 and Jones v. Kernott [2011] UKSC 53) can have a far-reaching impact in the Chancery Division, for example on the exercise of the right to buy: see Adekunle v. Ritchie [2007] 2 P&CR DG20.

3) There is also the issue of the effect of completion or non-completion of Panel 11 in the Land Registry Form TR1: see the observations of Baroness Hale in Stack v. Dowden [52] and of Lord Walker and Baroness Hale in Jones v. Kernott at [18]. This could have unintended effects if the family home became non-matrimonial property. There is potential conflict between legal ownership of the home and the source of the property.

4) Succession planning. As Thorpe LJ in the Court of Appeal pointed out in Radmacher v. Granatino [2009] FLR 1181, one of the reasons a
party to a second marriage enters into an ante-nuptial agreement is to ensure protection for the children of the first marriage.

3. There are also general concerns about divergence of jurisprudence between the Chancery Division and the Family Division in some respects. For example,

4) Piercing of the corporate veil in ancillary relief claims: see Petrodel Resources Ltd and Ors v. Prest and Ors [2012] EWCA Civ 1395;

5) Evaluation of whether trusts are sham trusts for the purposes of ancillary relief claims: see A v. A [2007] EWHC 99 (Fam).

6) Whether and in what circumstances spouses/civil partners of discretionary beneficiaries may benefit from the trusts in ancillary relief claims as a result of judicial “judicious encouragement”: see Whaley v. Whaley [2011] EWCA Civ 617.

7) Whether and in what circumstances property (such as shares in a company) held offshore for fiscal purposes can be brought into account in ancillary relief claims.

Inheritance (Provision for Family and Dependants) Act 1975

4. Jurisdiction is shared between the Family Division and the Chancery Division in cases brought under this Act, under which all property of the deceased is available for distribution to a meritorious applicant. Under s. 3 (2) of the Act one of the factors which the Court must consider in deciding whether reasonable financial provision has been made for a spouse or civil partner is the provision that would have been made if the marriage or civil partnership had ended in divorce or dissolution rather than death. (Although we bear in mind the observations of Gross LJ in Iqbal v. Ahmed [2011] 1 FLR 31 at [17] and Black J in P v. G [2006] 1 FLR 431 at [242], and cf Lilleyman v L [2012] EWHC 821 (Ch)).

5. We believe it would be better to retain judicial discretion rather than impose statutory rules which may operate rigidly and arbitrarily. It would be difficult to devise comprehensive rules which apply fairly across the board.

6. In addition there would seem to be no justification for drawing a distinction between matrimonial and non-matrimonial situations in deciding whether, as a starting-point, property should be part of the assets available for distribution in claims under the Act. What is the justification in claims under the Act for treating the family home in which parties cohabit as different in principle depending on whether the cohabiting persons are or are not married/in a civil partnership?
7.11. *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.*

Comment
The consultation paper places too exclusive an emphasis on the source of the property. The reasons for a gift or bequest and the involvement of the other party to the marriage in the acquisition may be important factors.

Further the definition of non-matrimonial property could operate unfairly in the common case where the principal family asset is a solely owned family home; see the comment on question 7.12 below.

We favour a guided discretion, namely no presumption that any property is non-matrimonial but a statutory list of non-exhaustive guidelines for the court to apply in deciding whether property should be shared or not.

7.12. *We ask for the consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.*

Comment
There are powerful arguments both ways for including/excluding the family home from the definition of matrimonial property as the discussion at 6.42 to 6.49 demonstrates. Extremes can arise: for example there could be a large landed estate on the one hand or a matrimonial home of very modest value on the other. The very existence of the difficulty is a reason for leaving the issue to (guided) discretion on a case by case basis. Alternatively there could be a presumption that the matrimonial home is included with a power to exclude it if it is in the interests of justice to so.

See also the comments at paragraph 2 above.

7.13. *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.*

Comment
In principle we agree that pre-marital cohabitation should be regarded as part of the duration of the marriage for the purpose of defining matrimonial
property. This acknowledges the reality that many couples choose to cohabit before entering into a marriage or civil partnership.

As before, it is suggested that a (guided) discretion should be retained.

7.14. We provisionally propose that non-matrimonial property should not lose its status as such merely by virtue of having been used by the family. And:

7.15. 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. And:

7.16. 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.

Comment
There is an obvious problem in defining what is meant by ‘use’, in identifying the extent of use, and in defining what is meant by “the same kind”. Is land held as land of a different kind from land held through a shareholding? A decision to substitute one class of investment for another might be dictated by market conditions rather than to express any intention as to whether the investment should be treated as matrimonial property. What about tracing exercises? H inherits a piece of jewellery of significant value. Faced with financial difficulty he sells it (or merely pawns it) and uses the proceeds to buy a car. Later, when his position has improved, H sells the car and acquires the same or a very similar piece of jewellery.

Again these are fact-sensitive issues. It is not considered that there is any benefit in creating formal rules to deal with them. A rule may make pre-nuptial agreements easier to draft but this fails to take account of the reality of married life in which parties do not deal with each other on an arm’s length basis.

A (guided) discretion is favoured.

7.17. 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 of the spouses? What values should be expressed in those rules?

Comment
Clarity in this area would be welcome as the authorities do not adopt a consistent approach. The preference again is for a (guided) discretion. Such a discretion should be framed along the lines suggested by Arden LJ in Jones v.
Jones [2001] EWCA Civ 41 at [60]-[64], recognising the value of prudent investment.

As to value generally it is clear from Jones v. Jones that every case is different so that hard and fast rules ought not to be formulated.
LAW COMMISSION
CONSULTATION PAPER No 208

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

RESPONSE FORM

This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

### Your details

<table>
<thead>
<tr>
<th>Name:</th>
<th>Rachel Rogers, Head of Policy</th>
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<tbody>
<tr>
<td>Email address:</td>
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<tr>
<td>Postal address:</td>
<td>Resolution London Office c/o Family Law in Partnership, 1 Neal Street, Covent Garden, London WC2H 9QL</td>
</tr>
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<td>Telephone number:</td>
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<tr>
<td>Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):</td>
<td>Yes</td>
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**Resolution**, an association of 6,500 family lawyers, mediators and other family professionals, committed to a non-adversarial approach to family law and resolution of family disputes. Resolution members abide by a Code of Practice which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family, and the best interests of any children in particular.

Resolution members seek to solve problems outside of court, where possible, through negotiation, mediation or collaborative law and now arbitration.

We also campaign for better laws and better support and facilities for families and children undergoing family change.

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

PRINCIPLED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

Yes

We agree that the current law on spousal support is not a sustainable policy choice for the future and that law should be founded on a principled basis. The lack of a principled approach can increase legal costs and the unnecessary use of limited court resources.

Resolution shares the Law Commission’s concerns about the lack of some objectives clause in Section 25 of the Matrimonial Causes Act 1973 and the equivalent part in Schedule 5 of the Civil Partnership Act 2004. The Commission strongly makes the case for reform to ensure that the law on the payment of spousal support is based on a consistent principle.

Our members aim to guide people through the resolution of the whole range of financial matters arising around divorce or dissolution, and to come to a fair and lasting outcome for former partners and their children. Collaborative family law and legal advice during mediation can be particularly effective in addressing the issues raised in paragraph 5.26 of the main consultation paper.

However, the experience of our members, as reflected in the Commission’s survey, is of wide differences of approach across the family courts to spousal support, resulting in a postcode lottery in relation to the form and quantum of orders for periodical payments (and in particular term orders). This raises difficulties in advising some clients, but also the issue of forum shopping. The skilled practitioner often knows that a particular court will not transfer a matter back to the home court and that a different type of order to that which would be made in the home court is highly likely to be made. Anecdotal evidence indicates, for example, an expectation of achieving a joint lives order if the matter is issued in the PRFD, or certainly challenges in successfully arguing the case for a term order. But a claimant in similar circumstances in Birmingham can expect a less generous term order.

We also strongly recognise that those without the benefit of access to family lawyers and/or the discretion of the family court cannot draw any principles or guidance about the starting point for the payment of spousal support from Section 25. Their numbers will become more acute. Even in mediation couples are making their own decisions,
albeit with guidance. It will undoubtedly become more common for clients to seek one off advice and for guidance to be requested, as already happens now. It would be helpful for both family lawyers and mediators to be able to provide improved information on a clear objective or principle in the area of spousal support.

The more difficult issue to address is whether a principled basis should be with or without the application of discretion.

We would add that any reform would need to be supported by robust judicial training. We believe that more uniformity could be achieved now through such training.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

We are of the view that our and the court’s broad objective should be to achieve a just outcome in relation to the payment of spousal support. This should generally be achieved by primarily balancing the reasonable needs of and resources available to the claimant and the other party taking into account other specified factors; and could be clarified by reform of Section 25 in the primary legislation.

As between the two principles discussed in the consultation, Resolution favours the principle of seeking to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution. Then an amalgam of both unravelling the “merger over time” and compensation rather than a compensation only model.

The unravelling of the “merger over time” approach is grounded in the reality of life at the end of the marriage or civil partnership, and might better address the complexity of the marriage partnership today which no longer necessarily follows the weaker claimant and stronger payer model. Most importantly it looks forward rather than backwards (unlike a compensation only model), reflecting the general direction of travel currently being taken by the courts to the question of spousal support.

In considering what is meant by ‘redressing the disparity in lifestyle caused by the divorce or dissolution’, and the objective above, it seems to us that ‘caused by the divorce or dissolution’ arguably requires an element of compensation to give a just outcome. “…as a consequence of the divorce or dissolution’ might be better wording.

A sole focus on compensation would elevate a factor which is not currently in Section 25 and likely to be applicable in only a minority of cases. The question of compensation makes parties to the marriage or civil partnership look back at a time when they are better encouraged to look forward. Compensation for loss or for the breakdown of the relationship might be blurred or arguably justify going beyond need, inviting making the current position even less clear.

A compensation model also disregards the means of the payer and could have arbitrary and unjust results. On a principled basis it is attractive, but it has a hypothetical objective with no ground in the reality of life at the end of the relationship and cannot alone address the issue of spousal support.
In addition, arguments on contributions would be run with the application of the compensation model being too much of a forensic exercise.

7.4 In answering the question at paragraph 7.3 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.

We believe that these specified and other factors, including the health of the parties, would be relevant to a reformed Section 25.

As the consultation explains, “merger over time” is a description of the intertwining which happens within a marriage – a 3 years marriage without children will be less intertwined.

Although a formula could in theory ignore any of these factors, all of them must, in our view, be relevant to spousal support and the “merger over time” approach as are other factors, including available resources and the existence of marital and non-marital property. It does not seem to us that the specified factors could be considered and balanced in isolation from other factors.

We are slightly unclear why the question does not seek views on all the Section 25 factors, implying that some should be elevated over others. It is difficult to see which of the Section 25 factors would not be relevant to redressing disparity in lifestyle and over what period of time.

(In forming our response we have assumed that the length of the marriage is as currently interpreted to include pre marriage cohabitation which moves seamlessly into marriage.)

7.5 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?

We believe that a principled reform of spousal support should take the form of a reformed discretionary approach, as broadly set out in the first paragraph of our response to 7.3. This should be supported by amendments to Section 25 reflecting a principle of independence and an expectation of spousal support orders for limited terms in most circumstances, as well as the availability of more information on the meaning of needs. Those changes would put more of a framework around the
exercise of discretion, reduce the need for a formula and could be introduced far more speedily and cheaply than any formula.

As set out in our response to 7.6 below, we consider there is a need for a principle of independence and possible codification of incentives to independence. That independence can sometimes be achieved through capital distribution. We find it difficult to see how a formula as to spousal support would sit with and have proper relevance to the capital element of a settlement without the full and proper consideration of the merits of more wholesale reform.

The impact on the rest of the settlement of the application of both separate child maintenance and spousal support formulas, would need further consideration, for example, how the latter formula would work where one party has a substantial mortgage.

It is already the case that many couples make their own agreements to deal with the financial consequences of their relationship breakdown, either on their own or through non-court dispute resolution. Our members find that the use of discretion is a vital tool in enabling couples to settle without or during court proceedings. Couples like to have the ability to craft solutions to meet individual circumstances. Even where finances are limited, clients can come to a useful outcome. Where agreement is not possible, the suitability of a formula principle is arguable.

In formulating our views, we have sought to consider whether a principled system of spousal support could still result in no clear starting point and a postcode lottery without the application of a formula. However, we are not persuaded about the merits of a purely formulaic calculation in relation to only spousal support, in isolation from full and proper consideration of the merits or not of reform of the whole law on financial remedies post divorce or dissolution.

We of course recognise that child maintenance is one element of the ‘financial package’ which is largely already hived off to a formulaic calculation. But that is still balanced by the discretionary overlay applying to the rest of the package. We have in fact long argued that the court should have the role of dealing with child maintenance in all cases where other financial provision is being considered.

A formulaic calculation alone could create arbitrary and harsh outcomes, and would remove the element of selection of priorities which can greatly assist in progressing negotiations or mediation on spousal support and other relevant issues.

We would certainly not support a cut off formula for spousal support without any range of provision in the formula, perhaps a discretionary range, or without specified exceptions. We envisage that the development of such would however be resource heavy.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

Going forward consideration should be given to providing a general guideline that not more than x% of a former partner’s net income will be paid in spousal support, and perhaps also child maintenance, irrespective of the circumstances, other than for good temporary reasons.

We would strongly support incentives towards independence, but would favour non-
absolute limits on the extent of support to be given, both in terms of quantum and time period, linked to the length of the marriage or civil partnership, and the period until retirement.

For example, we are concerned that limits should not cause hardship to wives over fifty five years of age who have not worked during the marriage.

We also consider that there is merit in reform to prompt the courts to fully and properly consider the exercise of their powers. For example, the experience of some of our members is that the courts simply ignore the question of any increase in earning capacity which it would be reasonable to expect a party to take steps to acquire.

We propose that there should be a stronger obligation on the court than that contained in Section 25A to decide whether it would be possible for support to be terminated, as opposed to just considering whether it would be appropriate. The hardship rule in Section 25A(2) should be retained.

The law should make clear that the expectation will be that in the normal course of events, there will be a term order for spousal support. That term might vary, but could be underpinned by judicial guidance and training about marriages and civil partnerships of different lengths and age of couples. The expectation of a term order would encourage maximising of income and earning capacity, and recognise the narrowing of the historic gender imbalance in earning capacity.

We also believe that consideration should be given to providing guidance about not expecting to achieve taking away “half” of the other party’s income, to provide more certainty, temper the unrealistic expectations of some claimants and avoid disincentives to payers to seek to reach agreements on their own or in mediation.

| 7.7 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? |

We agree that a review of principles and formulae from other jurisdictions would not produce sufficient and final evidence, not least due to the different social contexts applying in other jurisdictions. It would be helpful to understand more about the extent to which different approaches have assisted self-represented parties elsewhere.

Resolution is strongly of the view that there would only be confidence in future principled reform based on a formulaic calculation further to a full, lengthy and adequately resourced study overseen by the independent Law Commission over a number of years.

Any pilot would need to be supported by comprehensive judicial training.

Pilot data would need to include capture of the outcomes and impact on those using mediation, and not accessing family lawyers, other professional support and/or the
IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

   (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

   (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

   (c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Our comments on each of the possibilities set out in paragraph 7.8 are as follows:

(1) We would prefer to see this type of statutory change as part of a package of principled reform to Section 25 (covering qualifying nuptial agreements, spousal support, the objective of independence and the court’s obligations around such, and term orders subject to exceptions).

We are of the view that this type of statutory provision should be 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.

We do not agree that there is a need for the wording 'while bearing in mind... onwards or anything similar. The 'reasonable period' should be governed by the circumstances and the exercise of the provision would be subject to first consideration of the needs of the children under Section 25(1).

Otherwise, the proposed provision seems to us to give the expectation and message that the starting point will be that independence will not be practicable in many cases. This does not encourage maximising income and earning capacity, or reflect the reality of the lives of many parents. Indeed we are aware of some courts which already refuse to routinely make nominal periodical payments orders.

(2) Subject to the concerns we raise in sub paragraph (5) below and the issue of whether guidance would more easily be developed further to principled reform including addressing the issues in (2)(a) and (b), there is certainly a place for central guidance on these points for members of the public who can currently have a very broad concept of need, and may be without access to legal advice. We would however ask the Law Commission to recommend that any such guidance be consulted on with the final proposed guidance reviewed and perhaps endorsed in due course by various agencies and organisations including Resolution, in order to encourage confidence in and use of the guidance by separating couples and those using and involved in the family justice system.

Guidance might cover general pointers on what needs to be thought about when dealing with the consequences of divorce and separation. For example, the importance of valuing and taking into account pensions (which women in particular often feel has been ignored in their divorce settlement – Scottish Widows Women and Pensions Report November 2012). As to needs, guidance might cover what is considered necessary and where there is little flexibility; what is considered a discretionary spend where there is more flexibility; and what issues should be given the priority they deserve.

In reality there is of course existing 'guidance' and information about financial remedies available from numerous sources, particularly on line, which may or may not be helpful to members of the public. Our members' clients increasingly seek and use free sources of on line guidance and leaflets. For example, many of our members provide user friendly versions of Section 25 with references to prominent cases whatever process the client chooses to seek to resolve their issues. But clients also continue to see and use Resolution members as experts able to provide an authoritative source of guidance and tailored advice (an unbundling service), sometimes on a one off or occasional basis, and/or in support of mediation.

Guidance alone will not ensure people's understanding of their legal rights and ability to ensure application of the law to their own circumstances. Some do not access the information that is already out there for free and on line. Where they do, the information collated using guidance can be difficult to deal with without legal advice, or the involvement of a mediator with both partners having access to independent legal advice.

Judges would of course need to follow any guidance produced for them in line with that available to the public to improve the current position (see our comments on (4) below). We do not envisage the judiciary being influenced
by the limited guidance on the DWP 'hub'.

Some information would also be helpful for those mediators who feel unable to hand out legal information – some of those who previously would have been eligible for private family legal aid will be negotiating about financial remedies in mediation with limited legal advice at the end of mediation.

(3) In principle what is normally to be expected should be able to be dealt with by way of authoritative guidance rather than statutory amendment. Guidance can be a useful tool without the need for prescribed rules. We also believe that those individuals or couples contemplating separation or doing so are more likely to access and understand guidance than statute.

However it needs to be clearer whether interim guidance would be intended to be about the present law, tweak the existing law or set out what the law should be in relation to (3)(a) to (c). The giving of more than guidance on the current state of the law would appear to us to prejudge the outcome of principled reform. We have concerns that detailed and prescriptive guidance on the areas outlined in (3)(a) to (c), would simply not be authoritative in the absence of the principled reform envisaged in Part 4 of the consultation. There would also need to be clarity as to how that guidance sits with the current Section 25.

Whilst we also see the force of the issues leading to consideration of earlier statutory amendments on (3)(a) to (c), we are not sure that statutory reform on independence or more prescriptive maintenance arrangements now and in isolation from principled reform would be effective. This could have unforeseen consequences and risks doing what the judges are doing now.

Our views on the specific issues are as follows:

(a) Achieving independence should be an aim of the legislation. We would welcome the type of amendment envisaged in (1) as part of a package of principled reform.

We do not favour a prescriptive time limit, particularly without principled reform. The main factors affecting independence might be specified in secondary legislation including that there would be a stronger expectation of independence in most short childless marriages.

(b) An objective of independence should mean that the normal form of orders should be term orders. There should be no principle of joint lives orders. Such orders can be really corrosive in terms of disincenitising any return to work and reliance on state benefits. They work against strengthening the drive to independence and they should be expected to be exceptional.

We believe that principled reform could achieve a change in emphasis so that term orders would be the norm. Please see our comments in the response to the question at 7.6 above.

We find it difficult to see how authoritative guidance could be given ahead of reform, but it might be helpful to provide earlier guidance on maintenance other than for unavoidable temporary reason (for example mortgage expenses pending sale) not being more than 50% of income expectations as mentioned at 7.6.

(c) We are not persuaded of the logic of hiving off a statutory approach to
short childless marriages. The consequences of the breakdown of such marriages or civil partnerships can be very different according to whether the couple concerned are in their twenties or fifties. However, this does seem to us to be an area where guidance might be helpful emphasising the likely importance of achieving independence, the range of orders available and that the extent of those orders is likely to be more limited.

(4) We understand that the Family Justice Council’s Money and Property Group is already looking at practice guidance to assist self-represented litigants from April 2013.

Unfortunately, we doubt that judges would consistently take non-statutory guidance into account (even if produced by the FJC) unless it had the force of a Practice Direction accompanying the Family Procedure Rules. Practice Directions with worked examples have the benefit of being able to be updated quickly. Judges of course wouldn’t and shouldn’t be precluded from looking at hub guidance.

(5) It will undoubtedly be difficult for many of those no longer eligible to access private family legal aid after implementation of the LASPO Act 2012, and where mediation is unsuitable, to access legal advice about the general approach to financial remedies, understand their legal issues or know whether any agreement they reach is fair and reasonable. It is hard to envisage the financially vulnerable necessarily even knowing, for example, that s/he may need to urgently protect their matrimonial home rights, or have the option of applying for a new legal services order.

It cannot be assumed that all self-representing parties will access online information, but publication of that guidance would have to include publication on the DWP’s new ‘Sorting out Separation’ website and any linked family justice information. This website already includes short, simplistic content on ‘Your money and finances. How do you work it out?’ – there are clear gaps in the content.

However, as discussed above we are slightly unclear what the status and basis for the guidance would be (whether it relates to only the issues set out in (2) or also (3)) - this would have to be made clear.

Any interim guidance on the DWP ‘hub’ effectively ‘will become the law’ to people accessing the hub. It will be what people, especially those who don’t consult lawyers and/or act in person will expect. Information published on the hub will affect agreements made with or without professional support. There will need to be confidence that it is right in law, is based on the present law as opposed to what it might be in future, is understandable and will not lead to totally new or unjust results. Resolution would be happy to assist with the preparation of recommended guidance or case studies explaining the range of possible outcomes in certain types of cases, if that would be helpful.

People would inevitably rely on other non-hub guidance published elsewhere, but all parties might be provided with a copy of the hub guidance at a mediation information and assessment meeting and on the issue of a non-consent order court application.

It would be helpful if the Law Commission could recommend that any guidance make clear reference to the importance of taking legal advice.

Whilst not the direct purpose of hub guidance, improving people’s understanding of this area of law before entering into marriage or civil
partnership, particularly of the consequences in relation to non-matrimonial property, would be helpful.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

We welcome the non-matrimonial property aspects of the consultation. The issue of non-matrimonial property seeps into needs and might benefit from a clearer definition of needs.

The Law Commission is of course looking at its recommendations for qualifying nuptial agreements and is aware of our policy position on amending Section 25 to permit nuptial agreements. There are no other law reform measures short of fundamental and principled reform which we would immediately add.

We would however recommend that the court procedure in relation to finance cases as well as the law be considered. Resolution has made various proposals to ease and streamline the system which we will continue to raise.

The importance of both judicial training to improve consistency of decision making, and monitoring the impact of LASPO 2012 on resolving finance disputes including how this impacts on resolving children matters cannot be over emphasised.

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

We are not persuaded that statute should also specify the level of needs for these purposes.

Needs under Section 25 are generally understood not to be limited to income needs, but as including property/housing need for spouses or civil partners and children. If a discretionary framework remains in place, underpinned by authoritative guidance, then needs will depend on the facts of each case and no statutory definition is necessary. Income and capital needs as currently understood as a result of case law could be explained through guidance, including to inform those considering qualifying nuptial agreements.

NON-MATRIMONIAL PROPERTY

7.11 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?

**Supplementary Consultation Paper, Part 6, paragraph 6.41**

We agree that the source of property is relevant and that non-matrimonial property as described above should not be shared, subject to exceptions.

We consider that this principle should not apply where:

- (a) access to that property is required to meet needs;
- (b) the party who owned non-matrimonial property chooses to share it with the other party by putting it into joint names, or into the sole name of the other party;
- (c) one party has chosen to share property as at (b), while the other has not chosen to share their own non-matrimonial property, in which case those decisions could be corrected at the discretion of the court to achieve balance;
- (d) non-matrimonial property has been improved by the efforts or financial investment of the other party so as to enhance its value, in which case the matter should be subject to judicial discretion as referred to at 7.17.

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<th>7.12</th>
<th>We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.</th>
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|      | Supplementary Consultation Paper, Part 6, paragraph 6.50  
No. If the family home is a non-matrimonial asset, or is acquired using non-matrimonial assets, then the same principles as referred to at 7.11 should apply. |

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<th>7.13</th>
<th>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.</th>
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|      | Supplementary Consultation Paper, Part 6, paragraph 6.59  
We believe that the starting point should be that property acquired before cohabitation leading to marriage or a civil partnership should be non-matrimonial, but that acquired during cohabitation should be subject to the sharing principle, and that the definition at 7.11(2) above should be amended to reflect this.  
Guidance on the meaning of cohabitation in the context of financial remedies on divorce and dissolution would be helpful. |

| 7.14 | 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? |
|------|----------------------------------------------------------------------------------------------------------------------------------|
|      | Supplementary Consultation Paper, Part 6, paragraph 6.77  
Yes, subject again to access being required to meet needs, and to the comments at |
7.11 relating to change of ownership.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

No, we consider that the principles referred to at 7.11 should be applied consistently.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

This depends on the definition of matrimonial property. Again, we consider that the principles referred to at 7.11 should be applied consistently.

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

This is the situation referred to at 7.11(d) above. We consider that rules are inappropriate as the extent of the investment (financial or otherwise) will vary greatly from case to case. While appreciating the dangers of encouraging the court to "rummage in the attic of a relationship" we consider that a guided discretion on this issue is necessary. We consider that worked case examples could be used to guide the public and the courts to greater consistency.
LAW COMMISSION
CONSULTATION PAPER No 208
MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS
RESPONSE FORM

This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk
(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

### Your details

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<thead>
<tr>
<th><strong>Name:</strong></th>
<th>Irwin Mitchell Solicitors</th>
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| **Are you responding on behalf of a firm, association or other organisation?** |
|-------------------|---------------------------|
| **If so, please give its name (and address, if not the same as above):**    |
| N/A                |

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As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
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<th>Question</th>
<th>Answer</th>
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<tr>
<td>7.2 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?</td>
<td>Yes. However, the theoretical justifications for spousal support proposed by the Law Commission in the Supplemental Consultation Paper (“SCP”) are either inadequate or do not tell us how spousal support should be calculated or for how long (see answer to question 7.3, below).</td>
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<tr>
<td>7.3 Should spousal support:</td>
<td>Compensation for loss is an inadequate justificatory basis for calculating spousal support for the reasons given by the Law Commission in the consultation paper. It is backward looking and implies that the party with the higher earnings is somehow at fault. It appears to embody the feeling: “I deserve to be compensated because look what I have given up for you!” Seeking to “compensate” a party who has prioritised family over career is also demeaning to homemakers because it implies that h/she is a victim. Compensation should not form part of the justificatory basis for financial provision on divorce in a legal system which values the contributions of homemakers and breadwinners equally. There is, after all, no way of compensating the breadwinner for having missed his or her children growing up. The proposal elevates money over emotional advantages. It seems fairer and less artificial to regard the two parties as having voluntarily assumed varying levels of responsibility for different aspects of their lives, and in some circumstances these responsibilities continue after divorce. This idea may form part of the “merger over time” approach, which is Irwin Mitchell's preferred basis on principle for justifying spousal support. The major flaw of the “merger over time” approach is, however, that it does not tell us</td>
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“what has to be paid by way of spousal support and for how long” (quoting question 7.3). It is not clear, for example, why “the length of the marriage” is proposed as the logical duration of support. It is, therefore, necessary to have recourse to other principles to answer these questions.

Irwin Mitchell considers that the appropriate level and duration of support should be determined in accordance with the following principles:

- Where someone has an earning capacity, they should be expected to become independent after a period if that earning capacity is likely to suffice to meet his/her needs.
- A spouse may need support for a longer period where s/he has a low or no earning capacity because s/he has primary care of the children.
- Where spouses have dependent children, the spouses’ respective standards of living are relevant and should be comparable.
- Where someone has an earning capacity and so will be expected to become independent, but his/her earning capacity is such that there would be a decrease in standard of living if there were to be no continuing support, the spouse should be given sufficient time to adjust to the change in standard of living (as in the French *prestation compensatoire* system).

What constitutes “sufficient time” is not capable of being answered on the basis of principle alone – it is a practical question about the ability of people to adjust to change. It seems likely that it is more difficult, generally speaking, for older spouses to adjust to a change in standard of living, and so unfair to expect them to. But where the payee spouse is young, it may be that no period of adjustment is required and the payee spouse should be entitled only to as much as he/she would need to re-house and start again as a single person.

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7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

See answer to question 7.3., above.
7.5 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?

Irwin Mitchell considers that any principled reform of spousal support should take the form of a reformed discretionary approach rather than a formulaic calculation. It is not clear that fairness would be achieved through a formulaic calculation. The Canadian system calculates maintenance by reference to the spouses’ respective gross incomes. It does not, however, address the possibility that a spouse who does not currently have an income may have an earning capacity and could reasonably be expected to go out to work. The flipside of this, of course, is that a formula that did take into account a person’s earning capacity would not achieve predictability or certainty, since whether a person has an earning capacity and if so, what that earning capacity is, may not be clear-cut, but are matters that involve discretion.

A formula would also not be capable of addressing attempts to conceal or manipulate income.

Other problems include that the formulae discussed in the SCP do not take into account:
   - financial obligations of the parties, for example, to make mortgage payments;
   - division of ownership or use of capital assets, including the former matrimonial home;
   - the abilities of the spouses to borrow capital, for example, to start a business or buy a house.

Irwin Mitchell considers that a formula simple enough to be easy to use by most people, and therefore capable of securing the benefits of predictability and certainty, would not adequately cater for the infinite variety of factual scenarios and ways that individuals have chosen to arrange their person lives.

Irwin Mitchell notes, however, that the existence of regional differences in the amount and durations of awards is a strong argument in favour of a formula. There may, however, be other ways of addressing this issue, for example, through guidance of the kind discussed in the SCP at paragraph 5.40-5.42.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

Irwin Mitchell considers that the law should place time limits on support to encourage independence, with exceptions to cater for individual circumstances.

The following factors would be relevant in determining the time-limits on support:

**Children**

Where a spouse has primary care of children, it seems reasonable to expect a spouse to return to work and thereby achieve financial independence after the youngest child reaches an age at which it is generally regarded as safe for the child to travel to/from school and be at home unsupervised. It may be that further research or a study would be required to determine this age, but it is likely to be less than 18 but more than, say, 11.

**No children**

Where there are no children and the payee spouse has sufficient earning capacity to meet his/her needs, the duration of support should be for such period of time as would allow the spouse with lower (or no) earnings to adjust to any change in standard of living.

**Age**

Irwin Mitchell considers that there should be no time limit where the payee spouse is over a certain age and as a result (and taking account of any period to allow for adjustment in standard of living), his/her earning capacity would not generate enough earnings to meet his/her needs. Further research or a study may be required to determine this age.

Irwin Mitchell regards the length of the marriage as less significant than the age of the parties in determining the duration of support, since there is a more direct relationship between a person’s age and his/her earning capacity.

**Extension of the period of support**

Orders should be made extendable in certain circumstances. Where an order is made extendable, it should then be possible for the payee spouse to apply to extend the period of support providing that certain conditions specified in the order have been met.

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7.7 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?
Irwin Mitchell agrees that substantial research and piloting would be required to devise a formula that could work in the UK.

An adequate assessment of any wholly new approach would need to do more than simply compare the results produced by a formula with the numbers produced under the current approach. Ideally, a pilot would involve an assessment of the impact of any new approach on test cases at the time of the financial provision proceedings, during the period of maintenance, and after maintenance had ceased. A pilot would also need to capture data from a broad range of families of different incomes, capital assets and ages, and seek the views of industry professionals such as family lawyers, mediators, judges and therapists/counsellors.

Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:

- to live at the same standard as he would have lived during the marriage, and if so for how long?
- to as much as he needs to relocate and to start again as a single person?
- to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?
A. As Michael is young and there are no children, he should be entitled only to so much as he would need to relocate and start again as a single person.

B. Michael’s entitlement to maintenance should be calculated after calculating the parties’ capital. If, once the capital has been shared, Michael had enough to enable him to relocate and start again as a single person, it may be that no maintenance would be required.

C. After the ending of the civil partnership, Pat’s care should be the responsibility of the state, rather than Chris.

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. Irwin Mitchell considers that both Sarah and Ian would find it helpful to be able to calculate the amount/range of amounts of maintenance instantly using a formula.

However, Ian would find a formula less helpful if, for example, he considered that Sarah could earn an income by returning to work either full or part-time, or working from home. Similarly, if Sarah knew that Ian had asked his employer to pay his bonuses as pension contributions or he had sought to manipulate his income in some other way, she would also find a formula unhelpful. In both cases, a formula could engender feelings of resentment and disempowerment (along the lines of “computer says no”).

E. See above at 7.6.
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

F. Irwin Mitchell considers that the length of the marriage should not be regarded as relevant. The key factors should be the ages of the parties, whether they have dependent children, and their earning capacities.

G. In the case of Sarah, her and Ian’s standards of living should be comparable because they have dependent children.

Michael is young and there are no children, so he should be entitled only to so much as he would need to relocate and start again as a single person. There is a potential issue with Sophia and Michael, where some discretion might be thought desirable, if Michael had not maximised his earnings during the marriage by agreement with Sophia.

Pat might need additional time to adjust to a lower standard of living because of his/her accident. But, as stated above, Irwin Mitchell considers that the state should be responsible for Pat’s needs as a result of his accident, rather than Chris.

H. Yes

I. Since Sarah has primary care of the parties’ young children, it may be desirable for her to continue to live in the family home for their benefit. But in reality there may not be enough other assets to enable Ian to re-house. If Sarah can downsize, the house may need to be sold and the proceeds divided. If that is impossible, Ian may have to rent accommodation and have a Mesher charge on the house.

In each of the other cases, there should be no “entitlement” to continue to live...
in the family home after divorce, since in each case the party’s ex-spouse would have some entitlement (perhaps not half in Michael’s case) to share in any equity in the house.

### IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);
   - (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);
   - (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and
   - (c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

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.

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Irwin Mitchell considers that the statutory direction should be upgraded to one which directs the court to bring the financial obligations of each party towards the other to an end where possible. As further explained at 7.6 above, Irwin Mitchell considers
that, subject to exceptions, there should be time limits on support, which in some circumstances should be extendable.

Irwin Mitchell considers that it would be helpful to have guidance, and in particular, on:

- the circumstances in which the period of maintenance should be extendable; and
- the considerations involved in an assessment of need and the priority to be afforded to the different elements.

Irwin Mitchell supports the suggestion of including case studies in authoritative guidance.

Irwin Mitchell also supports the suggestion to create a database of anonymised case studies alongside the authoritative guidance provided that the organisation responsible ensured that the database included case studies that were consistent with each other on principle, and was accompanied by a note of caution that each case will turn on its own facts etc. Consideration would need to be given to the action to be taken if a large number of cases proved not to be consistent.

Irwin Mitchell considers that the Family Justice Council would be well-placed to prepare the authoritative guidance which should, as a minimum, be published on the internet.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

Irwin Mitchell does not wish to add anything further here.

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70
## NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

| Yes |

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7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

| Irwin Mitchell considers that the former matrimonial home (“FMH”) should be excluded from the definition of non-matrimonial property. It should, however, be possible to categorise the FMH as non-matrimonial property in a pre-nuptial or pre-civil partnership agreement. Furthermore, in deciding how the FMH should be divided on divorce, the origin of the FMH (e.g. whether it was inherited) and the parties’ respective contributions to the purchase or improvement of the FMH should be relevant considerations, even though the property is matrimonial. |
7.13 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.

Irwin Mitchell considers that property acquired during cohabitation should be regarded as matrimonial property where the parties subsequently get married or enter into a civil partnership. Irwin Mitchell agrees with Mr. Nicholas Mostyn QC in GW v RW [2003] EWHC 611 (Fam) that for the purposes of section 25(2)(d) of the Matrimonial Causes Act 1973, “where a relationship moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently”.

Irwin Mitchell notes that it would always be open to the parties to exclude pre-acquired property, subject to it being available to meet needs, by entering into a nuptial or civil partnership agreement.

7.14 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?

Irwin Mitchell notes that it would always be open to the parties to exclude pre-acquired property, subject to it being available to meet needs, by entering into a nuptial or civil partnership agreement.

Yes, although its exclusion from division may have a knock-on effect in relation to the assessment of needs – for example, if the property is a much-used holiday home that minimized the family’s holiday expenditure.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Yes

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Yes

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

Irwin Mitchell considers that any reform should take the form of guidelines rather than rules.

Irwin Mitchell agrees that property should not lose its non-matrimonial character as a result of the owner-spouse investing in the property during the marriage.

It would be unusual for a family business which represents the owner’s career and full-time occupation not to have provided financial benefits to the family. In such a
case, it would seem fair to regard at least a portion of the business as matrimonial property since it was used by the family.

On the other end of the spectrum is a person who has invested in non-matrimonial property not as a full-time occupation and which, consequently, has not been used to benefit the family. In these cases, it would seem fair that the non-matrimonial property should retain its non-matrimonial character.

In cases where the non-owning spouse has invested time and/or money in the business, but has not become a formal business partner, Irwin Mitchell considers that the area is too fact-specific to seek to devise abstract general principles. But the following considerations would be relevant:

- the nature of the contribution; for example, a spouse who works on the owning-spouse’s farming business but doing similar tasks and expending equal effort to the owning-spouse may be considered to be entitled to more of the business than a spouse who performs administrative tasks for his/her spouse who is a sole practitioner solicitor; and

- the extent of the contribution.
LAW COMMISSION
CONSULTATION PAPER No 208

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

**Your details**

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:
As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

**PRINCIPLED REFORM**

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114
7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116
7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or "unravelling the merger over time", as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?
7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.
7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70
7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50
7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

7.15 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?
7.16 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?

7.17 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?
Abstract:

Pre-nuptial agreements: Lady Hale, and a lesson from America

Subject: Family Law

This article discusses a key aspect of the dissenting judgment of Lady Hale in the Supreme Court case of *Radmacher v Granatino* (on appeal from EWCA Civ 649) regarding the differentiation between pre-nuptial and postnuptial agreements, and draws on my own research into the evolution of the law concerning such agreements in the states of California and New York. The article highlights inconsistencies in approach, and anomalies of outcome, in legislation and case law in these two states.

The article submits that an understanding of the evolution of these diverse types of agreement in English and Welsh law, will be crucial to the Law Commission in its the recommendations as to reform, and that the Commission should avoid adopting the premise, as proclaimed by the majority in *Radmacher*, that there is "no material distinction between ante-nuptial and post nuptial agreements".

Keywords: Financial Provision; premarital agreements; prenuptial agreements; post-nuptial agreements; separation agreements; reform
Pre-nuptial Agreements: Lady Hale, and a lesson from America

We all know that the Law Commission (“the Commission”) is intending to produce its long-awaited report on marital property agreements by autumn 2013, and that the scope of its enquiry was extended to accommodate additional work focused on, firstly, the extent to which one party to a marriage or civil partnership should be required to meet the other’s needs after the relationship has ended, and secondly, on how “non-matrimonial property” should be treated on divorce or dissolution. Its supplementary consultation paper¹ records a positive response on the question as to whether the law should be reformed so as to introduce “qualifying nuptial agreements”² (“QNAs”). Such QNAs ‘would be enforceable provided that certain conditions are met, without the need for the agreement to be scrutinised by the court in its discretionary jurisdiction³.

This article is intended to serve as a reminder that whilst the Radmacher majority held that there was “no material distinction between ante-nuptial⁴ and post nuptial agreements⁵, there are deep pitfalls into which the Commission might fall, should it be minded to adopt this as a premise in its proposals for legislation, and in particular when defining a QNA. It is indeed questionable as to whether it was legitimate of the court to make such an assertion at all. Brigitte Clark, citing Lady Hale’s dissent, makes a strong case that “the shifting of the onus [as the majority did] in relation to

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² to which to refer henceforth as “QNAs”
⁴ for convenience I refer to these henceforth as “PNAs”
⁵ Radmacher (formerly Granatino) v Granatino, on appeal from EWCA Civ 649, at paragraph 57
the fairness or otherwise of the agreement is…an unwarranted gloss on the applicable statute [the Matrimonial Causes Act 1973]" and that it was neither necessary nor desirable for the judiciary to create a legal presumption in favour of [prenuptial] contracts⁶. One can apply the same argument to the related issue which I raise here. Indeed, Lady Hale, the lone dissenting voice in Radmacher, saw the dangers and set out her reasons persuasively. She argued that the majority was wrong not to maintain the distinction of approach between those agreements made before marriage and those made after marriage, and came up with the historical facts in support.

Within her dissenting judgment, Lady Hale identified three diverse types of agreement, apart from PNAs, between (prospective) husbands and wives⁷:

Type (a): Those made during their cohabitation⁸;
Type (b): Those made upon or during their separation⁹; and
Type (c): Those made in connection with current matrimonial proceedings¹⁰.

She also alluded to a further type (to which I for convenience will refer as “Type (d)”) being an agreement made between a married couple while they are still living together, but in the absence of divorce proceedings or, in other words, in anticipation of a possible separation.¹¹ Lady Hale charted out the evolution of the various types of agreement, Type (b) having “the longest history”¹².

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² which would of course also be applicable between civil partners
² My bold type
² My bold type
² My bold type
² Being the type of agreement involved in MacLeod v MacLeod [2008] UKPC 64, [2010] AC 298
² having been intended to make some sort of provision for the wife, rather than the opposite
Her Ladyship then proceeded to identify two distinctive public policy rules and their respective rationales, the first of which I will refer to as the “future separation” public policy rule. The background to this is that agreements for better provision for a wife if she were to live apart from her husband rather than together were, in the now distant past, disapproved of, as they were deemed likely to encourage a wife to better herself financially by leaving her husband\(^\text{13}\). The second public policy rule, which might conveniently be labelled the “current separation” public policy rule\(^\text{14}\), is that Type (b) separation agreements cannot oust the statutory powers of the court to award financial provision in the event of divorce. This was firmly established in 1929 in the leading case of *Hyman*\(^\text{15}\) and was later enshrined in the Maintenance Agreements Act 1957: a promise not to go to court was void, but this did not render void or unenforceable the other financial arrangements in the agreement.

With regard to the “future separation” public policy rule, Lady Hale comments in her judgment that historically there was no distinction between the legally enforceable obligations of marriage, on the one hand, and provision for what is to happen in the event of a future separation or divorce on the other\(^\text{16}\). This was finally brought to an end by the 2008 case of *MacLeod*\(^\text{17}\), in which the Privy Council held that a post-nuptial agreement “providing for future separation [my Type (d) agreement] was valid and enforceable in the same way as any other contract between spouses”\(^\text{18}\). However she went on to say that “the Board [in that case] would not have felt able to

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\(^{13}\) *Radmacher (formerly Granatino) v Granatino*, on appeal from EWCA Civ 649, at paragraph 141

\(^{14}\) *Radmacher (formerly Granatino) v Granatino*, on appeal from EWCA Civ 649, at paragraph 143

\(^{15}\) *Hyman v Hyman* [1929] AC 601

\(^{16}\) *Radmacher (formerly Granatino) v Granatino*, on appeal from EWCA Civ 649, at paragraph 144

\(^{17}\) *MacLeod v McLeod* [2008] UKPC 64, [2010] AC 298

\(^{18}\) *Radmacher (formerly Granatino) v Granatino*, on appeal from EWCA Civ 649, at paragraph 152
take that step had there not been *a power to vary*\(^\text{19}\) such a contract in the light of changes in circumstances since it was made or for the sake of the children for whom [the parties] were responsible\(^\text{20}\). The Board specifically “held that these powers of alteration applied, not only to agreements for a current or immediate separation [Lady Hale’s Type (b) agreements], but also to agreements for a future separation [my Type (d) agreements]”\(^\text{21}\).

The power of the court to vary separation agreements is a significant reason why they are indeed materially distinct from PNAs. This power had been enacted in 1957\(^\text{22}\), and confirmed in sections 34-36 of the Matrimonial Causes Act 1973 (“the 1973 Act”). When *Radmacher* was in the Court of Appeal these sections had been alluded to by Wilson LJ as “dead letters”\(^\text{23}\) because in practice very few such applications to vary are ever made – the tendency is rather towards parties heading straight for divorce proceedings than towards making an application to the court to vary an existing separation agreement.

Why does it matter? The view was expressed *obiter* by the Board in *MacLeod*, that sections 34 to 36 of the 1973 Act do not apply to agreements between people who are not yet husband and wife. If this is right, argued Lady Hale, “can it be right that intending spouses can oust the jurisdiction of the courts before their marriage [through a PNA] but are unable to do so afterwards [through a Type (b) or Type (d) agreement]?”

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19 My italics
20 *Radmacher (formerly Granatino) v Granatino*, on appeal from *EWCA Civ 649*, at paragraph 152
21 *Radmacher (formerly Granatino) v Granatino*, on appeal from *EWCA Civ 649*, at paragraph 153
22 by the Maintenance Agreements Act 1957
23 *Radmacher (formerly Granatino) v Granatino* 2010 UKSC 42 – 2010 at paragraph 134
agreement]?” Her Ladyship was adamant that the fact that most people do nowadays go to the divorce courts to seek financial relief is “no answer” and that the very existence of a power to vary a PNA would mean that they would be likely to agree a variation for themselves without going to court.

The fact that the Board in MacLeod ventured to make its obiter comments contributes in large part to Lady Hale’s contention, that the law of marital agreements is indeed “a mess.”

Lady Hale raised the question as to whether the “current separation” public policy rule should apply “to all marital agreements, before or after marriage, before or after separation, and to all its terms, whether operating during cohabitation or after the couple have separated”, but argued strongly that parties to a marriage should always be able to apply for variation if they so chose, without which power to vary, divorce would be encouraged. Her Ladyship has since continued to lament that the Radmacher majority “could not see a good reason to distinguish between ante- and post-nuptial agreements once the rationale for the [“future separation” public policy rule] had gone. They were unimpressed by the dangers of making something legally binding when there was no power of variation...”

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24 Radmacher (formerly Granatino) v Granatino, on appeal from EWCA Civ 649, at paragraph 158
25 My italics
26 My italics
27 Radmacher (formerly Granatino) v Granatino, on appeal from EWCA Civ 649, at paragraph 159
28 Radmacher (formerly Granatino) v Granatino, on appeal from EWCA Civ 649, at paragraph 139
29 Radmacher (formerly Granatino) v Granatino, on appeal from EWCA Civ 649, at paragraph 159
On a related point, Lady Hale argued that, “without a power of variation, there remain serious policy objections...to recognising [PNAs] as valid and enforceable in a contractual sense”. Herring et al have concurred, pointing out that “It becomes difficult to promote marriage, if its legal effect depends substantially on the agreement of the parties”; all the more so if such an agreement cannot be varied by the court.31

Further help can be found across the Atlantic. I have been carrying out a comparative and historical study of the evolution of marital agreements in the states of California and New York, which has brought up some pertinent points of interest.

In California there is no independent body of law that details the enforceability requirements of Type (b) and (d) agreements and, unlike in England and Wales, “there is no discrete history of Californian postnuptial agreement law”32. Just a few sections of the state’s Family Code can be said to relate to Type (b) post-nuptial agreements, and these do not include specific, functional requirements as to their enforceability33. Furthermore, judicial rationale on post-marital agreements in California betrays a large amount of confusion34. In the leading case of Re Marriage

34 This confusion has even extended to Type (c) agreements. The court in Bonds went on to say that “It is well settled that property settlement agreements occupy a favoured position in California”. These sort of settlements are Lady Hale’s Type (c) agreement. Glass confirms this by telling us that the authority cited was a case involving the division of marital assets at the time of divorce, being very different circumstances from those in the case in hand. The statement about Type (c) agreements is, she observes, correct but irrelevant. Rebecca Glass Trading up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California (California Law Review, Vol 92, No 1, Jan 2004) 219.
of Bonds\textsuperscript{35}, the California Supreme Court did indeed distinguish between PNAs and Type (b) agreements, “but it did so on the basis that post-nuptial agreements are in fact entitled to \textit{more} protections [from the court] than [PNAs], due to married couples’ fiduciary relationships”\textsuperscript{36}. In the subsequent case of \textit{Friedman}, the same court held that section 1615 of the Family Code did not govern postnuptial agreements\textsuperscript{37}. The section concerned allows the court a wide discretion, in determining whether a PNA was made voluntarily, to take into account “any other factor” it deems relevant. The “unprotected wife” sought unsuccessfully to rely on this provision, so as not to be held to the letter of the agreement, but the effect of the court’s ruling was to afford her less protection than she would have had in the context of a PNA. Rebecca Glass concluded that “parties to postnuptial agreements receive less protection under California law than do parties to [PNAs]”\textsuperscript{38}. A failure to make appropriate and consistent statutory distinctions between the diverse types of agreements here could conceivably result in similar anomalies.

In New York, PNAs have express statutory authority and tend to be recognised as valid and enforceable, provided that certain conditions are met, the fundamental point being that the terms of the PNA are “fair and reasonable at the time of the making of the agreement...”\textsuperscript{39}. In New York it is remarkably easy for a spouse...

\textsuperscript{35} 83 Cal. Rptr. (Cal. Ct. App.1999)
\textsuperscript{37} In \textit{Re Marriage of Friedman}, 122 Cal Rptr. 2d at 417-18
\textsuperscript{39} Domestic Relations Law (“DRL”) Section 236B(3) per Peter E Bronstein, \textit{The Pre-Nuptial Agreement in the United States of America} appearing in \textit{International Pre-nuptial and post-nuptial agreements} by David Salter, Charlotte Butruilee-Cardew and Stephen Grant (Jordan Publishing Limited 2011) 478-9.
seeking to have a PNA upheld to satisfy the test that its terms “are not unconscionable at the time of entry of final judgment”\(^\text{40}\).

In New York, practitioner Richard B Alderman\(^\text{41}\) has looked at recent developments in separation agreements\(^\text{42}\), and contends that courts in New York “have thrown their cloak of protection about”\(^\text{43}\) such agreements. The principal cases on post-nuptial agreements\(^\text{44}\) provide an indication of where this cloak of protection has been thrown.

In *Barchella v Barchella*, probably unsurprisingly, the Supreme Court granted the wife’s motion to vacate a post-nuptial agreement, drafted by the husband’s attorney, which she had signed against the advice of her own attorney, while she was undergoing medical treatment\(^\text{45}\). The noteworthy point is that the same test has been applied to PNAs. In the case of *Bronfman v Bronfman*, it was held that a party “in challenging the (prenuptial) agreement, bears the very high burden of showing that it is manifestly unfair”\(^\text{46}\) and that this unfairness was the result of overreaching on the part of the defendant\(^\text{47}\). It is notable that the wording of the test is strikingly similar to


\(^{41}\) an attorney of Syracuse, New York


\(^{44}\) primarily equated to our Type (b) but which may also be said to include Type (d).

\(^{45}\) and suffering from the mental and physical effects of complications arising from surgery.


\(^{46}\) My italics

that in *MacLeod*, a test which Lady Hale considered, in hindsight, had been too strict\(^\text{48}\).

The anomaly seems to be that, whilst the test for PNAs is the same as for Type (b) agreements, in the case of the former, the courts have in practice been much more reluctant to exercise their discretion to hold them invalid. The few reported cases in which the New York courts *have* done so have usually been based on the absence of independent legal representation for each party\(^\text{49}\). However, the facts on which such cases have been decided are, in the main, extreme. An example can be found in *Bloomfield v Bloomfield\(^\text{50}\)* in which the wife had received no legal representation at any point during the PNA negotiations for, or the execution of, the PNA, and the PNA itself comprised a waiver by her of all rights to a share of any property which her husband had before marriage, or might acquire during the marriage, and to her statutory elective share rights against the husband’s will\(^\text{51}\).

In both states we can see a difference in judicial approach towards PNAs, on the one hand, and Type (b) and (d) agreements, on the other. If the distinction mattered there, in two states in which the power to vary PNAs does not exist, and in which there is no debate as to whether it should, it will matter all the more here, given the historical evolution charted by Lady Hale.

\(^{48}\) *Radmacher (formerly Granatino) v Granatino*, on appeal from EWCA Civ 649, at paragraph 167


\(^{50}\) *Bloomfield v Bloomfield* 97 NY2d 188, 192;194 (2001)

\(^{51}\) Added to which, at the time of execution the wife was 24 years old, having completed one year at college, whereas the husband was at that time a 30 year old practising attorney with holdings in real property – M D Fields and JK Pollack, *Pre and Post-nuptial Agreements in New York: Not Radmacher v Granatino* (International Family Law Quarterly Journal, June 2011).
Conclusion

Lord Phillips’ contention, expressed in the very first paragraph of his judgment, that ante-nuptial and post-nuptial agreements should be considered together under the combined term of “nuptial agreements”\textsuperscript{52} appears to have rubbed off on practitioners, Law Commissioners and academics alike. Presumably in response to the majority’s dicta, practitioners have begun habitually “to lump” all such agreements together. For example, the guidance provided by solicitors from Withers solicitors makes no distinction between the different types of post-marital agreement, reading as follows: “post-matrimonial agreements may be entered into during a marriage when the parties do not contemplate a breakup, or they can be entered into in the middle of a separation or a divorce for the purposes of reconciliation”\textsuperscript{53}. Elizabeth Cooke refers to the responses to the Commission’s consultation as demonstrating support for the introduction of a\textsuperscript{54} “qualifying nuptial agreement”\textsuperscript{55}, and Jens M Scherpe, whilst warning against direct or over-simplistic comparisons, tends to focus on similarities rather than differentiation\textsuperscript{56}.

One can reasonably ask, in the light of this, whether the crucial distinctions between the differing types of agreement are in danger of being overlooked.

The Commission might well conclude that legislation should incorporate a power to apply to the court to vary PNAs, and should set out a common test which would be applicable to PNAs and separation agreements alike. If it does not do so, then it will

\textsuperscript{52} Radmacher (formerly Granatino) v Granatino, on appeal from EWCA Civ 649, at paragraph 1

\textsuperscript{53} Suzanne Kingston and Amy Royce-Greensill (partner and solicitor respectively at Withers LLP), \textit{Binding Issues} (Family Law Journal, Number 111, November 2011)

\textsuperscript{54} my italics

\textsuperscript{55} Elizabeth Cooke, Law Commissioner, Professor of Law, University of Reading, \textit{Pre-nups and beyond: what is the Law Commission up to now?} (Family Law, Jordan Publishing Limited, March 2012) 323.

\textsuperscript{56} Jens M Scherpe, University Senior Lecturer, University of Cambridge, and Academic Door Tenant, QEB, London, \textit{Marital agreements and Matrimonial property} (Family Law, Jordan Publishing Limited, July 2012) 865.
need to proffer more than a single “one size fits all” QNA. To overlook this would be to court yet more confusion.
Law Commission Consultation
Matrimonial Needs, Property and Agreements
The Law Society
December 2012
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?

The Law Society agrees that the current system of spousal support could benefit from greater clarity and certainty, especially in the wake of an expected rise in self-represented parties. The absence of a coherent principle underpinning the rationale for spousal support can create unrealistic expectations for divorcing couples and can render the law inaccessible and uncertain, particularly for self-represented parties.

It is difficult to ensure that the framework for awarding spousal support accurately reflects current social, cultural and economic trends. Individuals and couples will have widely different views as to the purpose, meaning, and implication of marriage, depending on their cultural norms and personal beliefs. There are a number of ways in which couples can decide to share the domestic and professional duties. Attempts to find a principle reflecting this constantly fluctuating reality is a complex task.

Despite policy changes (shared parental leave, same-sex marriage), evolving cultural norms (marriages tend to be shorter, divorce more frequent) and other socio-economic trends (shrinking gender wage gap, greater gender equality), the effects of divorce are still particularly acute for women. There is also little evidence as to the expected take-up of policy changes such as shared parental leave, and the effect this will have on the gender wage gap. Attempts to ‘codify’ these evolving trends into a formula or principle is not only difficult, but will need re-assessing on a regular basis. The current discretionary nature of the law is better suited to such diversity than a single overarching principle.

In the vast majority of cases, however, any award of spousal support is constrained by the lack of capital and the income available to the parties. In those cases, there is little need for reform as the allocations of funds will be based on practicalities rather than principle. Separating couples should therefore be provided with information enabling them to understand how to navigate those practicalities.

The crux of the issue is that is highly unlikely that the payer will be able to afford more than child support and re-housing costs in the vast majority of cases. Spousal periodical payments are a luxury for those that can afford them.

‘Principle’ only becomes important where assets, income and capital are significant, but these are a small minority of cases. In those cases, however, the law plays a much larger role, and the Law Society agrees that additional principle and guidance would be helpful.

**Should spousal support:**

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(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?

The Law Society would favour Option 2, even though it recognises that, in most cases, judges will not have much discretion in balancing the reasonable needs of both parties since resources will be scarce.

Marriages today are not homogenous, and comprise many different situations and circumstances. Some partners will work, some will stay at home, some will work part-time; some will have high worth assets, others will have none. The old dichotomy of the working husband being the ‘breadwinner’, and the stay-at-home wife who looks after the children does not reflect the reality of many contemporary marriages. The process cannot therefore be one of simply ‘compensating’ the party that raises the children (or not, as may be the case). This would lead, in many situations, to awards that would appear ‘unfair’ or create unnecessary hardships. It is also impractical, as attempting to calculate how much a party could have earned ten or even twenty years previously had they not taken care of the children, and applying this to a settlement, is fraught with difficulty. The ‘compensatory basis’ which aims to measure ‘loss of earnings’ or ‘what might have been’ seems very difficult, if not impossible, to achieve in practice.

The Law Society would therefore be in favour of a ‘merger over time’ approach. This seems a more accurate reflection of the diversity of circumstances found in contemporary marriages. It also enables the parties to achieve independence more quickly, albeit within a timeframe reflective of their personal circumstances. Attempting to balance the spouses’ position for a period proportionate to the length of the marriage seems both fair and realistic.

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;

The length of the marriage is an extremely important factor in determining the award that should take place following a divorce. Marriages tend to be shorter than they were historically: 22 per cent of marriages in 1970 had ended in divorce by the 15th wedding anniversary, whereas 33 per cent of marriages in 1995 had ended after the same period of time. It seems unfair to force one party to support another for the rest of their life, which could be forty or fifty years, if they have only been married for a period of, say, five years. Conversely, it seems unrealistic and cruel to expect a party who has taken on child-rearing duties for 20 years to suddenly become independent within a three year time frame following a divorce.

Of the many factors to consider when either unravelling the ‘merger over time’ or deciding how long spousal support should continue, the length of the marriage is the most important.

(2) the marital standard of living;

The marital standard of living is important, but will only be an important practical consideration in a small minority of cases: those were there are high net assets to distribute. In most cases there will be little to share, and it is unlikely that this would allow either party to maintain pre-divorce standards of living.

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2 http://www.ons.gov.uk/ons/dcp171778_258307.pdf
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

This should be the second most important consideration following the length of the marriage. Many couples today share child-care duties and are both working full or part-time. Shared parental leave can enable both parents to stay in employment for most of the marriage. In that case, it is more difficult to argue that one party ‘lost’ earnings through the marriage. Conversely, where one party has dedicated themselves to childcare, this should contribute to being awarded a fair share of the wealth or assets accumulated by either party during the marriage.

(4) the occupation of the former matrimonial home following divorce

This consideration is important too, as it often constitutes the only asset that couples will have. While this is particularly relevant to cases comprising couples with children, it will be relevant in other cases. Suitable accommodation is emotionally and financially crucial to the well-being of both parties.

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?

The Law Society would favour a reformed discretionary approach, based on the principles listed above, and with the aim of achieving independence for both parties, although it must be noted that for the vast majority of couples, this may not be possible whilst seeking to preserve anything like a sustained standard of living.

In most cases, there will be little capital left once the reasonable housing needs of both parties have been met. The first and foremost objective is to secure housing for both parties. This will often be accompanied by a requirement for child maintenance, leaving little or no resources to share between parties.

In cases where there are resources left after child maintenance and needs have been met, the considerations listed above should be given considered by the judges according to their relative importance (length of marriage, sharing of joint responsibilities, occupation of the former matrimonial home, and marital standard of living). This could be codified to ensure that self-represented parties know what considerations are likely to affect spousal support, and how. Were self-represented parties to read Section 25 (g) of the Matrimonial Act, they would be left with the impression that ‘conduct’ is a relevant circumstance, when it is rarely the case in reality. Such codification should provide a clear starting point, and diminish the regional variations in the assessment and award of spousal support.

Finally, the aim should be for both parties to be independent, and for spousal support to be both limited in time, and calibrated to achieve this independence.

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?

The duration of spousal support is a controversial and difficult issue for judges, and it will only be resolved by looking at the specific circumstances of a particular case. The length of the marriage, and the way joint responsibilities will have been shared during
the marriage are both important considerations in deciding how long spousal support should continue.

Spousal support should foster independence as long as certain conditions are present: parties should be of working age, and should have reasonable prospects of finding suitable employment enabling them to sustain the mode of living to which they are accustomed, or to which they would have been accustomed had they not been married.

Another complexity is that it is harder for parties to achieve independence where:

- they are looking after school-age children, than for those who have children who are at university or working;
- they are not of working age
- they have no reasonable prospect of employment.

Judges should therefore consider whether it is realistic for the financial contributions from one party to end without strongly prejudicing the other party.

For those cases which are not simply about needs, it is important to reflect that the sharing principle does not apply to future income.

**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?

A consortium approach comprising experienced researchers from disciplines including financial remedy and statistical methods would be most suitable to this kind of research.

The methodology would need to be multi-method, using for example Rogerson and Thompson's methodology as a basis for developing an appropriate methodology for this jurisdiction. The researchers would need to collect data nationwide in order to appreciate the nuances of approach across the country. This would take time to organise, collect the data and finally analyse the huge amount of data that will be generated.

A realistic timescale will be required and anything less than 5 years would be very difficult to achieve.

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.**

The Law Society would favour such a proposal, but would also add that circumstances such as the employability of a spouse, the length of time he/she has been out of work, and the prospect of that spouse finding suitable and suitably remunerative employment should be taken into consideration.

(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.

The Law Society is in favour of publishing guidance for the courts and for members of the public, as this would increase clarity for members of the public. With the expected increase in self-represented parties, it is imperative that members of the public are provided with guidance as to the kind of issues that will be addressed during litigation.

The guidance should focus on ‘how’ to approach the assessment of maintenance, as in the vast majority of cases the assessment will be a budgeting exercise designed to stretch limited resources.

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

The Law Society has reservations about providing guidance about (a), since this will be extremely dependent on the facts of each particular case and will depend on the principles outlined above.

Authoritative guidance, however, for (b) and (c) would be welcome.

(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?

The Law Society agrees that it would be appropriate for the FJC to provide such guidance in the form of a Practice Guidance.

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

The current information hub remains deeply disappointing, inaccurate and misleading, particularly with regards to the role of solicitors. Unless it is vastly improved, mere publication of guidance in the hub would not be enough.

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 Law Society agrees with this proposal.

We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above

The Law Society believes that, in most cases, the family home should be excluded from the definition of non-matrimonial property, especially if there are children involved. The exceptions to this rule will need to be narrowly defined.
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

The Law Society does not think that property acquired by one party during cohabitation should be excluded from the definition proposed above. Such property, acquired during the course of the relationship, should be subject to being shared.

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?

The Law Society disagrees with this proposal, as it would create a disincentive for people to treat their marriage as partnership and would reward those who are financially manipulative.

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?

The Law Society believes that where a non-matrimonial property has been sold and the proceeds reinvested in another property during the relationship for use by the family, that property should constitute matrimonial property, even if it is of the same kind as the property sold.

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?

The Law Society agrees with this proposal.
LAW COMMISSION  
CONSULTATION PAPER No 208  
MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS  
RESPONSE FORM  

This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk  
(see A-Z of projects > Matrimonial Property, Needs and Agreements)  

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or  
by post to: Law Commission  
Steel House, 11 Tothill Street, London SW1H 9LJ  
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

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<td><strong>Name:</strong> Dr Emma Hitchings</td>
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<td><strong>Email address:</strong> [REDACTED]</td>
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<tr>
<td><strong>Postal address:</strong> University of Bristol Law School, Wills Memorial Building, Queens Road, Bristol, BS8 1RJ</td>
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As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
### PRINCIPLED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

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<th>Overall, yes - but the argument in favour of reform is not clear-cut.</th>
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Since the decision in White v White, there has been limited empirical research as to the implications of the substantive law in practice and there has been no empirical research into substantive financial remedy outcomes in England and Wales. The focus in legal commentary has therefore been on the implications of the ‘big money’ cases for future ‘larger asset / income’ case (eg. Special contribution / piercing of the corporate veil – Petrodel v Prest / pre-nuptial agreements). Consequently, one of the main difficulties we are faced with when it comes to reform is that there is very limited data on how the problems and issues identified in the big money cases translate to the realities of the majority of people divorcing in England and Wales.

One of the few studies to examine this ‘reality’ for the ‘everyday’ case, post White, was the Nuffield funded research that I undertook into ‘everyday’ cases a few years ago and I will rely on the findings from this in some of my responses to the Supplementary Consultation Paper.

Both Simple Quarrels (Davis, Cretney and Collins (1994)) and my everyday study suggest that outcomes in financial remedy cases are compromise driven – a product of bargaining and pressure rather than the law (p.107 Simple Quarrels). It is this pragmatism and ‘bargaining with the weight of additional considerations’ (Hitchings, ‘Chaos or Consistency’ in Miles and Probert (eds)) that perhaps goes some way to explain the apparent difference between the relatively consistent advice that I found is given to clients in the everyday case and the wide variety of commentary as to inconsistent outcome; the fact that other considerations in addition to and sometimes other than legal doctrine impact the settlement that is ultimately achieved. Outcome may well be different to advice due to a host of other considerations which induce parties to settle.

In relation to duration of periodical payments, the Law Commission’s supplementary CP suggests that:

"where there are periodical payments they are often made on a joint lives basis ... There may also be uncertainty arising from the fact that judicial discretion is exercised inconsistently across the country."

In the everyday study, what was not clear-cut was the duration of spousal periodical payments. On the one hand, the majority of interviewees did not refer to the duration of any periodical payments order when responding to the mid-money scenario, saying that it was an issue for negotiation, but also depended on the wife’s earning capacity/ability to get back to work. Where it was mentioned, five practitioners suggested a fixed period whilst she gets back to work, whereas only one (Practitioner O) suggested joint lives. On one level this suggests a certain amount of consistency of approach amongst the practitioners in their advice:

- Duration depends on negotiation between the parties (i.e. other factors come...
Where it was mentioned, the majority mentioned that a fixed term would be most appropriate.

However, when practitioners’ responses to the general questions were examined, the study suggested that duration of periodical payments were dependent on the area of the country in which the practitioner was based and which county court they issued in. This is reflected in a very telling quote by practitioner B:

“I think in (local County Court) they are keen to limit joint lives maintenance whereas in the (other County Court) they’re not. That actually became clear when we had a Resolution seminar and the people who were presenting it were from (area which contains other County Court) and everyone in the room from (local area) – we were doing scenarios similar to your ones – and everyone in the room said, 5 years of maintenance with a bar, and the presenter said: are you serious? No way! It became clear that there was a huge difference of approach.”

Ultimately, the necessity of law reform in this area is very finely balanced and not helped by the lack of empirical data on the question of outcomes across the spectrum of financial remedy cases post White. As we emerge into an era in which legal advice for those who need it will be a memory, principle may well be helpful for those who are bargaining without recourse to lawyers AND for those legal advisers and judiciary deciding on cases where the asset structure is more complex/ income is higher and the legal issues more uncertain. However, at the ‘everyday’ level where parties have access to legal advice, I remain unconvinced that additional principle will be helpful in a situation where division of assets is dominated by affordability.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

The everyday study suggested that practitioners’ advice in the run-of-the-mill case in relation to the level of spousal support, demonstrated some linkage with child support levels and the one-third ‘rule’ (p 188-191, Miles and Probert (eds)). The following comment from Practitioner H summed up the position when advising in ‘scenario 1’ of the interview schedule (mid-money case with £50k income):

“...You’ve got 20 per cent in hand anyway because you’ve got the two kids and you’ve got the CSA, so really you’re looking somewhere between 20 per cent and half, that’s really the field, so if you say about a third, that’s probably the best you’re going to get.” (Practitioner H)

This scenario, which was based on the husband’s income of £50k is classed (by lawyer standards) as a middle-income case. However, according to statistics on the
HMRC website, a personal income of £50,000 before tax would put someone above the 90th percentile, and place him in the ‘rich’ category that Hamish Low spoke of in his paper at the Nuffield seminar on Tuesday 4th December.


What this demonstrates is how exceptional the big money cases are – and how even ‘everyday’ income from a lawyer’s perspective, is considered wealthy from a social-scientist / economist viewpoint. (My thanks to Fran Wasoff for this point). Consequently, from a practical perspective, periodical payments beyond providing for the basic housing needs of the children and/or the parties will be extremely difficult to achieve in cases where there is limited income.

It is therefore only in a small proportion of cases where the issue of principle will be of relevance – those cases where the income is sufficient to discuss the possibility of spousal periodical payments for their own sake. In those cases, I would favour the ‘merger over time’ option reflecting the complexity of the marital relationship and that it has potential wider applicability than a ‘compensation’ approach, in which the person receiving periodical payments would need to be compensated for something ‘tangible’ (i.e. lost income / potential career). Furthermore, a ‘merger over time’ approach to spousal support would be a principle grounded in the lived reality of the individuals as they leave their relationship, not needing a hypothetical assessment of quantification of loss for example.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

In those cases where income is sufficient to discuss the possibility of spousal periodical payments based on the merger over time approach, all of the factors identified above will be relevant: i.e. a childless marriage of 4 years will be less intertwined than a marriage lasting 20 years with 3 children. Whilst length of a relationship is one strong indicator as to the extent of the inter-relationship between the parties to the marriage, it cannot give the whole picture of the way in which responsibilities were shared and family life was led during the relationship.
7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

I would favour a bottom-up reform process along the lines of the approach developed in Canada, although the route to achieving this would be time-consuming and resource intensive. Any principled reform would need to be undertaken with a thorough appreciation and understanding of the current range of outcomes that occur in practice across the country and not merely the outcomes that we are aware of from the reported decisions.

In the vast majority of cases, the parties' capital will be used up meeting the housing needs of both parties. Once child support has been paid (and everyday housing and living expenses paid) there will be little room for negotiation on future income distribution. Reform along the lines of the SSAG approach, would allow for a range of options for the parties to negotiate (ensuring some familiarity with the current purely discretionary approach), but enabling consistency through an appreciation and understanding of the current approach and bringing the viable options for spousal support within a specified range.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

Independence after a relationship has ended should be strongly encouraged but absolute limits on support have their own drawbacks in terms of the possibility of causing hardship in certain situations. I would be concerned about any proposal that placed absolute limits on the extent and duration of periodical payments but would strongly support 'bottom-up' guidelines along the lines of the approach developed in Canada (see my response to question 7.5 above).

Spousal support should therefore foster independence but have regard to the lived realities of the individuals involved. For example, having regard to standard of living will only be relevant where there are sufficient assets to take this into account. In the vast majority of cases, standard of living will be irrelevant as the majority of periodical payments will be taken up with child support and keeping a roof over the parties heads (see my response to question 7.3).

One option for the Law Commission in providing a possible statutory incentive towards independence could be to consider a more strongly worded s.25A – rather than the current requirement that a clean break should be merely 'considered'.

7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

The research needed would be a long-term project requiring something akin to the Canadian research by Rogerson and Thompson over a realistic timeframe (5+ years). Ideally, this would comprise a consortium of experienced researchers from disciplines including ancillary relief and statistical methods. The methodology would need to be multi-method, using Rogerson and Thompson’s methodology as a basis for developing an appropriate methodology for this jurisdiction. The researchers would need to collect data nationwide in order to appreciate the nuances of approach across the country.

IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).
(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

1. Statutory provision

Whilst this is initially attractive, my concern is whether the provision as specified is too limiting. For example, an older spouse coming out of a long marriage who has been out of the workplace for many years.

2. Authoritative guidance

Publishing guidance for the courts and for members of the public would be very welcome. With the expected increase in self-represented parties in the wake of LASPO 2012 coming into effect, authoritative guidance would be particularly useful for the parties who currently have access to private family legal aid, but after April will be negotiating their financial remedies in mediation or even around the kitchen table.

Information is currently available from a number of online sources, but there is nothing ‘authoritative’ currently available. The online hub has just been launched, but as yet, this is an unsophisticated mechanism for providing authoritative guidance to members of the public. Unfortunately, guidance alone will not ensure an individual’s understanding of their legal rights and responsibilities but it is important that members of the public are not only provided with information about the substantive law, but guidance should also be available as to the procedural journey (and the associated options) that they are about to undertake.

It is hoped that any authoritative guidance would be subject to a consultation process where the main stakeholders (Law Society / Resolution / District Judges Association etc) who could feed into the guidance and endorse it.

3. Provision by way of statutory amendment or authoritative guidance

I would be hesitant about the benefits of statutory amendment without a full-scale research project to look at the current outcomes in financial remedy cases.

Consequently, any authoritative guidance (as per my response above) would need to be clear that this is guidance based on the current law, intended to encourage consistency of approach and be a useful reference point for those involved in the process: this will include parties / lawyers / mediators and the judiciary. One potential consequence with providing interim guidance (not based on the current law) at this stage is that it may have a noticeable impact on any findings/outcomes from a future full-scale research project.

As regards the specific issues for consultation:

- I have major reservations about providing guidance in relation to (a-c) without any evidence. In order to provide guidance or statutory amendment, research
along the lines of the Canadian approach would be a necessity. In the long-
term, providing timescales within which independence could be expected and
the financial arrangements that could be expected after short childless
marriages may be more realistic.
- The principle of joint lives orders runs counter to the objective of
independence, although absolute limits on support have their own drawbacks.
However, guidance which encouraged parties/judiciary to consider/make a
term order capable of extension would place the onus on the payee to apply
for an extension and would encourage the recipient to focus their attention on
trying to regain their independence in the knowledge that continuation of the
spousal support order was not guaranteed.

4. Who should provide that guidance?
The Family Justice Council in the form of a Practice Direction accompanying the
Family Procedure Rules

5. Publication of that guidance
Publication of any guidance should be accessible for those individuals who will no
longer have access to private family legal aid after the implementation of LASPO
2012. Currently, the information hub provides unsophisticated content on financial
remedies and guidance merely ‘posted’ on this website without any accompanying
explanatory notes will in all probability be of limited assistance to parties in the
process of divorcing.

Currently, Liz Trinder et al are in the early stages of a MoJ funded qualitative
research project which is designed to develop the existing evidence base on the
range of SRPs in private family law cases, their behavioural drivers and their impact
on the court system. Publication of any guidance on financial remedies would benefit
from the results from this project into the usual range of resources / sites and
organisations that SRPs rely. i.e. If it is found that SRPs rely on certain online sites or
particular organisations, these could be targeted to provide the relevant information.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

Without detailed research as to substantive financial remedy outcomes in England
and Wales post White, suggesting any further reform would be incredibly difficult. As
discussed in my response to question 7.2, the focus in legal commentary has been
on the implications of the ‘big money’ cases for future ‘larger asset / income’ cases
(eg. Special contribution / piercing of the corporate veil – Petrodel v Prest / pre-
nuptial agreements). Therefore research on needs – both from a theoretical and
empirical perspective has been limited. Consequently, one of the main difficulties we
are faced with when it comes to reform is that there is very limited data on how the
problems and issues identified in the big money cases translate to the realities of the
majority of people divorcing in England and Wales. Therefore before any further
reform measures on needs are suggested, research as to the outcomes of needs
based cases would be helpful to examine issues such:

1. Whether outcomes in those cases are inconsistent and inaccessible
(particularly relevant post LASPO)

2. Without recourse to legal advice (and mediation), how are parties negotiating settlement and to what extent are they relying on substantive law?

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

Possibly

Marital property agreements (and in particular pre-nuptial agreements) are pertinent for couples with sufficient assets to make the agreement worthwhile. Without guidance as to the level of needs for the purpose of pre-nuptial agreements, the wealthier spouse who wishes to enter into a pre-nuptial agreement, may well try to limit the needs based claim of the other spouse (at the date of the contract and/or at the time of the marriage break-down) I appreciate that the Law Commission consider this unlikely (p.85 LC CP), but it is a possibility. In addition, it is in the larger asset case where there is scope for discussion and manoeuvrability over what constitutes ‘needs’ and therefore guidance on this point would be helpful (i.e. what is ‘needs’ in a £20 million asset case?)

Furthermore, specifying the level of needs may go some way to protect the less well off party who may be at a disadvantage in negotiations. In the MPA research study, one of the most striking examples of the inequality in bargaining power between the parties to a pre-nuptial agreement was demonstrated in one of the practitioner’s most recent cases – where the paying (wealthier) spouse set a tangible financial limit on the amount of legal advice that the other party was able to receive. Consequently, wealthier individuals may try to limit the entitlement of the other spouse if the option is available to them. With a definition of ‘needs’ for the purposes of pre-nuptial agreements, this option will be limited.

NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

The issue of non-matrimonial property is not particularly relevant to the majority of everyday cases where settlement will be focused on the needs of the parties and
practicalities – in particular housing two parties and any respective children.

In those cases where the assets are sufficient to consider the distinction between matrimonial and non-matrimonial property, the source of the property is a relevant consideration and given the recent developments in case law, should no longer be subject to the sharing principle. However, my only concern about the above provision relates to the basis of needs and any potential slippage into the ‘everyday’ case where such a distinction should not and cannot be relevant.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

In the majority of cases, the family home should be excluded from the definition of non-matrimonial property, especially if there are children involved (see my response to question 7.14 below).

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

Property acquired by one party during cohabitation should be excluded from the definition proposed above. Such property, acquired during the course of the relationship, should be subject to being shared.

Guidance on the meaning of cohabitation in the context of financial remedies on divorce and dissolution would be helpful.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

No

This is a tricky question and one that the Law Commission addresses with the reference to the difficulties associated with what counts as family involvement in the non-matrimonial property.

Ultimately my approach to this question draws on my response to question 7.3 and my view that the principle underpinning spousal periodical payments should reflect the ‘merger over time’ principle. For example, I would class it as unfair if non-matrimonial property that has been used by a family with little consideration as to its ownership whilst the family unit was together (e.g. a holiday home or a share portfolio which paid for a child’s school fees) was taken out of the section 25 exercise in its entirety by virtue of its ownership. In circumstances where the family has enjoyed, used and taken pleasure out of the non-matrimonial property, I would suggest that the importance of the source of these assets diminishes over time (as per Nicholls
and Hale in Miller/McFarlane).

Therefore my response to this question is underpinned with the same underlying principle as my response to spousal support: That the ‘merger over time’ principle reflects the complexity of the marital relationship and the lived reality of the individuals during the course of their relationship.

For individuals who wish to use their non-matrimonial property for the benefit of their family but retain it in its entirety upon any future divorce, the option to enter into a binding pre-nuptial agreement would be available (if the Law Commission’s MPA proposals are enacted).

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Where a non-matrimonial property has been sold and the proceeds reinvested in another property during the relationship for use by the family, that property should constitute matrimonial property, even if it is of the same kind as the property sold.

See my response to question 7.14 for my rationale.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

I agree
This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

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| Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above): |
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**PRINCIPLED REFORM**

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<td>Supplementary Consultation Paper, Part 4, paragraph 4.113</td>
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<td>Yes. Excess discretion in the hands of the judiciary has led to an interpretation of the law which is too wide and a loss of “equity” in the application of the law. We should not take pride in London being seen as the “destination of choice” for non earners seeking divorce.</td>
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<td>Supplementary Consultation Paper, Part 4, paragraph 4.114</td>
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<td>In this day and age it is inappropriate, other than potentially in very exceptional circumstances, for spousal maintenance to continue for an indefinite period or indeed for joint lives. All adults should be expected to seek to provide for themselves, either alone or collectively with one or more others. It is not the responsibility of a former spouse to maintain the other. The contribution of the parties to a marriage can be measured in the value of the assets at the point in time of the dissolution or end of the relationship. Other than as a transitional arrangement there should be no need or expectation of continued income support.</td>
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<td>To the extent the couple have children who require support and care the financial consequences should be addressed through sufficient child maintenance and not through spousal maintenance.</td>
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7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

I believe that each adult should stand on their own two feet. Transitional (and by definition temporary) support may be provided from one spouse to the other if the recipient spouse has demonstrably reduced their earnings ability as a result of joint decisions made in the marriage. However the objective of the transitional support is to help the recipient become independent. Independence and need should not be referenced to the marital standard of living but simply to the ability to operate independently.

Therefore the length of the marriage is only relevant to the extent it influences the need for transitional support from one spouse to the other. If the marriage has been a long one then the absence from the workplace may have been longer and hence more transitional support may be required. However this transitional support should only be temporary in nature.

Where there are joint responsibilities that continue after the breakdown of a marriage then this will also influence the transitional support. In the instance of childcare then the ongoing responsibility should be shared equally and this may require the parties to agree to vary the economic support provided from one spouse to the other if they also want to vary the division of childcare responsibility. However this may be achieved through the allocation of shared marital assets rather than through the provision of income support. An example would be that the higher earning parent may conclude it better for children to remain primarily with their “non working” parent for more of the time but then the higher earning parent should be expected to “pay” for the childcare being provided. In the instance of caring for elderly parents that responsibility should fall on their offspring, but again economic arrangements could be made to “pay” for any care provided by the other spouse.

The matrimonial home should primarily be considered in the allocation of marital
assets. However if the asset allocation is biased towards one party then this should relieve or reduce the obligation to make transitional support payments. All too often we see a non-working wife secure the matrimonial home “for the care of the children” and then also receive substantial periodical payments. Finally the consultation document refers in a number of places to the practice of nominal periodical payments being ordered so that they can be changed later if needs change. If needs change after the divorce then it should be for the party to look out for themselves. There should be no need for the periodical payments to be revised. Under no circumstances should the earning spouse be expected to make payments that are greater than their income.

7.5 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?

Simplicity and clarity aid understanding and ultimately aid dispute resolution so if a simple formula can be articulated it is far more preferable for us to adopt that simple route which may in turn help keep financial matters out of the family courts and agreed through alternative means. However if the guiding principles can be sufficiently clearly articulated then a discretionary approach may suffice, although as judicial discretion is heavily influenced by the nature of the advocacy system of law there need to be provisions for either removing divorce proceedings from the “advocate” courts or sufficient checks and balances to ensure only appropriate discretion is applied.

Given the likely cost of this and the likely unwillingness to seriously reform the ability of parties to resort to the courts it may be best for a formula to be defined that produces a range of outcomes to provide the parameters for the judgement to be exercised. What we must seek to move away from is the lottery and uncertainty that are the family courts today.

7.6 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
I believe the absolute guiding principle should be for the adults in a “failed” marriage to become independent. Therefore it is critical that appropriate incentives be included in a reformed basis which will limit the duration of any transitional support. However it would be possible for payments made for services provided (childcare or care of elderly parents) to go on beyond the limit of the spousal transitional support if the services themselves are provided beyond that time limit.

7.7 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?

As an individual it is difficult to comment on this question, although the current arrangements, whereby England has become the “divorce capital of the world” need to be stopped and replaced with a more equitable and equal approach as soon as possible.
A. Michael should have no entitlement to live at the same standard as he lived during the marriage. The objective is for him to be independent. In the initial scenario, on his own it is extremely unlikely that he would have achieved anything like the standard described. The reasonable allocation of the capital in the marriage should provide adequately for Michael to set up independently. In the variation scenario (Michael gave up a lucrative career) then it may be appropriate for Sophia to provide some transitional support. However Michael has clearly not sought to maintain his career as evidenced by his choice of economic activity whilst married.

B. The settlement of marital assets should be determined first and then the degree of transitional support should be impacted by the extent to which the allocation of assets gives Michael the ability to set up independently. In this case I believe that the property has only been able to be purchased as a result of Sophia’s income and therefore the asset allocation should favour
Sophia – there should be no presumption of a 50:50 split of matrimonial assets.

C. Chris has no responsibility to provide for Pat’s care. To the extent that the division of matrimonial assets does not provide sufficient resources for Pat’s continuing care then the responsibility will fall on the State.

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. A calculation would provide a degree of certainty to both parties and therefore must be helpful. However there also needs to be guidance as to how to use the calculation and apply judgement to reflect circumstances and preferences. As noted above I suggest the formula could provide a range of outcomes and it is then for the parties to seek to agree where in the range they fall.

E. As noted above there should be limits on the length of time that transitional support is provided. Children and the additional costs of children can be addressed through reforming the child maintenance provisions and should not impact on spousal maintenance. However provision may need to be made for the economic value of one parent carrying out more of the childcare than the other.
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

F. The length of the marriage / relationship should not, in itself, impact on the level of support to be provided. However the time out of the workplace may well be a relevant factor for the degree of support required for the non-working party to transition back into the workplace and independence.

G. Sarah, Michael and Pat should have no entitlement to continue at the same standard of living. They need to live as independent parties and to find the relevant standard they can afford to maintain. Couples may experience significant fluctuations in their lifestyles during the course of a relationship, for instance in the event of redundancy. They have to adapt to those changes. The current arrangements for spousal maintenance put the interests of the recipient ahead of those of the earner and provide a greater degree of protection to the spousal maintenance than the earner has in practice. This is completely inequitable and plain wrong.

IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);
(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);
(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and
(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

(1) Statutory provision to ensure that the payee spouse becomes independent within a reasonable period is critical to making the right change in the law. However I disagree that “independence” is less likely in the period whilst the children are in full time education. The provision of child maintenance and economic arrangements to compensate the primary carer for their excess portion of the childcare may mean the payor spouse continues to provide financial support, but it is important that this is not confused with spousal maintenance which should cease after the transitional period. In addition given the number of flexible roles within the workplace there should be an expectation that the payee spouse will return to the workforce even if the children are still in education.

(2a) A checklist of “need” may be helpful to the parties in a divorce assessing their needs. However it is important that the needs are matched equally and that priority is not simply given to the payee spouse’s needs ahead of the primary earner. There also needs to be a distinction between genuine need and the wishes or desires of the party to have a particular lifestyle. Therefore the marital standard of living should not be a relevant factor in the assessment of need. For instance the children in a failed
marriage may have previously had horses. When the single earner needs to now provide for 2 households there should be no expectation that keeping the horses qualifies as a need!

(2b) Prioritisation of the checklist is also helpful. However this must reflect the needs of the children (first) and then of both parties.

(3a) The transitional period to independence should be short so as to act as an incentive to the payee spouse to become independent. However also consider my views on the purpose of child maintenance and economic support for services provided set out above. Need should never be set by reference to the level of the marital standard of living.

(3b) Periodical payments should never be for an open ended period and hence should never be for joint lives. To allow this would be to fly in the face of the drive towards the payee spouse becoming independent.

(3c) As noted above I do not believe that the length of the marriage should be a relevant factor although it may give rise to relevant factors, such as absence from the workplace. Therefore there needs to be no special provision for short, childless marriages.

(4 and 5) The guidance needs to be authoritative and only capable of being set aside or ignored by a judge in exceptional circumstances. Publication should be in whatever form provides for this. Perhaps the statute needs to identify the body that will be responsible for the guidance and the weight the guidance should have.

(Other) if the income of the payor spouse is not sufficient to meet the combined needs of their household and the payee spouse’s household then each household should be required to make equal compromises to curb their needs. This should include any commitment arising from a payor’s spouses second family / children. The stated principle of “the First Family First” is in many circumstances entirely objectionable.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

Reform of “First Family First” principle as a subsequent family or child should be
equally important for the payor spouse.

Clarity around

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

There is no logical reason for a separate definition of need in relation to qualifying nuptial agreements but a common interpretation should be applied.

NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

Non matrimonial property should be excluded from assets for sharing. In evaluating the needs of the parties extreme care should be exercised if the only way those needs can be satisfied is through the realisation of non-matrimonial property as this would prima facie indicate that the level of need being established is excessive.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

Whether the family home should be included or excluded in non-matrimonial property
depends on the circumstances that gave rise to the family home being procured.

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

No specific opinion.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

No specific opinion.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

No specific opinion.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

No specific opinion.
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<th>7.17 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?</th>
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LAW COMMISSION
CONSULTATION PAPER No 208

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

RESPONSE FORM

This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

**Your details**

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Are you responding on behalf of a firm, association or other organisation?
If so, please give its name (and address, if not the same as above):

Tony Roe Solicitors
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As explained above, we will take full account of your explanation but cannot
give an assurance that confidentiality can be maintained in all circumstances.

PRINCIPLED REFORM

7.2 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?

Yes.

7.3 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?

(1) No. The concept of loss being caused by the relationship might cause unfair results, particularly if “cause” was interpreted too strictly.

(2) Seeking to unravel the “merger over time” would be nigh on impossible, complex and expensive.

7.4 In answering the question at paragraph 7.3 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.

(1) The length of the marriage is probably one of the most easily measurable criteria. However, it does have its problems. The level of support in a short marriage undergone in later life may need to be greater. Practitioners are used to measuring it to date of separation but that can be in dispute. Equally,
there may be dispute over how “seamless” was any pre-marital cohabitation.

(2) In most lower and middle money cases it is very rare that standard of living can have any bearing on outcome as neither party can normally dream of enjoying again that which they had, at least in the immediate aftermath of the marriage.

(3) Highly relevant.

(4) Relevant. Of course, one would normally wish for one party to occupy the property post-settlement, thus avoiding the uncertainties of the market and costs of sale, if at all possible.

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

(1) Yes.

(2) No. Not under any circumstances.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

In my experience, there is often little real analysis of a party’s earning capacity, let alone that which it may be reasonable for them to acquire.

As far as spousal periodical payments are concerned, it is unsatisfactory for the onus to be on the payer to apply to vary or terminate a joint lives’ order.

It may be a blunt instrument to propose but perhaps a rebuttable presumption could be considered that spousal periodical payments should not be payable for a period of years beyond the length of the marriage, unless there are children.

7.7 What preliminary work would be needed to research and pilot a new approach? In particular:
As a non-academic, I find it rather difficult to answer this question. I accept that empirical research would be necessary. In the present climate I find it hard to imagine where the money might be found for such a process which would be costly in terms of time and money.

In reality, I feel that it is highly unlikely that such research could be realistically progressed in the foreseeable future.

Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments

A - to live at the same standard as he would have lived during the marriage, and if so for how long? I do not think that Michael should be necessarily entitled to live at the same standard as he would have lived during the marriage. Even if he were to be so entitled, then I am not sure
that it would be right for him to do so for anywhere near the six year length of the marriage.

- to as much as he needs to relocate and to start again as a single person?
  Possibly, but we may ask ourselves what do we mean by “needs”?

- to a more graduated transition to independence, with some income contributions
  from Sophia and, if so, for how long? Again, possibly. Any transition should be no
  more than a couple of years.

B. I believe that this entitlement should be subtracted from that value before sharing what is
left rather than being calculated before the capital value of the couple’s home is shared.

C. Compensation aside, Chris does have a responsibility to provide for Pat’s care after the
ending of the civil partnership even though Chris’ needs might not be generated by the
relationship. Were the relationship to have continued beyond the eight years one would have
expected Pat to provide for Chris’ care. The question is to what extent can Pat afford to do
so.

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the
difficulties in calculating levels of support on any basis; even if you feel that Sarah should be
compensated for her past and ongoing losses as a result of the marriage, you may also feel
that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal
advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s
claim (as, of course, they can for child support). Would they find that helpful because it gave
them an answer? Or frustrating because that answer cannot be flexible or responsive to their
individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a
limit on the length of time for which Sarah can be supported by Ian and, if so, how strict
should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. One might argue that such a method of calculating a figure would be better than nothing.
Even if there were to be provided a range of values, an individual could find that they were
selling themselves short, although they would risk this anyway without independent legal
advice.

Pragmatically, bearing in mind the abyss that looms in April, after the severe reining in of
public funding, something must be better than nothing, no matter how frustrating it might be. It
is, however, inevitable that we will have even more of a first class and steerage method of
(access to) justice.

E. I do not feel that there are sufficient incentives for independence. As mentioned above,
there could be a rebuttable presumption that spousal periodical payments should not be
payable for a period of years beyond the length of the marriage, especially if there were no
children. I concede that this could give very unfair results if there were children, whereupon
the limit for spousal periodical payments might be until the youngest child reached 18 years.
### Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

### Comments

F. Were my proposition at E to be used, the position would not change. However, one might argue that my proposition undermines the section 25 principle relating to the duration of the marriage.

G. As alluded to elsewhere in my response, entitlement to maintain standard of living is one thing. The ability to maintain it, based on the resources available, is quite another.

H. Such continuing responsibilities are very important. I agree that Sarah having the ongoing care of the children should make a difference to levels of support in case study one.

I. Sarah should be entitled to carry on living in the family home after divorce due to factors including the discrepancy between the parties’ respective financial positions and, of course the children.

Sophia: probably yes, unless it has to be sold.

Ian: probably not unless he can somehow provide purchased suitable alternative accommodation for Sarah of similar worth.

Michael: probably not. Short marriage with no children where Sophia’s earnings bought and paid the mortgage on the £2m property.
IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

(1) This would be my favoured approach.

(2) Guidance on the considerations at (a) and are usefully provocative and could prove very helpful, as it would be for (b).

(3) I would favour statutory amendment in each case.

(4) The Family Justice Council would seem appropriate but, anecdotally it is apparently overworked.
7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

I struggle to make any suggestions here.

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

Yes. I believe that should also specify the level of needs.

NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

I feel that this is about as good a definition as we are likely to get, subject to my point below.

The only real point that I would make is in terms of “seamless cohabitation”. Accordingly, perhaps (2) could read: “acquired before the marriage or civil partnership took place or before any prior and seamless cohabitation occurred”.

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7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

I am persuaded that the family home should be excluded from the definition of non-matrimonial property proposed.

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

Is it not a contradiction to measure the length of the marriage, including seamless cohabitation, but then regard property acquired by one party during such cohabitation as non-matrimonial property? I believe that it is.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

Yes. I am also persuaded by the footnote: “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”.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Yes. The sort of tracing exercise otherwise required would be detailed and costly.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Yes.
7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

I think that this would be far too difficult if it were to avoid unfairness caused by too much rigidity.
LAW COMMISSION
CONSULTATION PAPER No 208
MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS
RESPONSE FORM

This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:
www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:
by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

No.

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

Yes – I absolutely agree with this.

My experience of the current law is that it is too vague and the applicable is so variable and judgemental that it results in inequitable and highly variable orders, in unsustainable situations being created, long delays and very significant expense through use of the courts which always has a detrimental impact on the families involved, and I consider there is a lack of guiding principles as to what spousal support is actually trying to achieve.

In addition, given the rise in life expectancy and the rates of divorce, and the resulting impact of many more second families I think far more clarity is needed to ensure that situations do not penalise (generally) the male parties and that the law becomes more equitable, consistent and sustainable whilst (in particular) still supporting children in families where marriages end.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114
I believe that spousal support should be a transitional, short term arrangement to facilitate a move to independence.

I do not think under any circumstances that a spouse should be maintained in the standard of living enjoyed during a marriage for joint lives.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

1) I think the length of marriage is a relevant factor, but I think that beyond a certain period (say 3 to 5 years) its relevance diminishes. And actually if no children, then I think it could well be irrelevant.

2) I do not think the marital standard of living has relevance in determining level of need and I believe a needs based assessment should put equal weighting on the needs of both parties to the marriage. It should not be appropriate to maintain the standard of the (typically) wife (or the financially poorer party) at the detriment of the husband.

I also think a needs based assessment should start from a level of actual need, not previous lifestyle. I.e. necessities (which would for example not include things like dog grooming, horses, or manicures). The law should seek
to meet the needs of both parties equally first (and then only for a period of
time say 0 to 5 years depending on length of marriage and number of
children) before considering the appropriateness of provision for lifestyle
(which should also only be made for a short period of time). And then the
provision for lifestyle of the (typically) ex-wife should not come at the
detriment of the needs of the (typically) ex-husband.

3) I think this factor is relevant – however if settlement were to continue to
typically pass the former matrimonial home to the women and dependent
children then I think the capital settlement is already making provision for
need for some significant period of time and this should be better taken into
consideration.

4 – the typical scenario appears to be the wife remaining in the matrimonial home
following divorce with the children. I think that whilst this scenario is probably largely
appropriate where there are children within a marriage, that it should be recognised
that this in itself provides the opportunity for a wife to transition over time so that as
children grow up and move on there should be an expectation that a wife could
downsize at that point and therefore provision of the marital home to a wife gives
them the opportunity to further support their independence in the longer term and this
should be factored into (i.e. reduce) the level of spousal maintenance – or at least be
one key factor as to why joint life orders are always inappropriate.

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116
I think a formulaic calculation would be more appropriate. This would provide greater certainty for all parties and should significantly reduce the involvement of the courts in the process which must be a benefit.

The current approach demonstrates that significant discretion in the hands of judges results in serious inconsistency in application.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

I firmly believe that the overarching principle of spousal maintenance should be about transition to independence and therefore limits are appropriate as I believe is a (relatively short) time limit on the payment of spousal maintenance. The current system in my view provides no incentive for (typically) wives to seek independence.

This is of course further compounded by the benefits systems in this country which does not provide any consideration of the levels of maintenance paid, and therefore in my view unfairly penalises the parties paying maintenance.

In many ways I think if there are no children in marriage there should be none, or very limited payment of spousal support. Where there are children there should be more, but the period of spousal support should still be limited (but probably to 5 years max).
7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

I think consideration of models adopted in other countries is important as well as work to define what ‘needs’ are. This would I expect be something that could be linked to the benefits structures in this country in terms of minimum needs of people.

Action should be taken quickly because it is clear that the current approach is very flawed.
**Our case studies: the basis of support**

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:

- to live at the same standard as he would have lived during the marriage, and if so for how long?
- to as much as he needs to relocate and to start again as a single person?
- to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

**Comments**

- In case study question A I believe point 3 ‘to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?’

- However I consider that in the event that the economically stronger party is able to provide a clean break to give sufficient funds to relocate and start again then that party should have that option if that is their preference.

- I think the period of transition should be c.3 years (unless the marriage was shorter than 3 years). I do not believe transition should only be once children are > 18. I think there should be a maximum period of up to 5 years based on the length of marriage.
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D – I think being able to see a calculation providing a guide would be helpful to give some context as the current law is so flawed. Clarity must be helpful in all situations. I also think there should be a formal link to the CSA calculation for child support and that that should be the first element payable. Even if the formula gave some element of a range that would be more helpful that the current situation which is down to the judge that you get on the day and the court that you happen to end up in.

E - Yes I believe that there should be rules on the length of time that support should be provided for, and they should be strict. The time period for payment of support should probably be longer in the case where there are children (but not for a period until all children are >18) but should still be limited.
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

I think a marriage of 12yrs rather than 6 may make some difference, the same as 10 rather than 6, and the same 2 rather than 8. But not a very significant difference.

G- no I do not think in divorce that the economically weaker party should be entitled to continue at the same standard of living, or if they are it should be funded only for a transitional period which should be limited.

The party who continues to live in the former family home and gets the benefit of all that capital should get reduced periodical payments as a result of that. It does not appear to me at this time that the capital settlement is considered when the periodica; element is set.
7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);
   b. the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);
   b. the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and
   c. the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

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.
### Supplementary Consultation Paper, Part 5, paragraph 5.62

I do not think that ‘independence’ should be viewed as being able to support oneself to live at the standard of living during the marriage.

### Supplementary Consultation Paper, Part 5, paragraph 5.63

7.9 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.

7.10 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.

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<td>I think fundamental reform is required and is required urgently, but in the interim some guidance on how to assess need could be helpful.</td>
<td>I think it should be possible to contract out of provision for needs.</td>
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There is then separate recourse through the law should someone for some reason have entered into an agreement inappropriately.

**NON-MATRIMONIAL PROPERTY**

7.11 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?

*Supplementary Consultation Paper, Part 6, paragraph 6.41*

| Yes |

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.
No. But it may depend how it has been funded since the marriage.

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Do consultees agree?

Supplementary Consultation Paper, Part 6, paragraph 6.87

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Supplementary Consultation Paper, Part 6, paragraph 6.88
7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100
Response to the Law commission Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements

Julia Thackray – Mediator, Collaborative Lawyer, Head of Family Law Penningtons Solicitors LLP

This consultation asks whether there is a need for principled reform and, if so, what changes should be brought about in relation to matrimonial property and on the question of needs. In my view there is a need for principled reform, rather than continued piecemeal development through individual case decisions. A full review of financial provision is called for by many, but is not an option at present. Here, though, in combination with the consideration of the issues on pre-marital agreements, many of the key areas in family law practice are covered.

Discretion vs certainty. Fairness v clarity.

The current position is that the MCA provides a good framework for a fully discretionary system; it allows all factors to be considered in the particular circumstances of each case. As a family lawyer I have always appreciated the flexibility of the system and the ability of judges to adapt to circumstance. Discretion is the protection for those whose circumstances are complex or unusual and for whom hardship or unfairness may be caused by the blunt application of a set of rules. However, in practice this fully discretionary approach can cause difficulties; the discretionary arguments are relied on not only in those cases where an impartial third party would recognise the need for a more subtle approach, or divergence from the general rule. The arguments are applied in many other cases, perhaps where one person holds very firm views (which may not be in line with current guidance) as to what a desirable outcome may be and where there are significant funds in issue it may be ‘worth running’ the arguments. Where lawyers see it as their duty not only to advise on the issues and the potential availability of certain arguments, but to ensure that they are tested whenever possible, then inevitably the boundaries of particular arguments are pushed. In my experience there are many people who do not seek actively to push their cases to the limit of what could be achieved, e.g.to pay as little as possible or to receive as much as possible. They do often, however, feel pressured by the actions and attitudes of their ex-partner/ex partner’s lawyer to defend themselves when they feel pressed. Comments made early on in almost all cases reflect people’s desire to be fair, to have a fair deal and not to be ‘taken advantage’ of by the other person. Where there is significant uncertainty about outcome on a particular element of the outcome, there is more scope for pressure and argument and more scope for feelings of unfairness if the outcome is very much at one extreme of the possible bracket of outcomes. It is my view that many people find the uncertainty of outcome difficult and often respond by protective or defensive approaches and that a greater degree of certainty would help those people to resolve their cases.
The need for greater clarity has frequently been the criticism of the current system. Clarity is desirable, but so is fairness and one may come at the expense of the other. Like many other family lawyers I have been attached to a discretionary system with all its capacity to achieve fairness in any given situation. I am moving now, however, to a position further along the spectrum towards clarity over open ended discretion.

One factor identified has been the fact that in the future landscape of family law there will be many more self represented people with little or no legal advice and that in those circumstances, better clarity and a manageable system than a bespoke system that few can afford. I don’t think that we should allow a principled review of this area of law to be determined by political decisions to remove legal aid etc and to give up on something only because it may not be universally accessible. However, I have begun to see this fully discretionary system as not only something of a luxury that we collectively may not be able to afford, but that in many ways it is not one that is as highly desirable to the people involved as may be thought. In short, many people I have worked with value certainty highly, or at least they would value greater certainty than they currently have. Not only does the tailored outcome cost a lot to achieve financially, it can cost a lot in terms of time and emotion to work through the procedure. Often an earlier resolution would be welcomed, because the end of the whole process can come more quickly and for so many people they want to move on.

For some greater predictability means knowing what is going to be the outcome and getting on with accepting it. Sometimes there is a desire to be ‘told how it is going to be’, but for many people it is something different. These people do not seek the comfort of a predictable or imposed outcome, whatever it is, but they want to be able to reach their own solutions. In order to be able to do that, however, people either need to feel very comfortable with the idea that they construct their solution or they need to feel more sure about the likely range of outcomes. Where they feel strongly enough they will take a point and argue it, but clearer guidance is likely to help to encourage both spouses that the scope for argument is fairly well defined and that fairness can in some way be quantified. I feel that a fairer basis for the development of law in this area would be principled reform, rather than relying on individuals to want to litigate a particular point and be willing to take it to an appeal to test a point. Not only does that distort by an over emphasis on big money decisions as these are the cases than can be tested, but that as a legal community we expect individuals and families to bear the financial and emotional cost of breaking new legal ground.

Needs

It is, in my view absolutely essential that needs are properly dealt with on divorce and I support the approach of the Commission in its pre-marital agreements consultation that meeting needs should be a pre-requisite for any enforceable nuptial agreement. A system of very time limited spousal support would risk many spouses being left without sufficient resources with the other potentially
very well off and this would particularly unfair where decisions had been made during the marriage which compromised one person’s earning capacity more substantially than another’s.

I think that arguments against on-going spousal support often assume that a 50:50 share of capital will be sufficient and fair. Clearly in families with few assets there will be little or no capital to share, but in many relatively well-off families there may be significant income which is all taken up with expenditure and there remains little capital on division. Real unfairness would be created in those cases by an over focus on capital at the expense of income.

Post White there may well be high asset cases where a capital split will be sufficient and fair, but there is significant uncertainty about the point at which 50:50 on capital is ‘enough’ without maintenance; at how many millions does that rule apply? This uncertainty promotes litigation in those cases where different views are held about whether any maintenance is payable or not.

*Compensation or unravelling ‘merger over time’*

I tend to favour the latter approach. If there is any common approach to marriage (and that is a big ‘if’) then I think that it is in the territory of commitment and interdependence.

To me the compensation narrative tends to bring a transactional quality to relationships. In its current form the compensation argument applies to a relatively few spouses who can prove what they have ‘lost’ or lost the chance of obtaining. That privileges people who had a lucrative career at the expense of those who have lost a chance at work experience of a more modest kind who may still be significantly disadvantaged economically on divorce.

People expect their marriages to last and they make joint decisions about child care, work and where they will live on what seems best for their family at the time. I don’t think that people should be penalised for such an approach and I think that it would be unhelpful on a societal level if people were discouraged from doing what they feel is right in terms of looking after children or elderly relative on the basis of fear that they may be disadvantaging themselves in this context.

I do not think – for the reasons illustrated in the Commission’s cases studies – that limiting compensation to reasons created by the marriage is helpful. The reality that someone has become disabled through accident is a real one and should not be ignored on a division of assets because it was not disadvantage generated by the relationship. It would also seem to invite litigation as to what could be put down to the marriage and what came about for other reasons.

*Particular factors in assessing need/spousal support*

(1) I think that the reactions to the length of marriage issue are interesting. Since Miller guidance has shifted to tell us that the length of marriage is a factor of much reduced (no?) significance, but the outcome in Miller caused disquiet to many. Whilst the ‘tariff’ approach
to a particular sum for year of marriage is unappealing, there is a sense among very many clients I work with that length of marriage matters. And in fact it seems to me that in a more or less unspoken way, court decisions do still take into account the length of marriage and it seems to me to reflect a widely held view.

(2) Marital standard of living – there needs to be context to an award so that huge ‘needs’ are not applied to modest cases, but perhaps the relevance of this would reduce if some formula were to be introduced in the sense that what assets/income available would be divided without much reference to historical standard of living.

(3) The issues of child/elder care and economic disadvantage as they have impacted and will impact on need and capacity to earn seem to me to be central to achieving a fair outcome.

(4) Often the most valuable asset the FMH takes on significance. Whether it can be retained or needs to be sold depends on the overall funds. I am not sure that the fact of remaining in the FMH in itself is a particularly significant factor.

Incentives to independence and limiting spousal support

If there should be incentives to independence then they should apply equally, but what I suspect is often meant here is that the dependent ex-spouse should be encouraged/forced in to a certain position as otherwise they will ‘continue to take advantage’. Whilst I do think that it is true that in big (and biggish) money cases in Central London there can be a paternalistic view of some women and their incapacity to return to work, I think that applies to a real minority of cases. In the majority of cases parties are both willing to work and it is work experience/qualification/employment market which are the limiting factors and not a lack of desire to work.

I think that the kind of arguments about the need to ‘encourage independence’ often overlook the way in which the gendered workplace and economy generally affects women and men differently. There may be restrictions on men being able to work part-time to look after children in that their employers will not entertain that arrangement. Where men are the higher earners in a relationship it is often the case that it makes financial sense for a mother to return to work part time and for the father to work full time. To then treat couples at the end of a twenty year period of this kind of arrangements as on an equal playing field overlooks the reality.

Formulas vs discretion

Like many other family lawyers the idea of a formula to determine maintenance did not appeal to me. Our experience of the CSA formula has not been an entirely happy one. Family circumstances vary widely and we want to be able to tailor settlements appropriately. I have, however, been
considering the possible look of the future of family law and what people divorcing want and need. Even wealthy clients can find plenty of other things to spend their money on than lawyer’s fees. Most clients who end up arguing over these issues feel to an extent drawn into a conflict that they didn’t know would exist or that they feel drawn into and greater guidance on the spousal support would assist.

I have come to see that the kind of guidance applied in the Canadian courts could be usefully explored her. Not a strict tariff or formula, but bands of maintenance based on the differential between the parties’ earnings. Not an absolute amount, but a balancing up of income disparities taking into account whether there are children and the length of the marriage. On top of clear capital split it seems to me that such a system could mean that in many cases there would be reduced scope for argument whilst preserving sufficient room for manoeuvre where particular needs arose.

11 December 2012
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You can view or download the Supplementary Consultation Paper free of charge on our website at:

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(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

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As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

Yes, much greater clarity is required in relation to the payment of spousal support. The majority of my responses for this consultation paper draw upon doctrinal, comparative and empirical research conducted for my doctorate entitled Valuing Domestic Contributions: A Search For A Solution For Family Law which was submitted this year. I have written a more detailed outline of this project below in this section. The aim of this project was to look at the way that domestic contributions should be valued at the end of a relationship. To answer this question, I used a range of doctrinal, feminist and empirical methodology, namely interviews with legal practitioners, to compare the approaches in New Zealand, Scotland and Queensland, Australia alongside England and Wales. This project also used focus groups with members of the public in England and Wales to ascertain the affected communities' views on these models of financial provision. Drawing on these results, this thesis considered how the law of financial provision in England and Wales should divide assets on relationship breakdown in the marriage, civil partnership and the same- and different-sex cohabiting context.

Some of the findings from this project emphasised the importance of having a principled basis for the application of discretion. Without clear guidelines, the application of discretion within these four jurisdictions was either too narrow or too wide. Lawyers from all four jurisdictions called for more guidelines in relation to the application of discretion. This included the lawyers from England and Wales. Consequently it seems that the rational for spousal support needs to be founded on a principled basis in order to ensure that the application of discretion is to be appropriate.

The Project's Outline

Valuing Domestic Contributions: A Search for a Solution for Family Law

…the English statute [the Matrimonial Causes Act 1973], in its fundamental provisions…is in…need of modernisation in the light of social and other changes as well as in the light of experience.

There is a limitation on the resources of even the judges of the House of Lords to conduct wide-ranging comparative studies as a prelude to establishing a new principle, or perhaps to abandoning an existing principle in what is essentially a social policy field…

Charman v Charman (No. 4) [2007] 1 FLR 1246 [121 – 122] (Postscript, per Sir Mark Potter)

Financial provision on relationship breakdown in England and Wales is in need of reform. The calls for change come from a vast range of bodies including the courts,¹ legal practitioners,² independent public bodies³ and academic communities. This

¹ Charman v Charman (No. 4) [2007] 1 FLR 1246
² For example Resolution. See Resolution ‘Campaigns’ <http://www.resolution.org.uk/campaigns/> accessed 04 December 2011
³
5 White v White [2000] UKHL 54 at [24], [2001] 1 AC 596
9 Some argue that in effect it makes it financially better for the woman to be the homemaker. See, for example, N Francis, ‘If it’s Broken – Fix It’ (2006) 36 Family Law 104, 107.
13 A Barlow, ‘Configurations(s) of Unpaid Caregiving within Current Legal Discourse in and around the Family’ (2007) 58(3) Northern Ireland Legal Quarterly 251, 260.
14 Chairman v Chairman (No. 4) [2007] 1 FLR 1246.
16 Sir Mark Potter concluded was the result of the removal of exchange control restrictions in 1979. Chairman v Chairman (No. 4) [2007] 1 FLR 1246 (Sir Mark Potter).
18 Law Commission, Matrimonial Property Agreement (Law Com CP No 198 2011).
26 Jonathan Djanogly, Parliamentary Under-Secretary of State, Ministry of Justice, Written Ministerial Statement, 6 September 2011.
30 This debate is explored in more detail in Chapter 2.
31 R Deech, ‘Cohabitation’ (2010a) 40 Family Law 39, 43.
33 See Chapter 2 for greater expansion.
34 Chairman v Chairman (No. 4) [2007] 1 FLR 1246 [121 – 122] (Postscript, per Sir Mark Potter).
36 V Braun and V Clarke ‘Using Thematic Analysis in Psychology’ (2006) 3 Qualitative Research in Psychology 77, 87
41 S14 Property (Relationships) Act 1976 (New Zealand).
42 S15 Property (Relationships) Act 1976 (New Zealand).
43 S18 Property (Relationships) Act 1976 (New Zealand).
44 R Deech ‘The Principles Against Maintenance’ (1977) 7 FL 229; R Deech “What’s a woman worth?” (2009a) 39 FL 1140.
criticism extends to both the married context (and where the same provisions have been extended to civil partners) as well as the unmarried cohabiting context.

Currently, the law categorises contributions in relationships as financial and non-financial (or domestic), which gives rise to many issues on partnership breakdown: financial contributions are much more straightforward to quantify than the non-financial ones. Consequently, a central focus for criticisms in this area has been gender, given that this area raises questions concerning the public regulation of the private sphere, and research has consistently demonstrated that women are most typically responsible for contributions associated within this sphere. Even when both partners are in employment, the division of paid and unpaid work carried out within households remains gendered, with women rather than men making the most of the unpaid domestic contributions of caring for children, household chores and the organisation and running of the family home. Consequently, the fundamental question concerns how much financial recognition should be given to domestic contributions when relationships break down. How far should the law value those contributions made within the private sphere?

In England and Wales, domestic contributions are treated in fundamentally different ways in different relationship contexts. In the marriage context, White v White (2000) introduced a principle of fairness establishing a principle of non-discrimination so that breadwinner and homemaker contributions are valued equally when deciding how to divide assets on divorce. Yet, despite a sharp increase in the numbers of those cohabiting in England and Wales since the 1970s while the number of those marrying has declined, no such principle applies in the cohabitation context. Rather, Property Law applies and domestic contributions are ignored. For Eekelaar, differential treatment between cohabitants and married couples seems to implicitly presuppose a difference in behaviour. The principle of fairness on divorce provides for and even encourages a gendered homemaker/breadwinner split in relationship roles. Yet, in the cohabitation context, the Law’s abstention which provides little or no support for cohabiting couples infers a social norm which assumes financial independence and thus implies that gender equality already prevails.

These different approaches have been criticised heavily. In the married context, some commentators such as Deech suggest that domestic contributions are overvalued in the divorce context, leaving marriage exposed to gold-diggers. The Law’s presumption that there will be a homemaker/breadwinner divide ignores the increase in the number of women in the labour force. Deech’s fundamental criticism of this approach is that it will encourage women to continue to adopt the homemaker role. Consequently, as Barlow suggests, this non-discrimination principle may have been a reform more suitable for the 1970s. Similarly, Sir Mark Potter in his postscript in Charman v Charman questioned whether the huge settlements that are possible on divorce were ‘desirable’, and suggested that the Matrimonial Causes Act 1973 is ‘in need of modernisation in the light of social and other changes.’ This modernisation is especially necessary given that the predominant origins of assets in big money cases has shifted from inheritance to a ‘new financial era dominated by hedge-funds, private equity funds, derivative traders and sophisticated off-shore structures mean[ing] that very large fortunes were being made very quickly.’ Thus, there is a call for a comprehensive review of the law and the Family Justice Council in 2007 requested the Law Commission to consider reform in this area. The Law Commission has also recently recognised the need to re-examine this area of Family Law and has expanded the scope of its current project from ‘Marital Property Agreements’ to ‘Matrimonial Property, Needs and Agreements’. Initially, the Law Commission (post Radmacher v Granatino which gave greater weight to pre-nuptial agreements) was considering a scheme for binding pre-nuptial agreements. However, the Law Commission recognised that the questions being raised in relation

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44 This is through the yardstick of equality and the three strands of fairness.
to these agreements could only be fully answered through a greater consideration of what ‘needs’ means in ancillary relief.\textsuperscript{20} Now, the project is also considering the definition of matrimonial and non-matrimonial property and how far ‘one party should be required to meet the other’s needs after the relationship has ended.’\textsuperscript{21} Thus, the Law Commission’s focus is now centred on the heart of the approach in the divorce context.

In complete contrast, the Law is also criticised for ignoring, or at best undervaluing, domestic contributions in the cohabitation context,\textsuperscript{22} given that research shows the division of paid and unpaid work undertaken for the household reflects that of married couples.\textsuperscript{23} Consequently, the fear is that in fact the current law discriminates against the traditionally female homemaker ignoring ‘home-making and parental contributions’.\textsuperscript{24} Yet progress is slow; attempts at reform from the Law Commission and also Lord Lester’s Cohabitation Bill 2009 have come to nothing and the government has made it clear that cohabitation reform is not on their current agenda.\textsuperscript{25}

Consequently, Family Law in the 21st Century and the area of financial provision on relationship breakdown can be seen to be in crisis. Therefore, there is a great need for reform in both the married and cohabiting contexts, with particular attention needed on how the law should value domestic contributions. As Glennon argues:

\begin{quote}
...there is a clear need to combine the debates on married and unmarried couples as they raise mutual questions concerning obligations within domestic relationships of varying duration and circumstance and, as such, they should be considered as integrated policy issues.\textsuperscript{26}
\end{quote}

Yet, there lacks a consensus over the shape that subsequent reform should take and feminist opinion is itself divided about whether the developments in the married context are a threat to the financial autonomy of women,\textsuperscript{27} encouraging patriarchal financial dependence; or whether such developments have redressed a glaring inequality inherent in gendered roles freely chosen within the family.\textsuperscript{28} Thus, at the heart of this debate is the public/private dichotomy which can be seen to reflect the delicate balance between autonomy and protection; should the law remain out of the private sphere, ignoring domestic contributions and thereby promoting the financial autonomy of women through the public sphere? Or should there be greater public regulation in the private sphere valuing domestic contributions within relationships and thereby affording greater protection for women who assume the homemaker role?\textsuperscript{29}

Given the context set out above, it seems that future reform requires consideration of the appropriateness of greater recognition of non-financial domestic contributions in the cohabitation context; a clearer understanding of how domestic contributions are being valued on divorce, and guidance on whether this should or should not extend to the same-sex context. The aim of this project is therefore to examine how the law might in future better address the valuation of domestic contributions, in order to consider these calls for reform and to provide further evidence for policy makers in this area when addressing reform.

To consider how the law should develop in the modern context, this thesis takes a feminist approach as this is undoubtedly a women’s issue. While doing so, this thesis will use the public/private divide identified in feminist legal theory as a starting point to determine how far the law should regulate the private sphere. To see if a compromise can be reached between the approaches which divide feminists on this issue; this thesis uses (heuristically) the polarised feminist perspectives of Ruth Deech and Martha Fineman. These two commentators embody the dichotomy in this feminist debate and therefore they shall be used as lenses through which the subject matter of this thesis shall be analysed. For Deech, the law should promote autonomy,
stay out of the private sphere and give no value to domestic contributions; to attach a value to the traditional ‘female role’ would retard the emancipation of women. Furthermore, in the cohabitation context, Deech argues that the law should recognise that cohabitants have chosen to avoid legal regulation by not marrying and therefore we should allow ‘a corner of freedom where couples may escape Family Law with all its difficulties.\textsuperscript{30} In direct contrast with Deech, Fineman argues that the law should protect those within the private sphere and in particular, protect the Mother/Child care-dyad and other forms of care-giving relationships by protecting those who are economically dependent as a result of being a carer. For her, the care-giving relationship, and therefore domestic contributions, should be central to the legal framework and this should be irrespective of the relationship status.\textsuperscript{31} This thesis aims to examine these theoretical positions in practice to see whether a balance can be achieved between the two and to propose a suitable line for reform.

To test out these stances, this project compares the approaches in New Zealand, Scotland and Australia alongside England and Wales, which differentially reflect the positions between Deech and Fineman’s positions. These jurisdictions each have legislation that requires the courts to take account of domestic contributions and each has different formulations of approach, resolving these issues in distinctive ways. New Zealand most closely resembles Deech’s approach, emphasising autonomy and clean break; Scotland also embraces Deech’s approach but to a lesser degree, recognising economic disadvantages; Australia’s welfare based system is much closer to Fineman’s position; and finally England and Wales, which is inherently needs-based in terms of its bottom line, embraces Fineman to the greatest degree.\textsuperscript{32} Consequently, this thesis shall use Deech and Fineman’s positions as heuristic devices to evaluate these different jurisdictional approaches and also to provide insight into reform considerations through the comparative doctrinal analysis, as called for by Sir Mark Potter in \textit{Charman v Charman} above.\textsuperscript{33}

In addition, empirical methods are used to provide a holistic examination of these perspectives in practice. This project uses structured interviews with lawyers practising in the four jurisdictions to ascertain their perspectives on the effectiveness of their respective schemes. Additionally, the empirical stage of this project asks the essential question of how well each approach might serve families in England and Wales by carrying out focus groups with purposively selected members of the public in this jurisdiction to see how these different formulations of domestic contributions might be received by the affected community. Accordingly, this holistic examination provides a three-dimensional depiction of how the law in each jurisdiction works in practice, allowing the attitudes, thoughts and perceptions of the lawyers to build a thorough picture of how these different jurisdictions, embodying different feminist positions, operate in reality.\textsuperscript{34} Furthermore, the doctrinal and empirical methodology gives these feminist positions a practical framework of effect and will provide an opportunity to consider how the law of financial provision on relationship breakdown in England and Wales could and should be valuing domestic contributions in the 21st Century.

\textbf{Research Questions:}

\textbf{RQ1:} How successful is each scheme in valuing domestic contributions? This will be considered by asking:

\begin{enumerate}
  \item How domestic contributions are valued for:
    \begin{enumerate}
      \item Married Couples
      \item Cohabiting Couples
      \item Same-Sex Couples
    \end{enumerate}
  \item How satisfactory is this valuation when viewed from (divergent) feminist perspectives?
\end{enumerate}
(c) How satisfactory is this valuation considered to be within its own individual jurisdiction?

RQ2: What lessons can be learned in England and Wales from these other approaches?:

(a) Do they rectify the current criticisms?
(b) Would they be well received?

**Empirical Methodology**

Altogether 58 lawyers were interviewed (between 13 and 16 from each jurisdiction) over the telephone. As this project was particularly interested in the way in which each jurisdiction treated domestic contributions on relationship breakdown, and thus the empirical phase explored how satisfied the lawyers were with the approach that is taken towards the caregiving/homemaking role. Consequently, a number of questions were posed to the respondents which centred on their opinions of the principles guiding the jurisdiction and the courts when dividing assets on relationship breakdown. To consider how appropriate each system is in varying contexts, a number of different variables were tested such as different forms of divisions of labour, different lengths of relationships and the presence of children. The data collected from this study was analysed using thematic analysis according to the six step process suggested by Braun and Clarke. This involved the researcher familiarising herself with the content, generating initial codes, searching for themes, reviewing, defining and naming themes before setting out the findings. The overarching aim was to get an in-depth picture of how 'successfully' the system approached domestic contributions at the end of the relationship, and this 'success' was measured by the lawyers’ satisfaction with the scheme.

**An outline of the findings in relation to the four jurisdictions**

Each of the schemes aligned to varying degrees with Deech’s and Fineman’s positions. Yet to what extent can these aid reform considerations in England and Wales? How well did these approaches value domestic contributions and did they achieve a balance between the two polarised positions? The first measure that this thesis had intended to use to help this reflection was a comparison of the level of satisfaction between the lawyers from each jurisdiction. However, the majority of lawyers who took part in this investigation were surprisingly overwhelmingly satisfied with their jurisdiction’s legal framework for financial provision on relationship breakdown, despite there being such disparities in the theoretical underpinnings of the approaches. Whilst the lawyers recognised and were keen to voice difficulties within their systems, it was evident that the general perception was that each approach ‘worked the best it could’ and that ‘things could be a lot worse’. This fits in with Dewar’s notion of the normal chaos of family law; that those legal professionals make sense of the system they are in, inevitably making it work in practice and it is perhaps why this researcher’s own suggestions for a reform (discussed below) are based within a balance between Scotland and England’s approach rather than a radical reform that is completely alien to the approach currently within England and Wales.

Nevertheless, there were clear advantages and disadvantages that shone through each scheme from both the feminist and empirical critiques. New Zealand and Scotland had principles of certainty, equality and clean break at the heart of their systems reflecting Deech’s position. New Zealand most closely echoed Deech’s attitudes and operated a community of property system which divided equally a very narrow definition of relationship property (limited to family assets) and maintenance was very rarely awarded with the onus being on rehabilitation. Consequently, domestic contributions received very little consideration from the courts. However,
there are three exceptions to equal division under the Property (Relationships) Act 1976 namely short duration marriages, extraordinary circumstances, and economic disparity where the courts are able to look at the contributions made, with the statute declaring that domestic and financial contributions are to be given equal weight. The strengths of the scheme were evident: procedural fairness which meant greater out of court settlement and lower litigation levels. However the feminist and empirical analysis revealed that in fact the system sacrificed substantive or individual fairness. Sections 14 and 15 provisions were rarely used and when they were successful, the awards were too modest and the courts tended to value financial contributions with greater weight than domestic ones, leading the lawyers to call here for greater recognition and provision for the financially weaker party. This combined with the narrow definition of relationship property and the limited application of maintenance consequently meant that domestic contributions tended to be invisible to the courts with little room for protection of Fineman’s care-dyad.

Scotland on the other hand operated a quasi-community of property system (equality is the first principle rather than the overriding principle) and thus is slightly closer to Fineman’s end of the spectrum. It has a wider definition of matrimonial property that includes property acquired during the relationship (although this can be limited through s10(6)(a) – (e)) which is divided equally at the end of a relationship. However, the courts have far greater discretion to alter equal division under economic advantage/disadvantage and economic burden of caring and so there was much greater protection afforded to Fineman’s care-dyad by recognising the financial implication of relationship roles and greater awards were easier to come by. Furthermore, the benefit of a predominantly one-size-fits-all approach was once again made apparent with lower level litigation and the lawyers championed the clarity and certainty within the system. However, there was concern that the additional principles to equal division were too financial in their focus and thus seem to place financial contributions as being of greater importance than domestic contributions, emphasised through the courts consideration that a homemaker who has been ‘kept’ by the breadwinner has therefore had an economic advantage that is often seen to outweigh the sacrifice of a career. Combined with an even stronger focus on maintenance (only being rehabilitative) than even New Zealand, Scotland again places the care-dyad at a disadvantage especially in small asset cases. It particularly ignores relationship-generated disadvantages and the full impact that child-rearing can have on the financial position of the care-giving party and thus here it seems to be inappropriate for relationships with children.

Where New Zealand and Scotland had Deech-like principles at their core, Australia and England and Wales appeared to embrace a starting point that reflected Fineman’s position: discretion, protection, need and substantive equality which place the care-dyad central to financial awards; and both allowed all property to be subject to division, enabling far greater awards to be given. Australia was retrospective in its focus, as the fundamental step in determining the size of the awards was by looking at financial and non-financial contributions and contributions made to the welfare of the family throughout the relationship, and therefore the courts have a large amount of discretion in determining the size of the awards. This concentration for Australia meant that it was the only jurisdiction that specifically valued domestic contributions as there was no presumption of equality and financial contributions were given greater weight than domestic ones. The process of valuation in absence of equality has produced a complex dual approach taken by the courts: nexus and partnership, but essentially, the courts look for a nexus between domestic contributions and the asset before making any quantification. The limited focus on needs and the rare application of maintenance meant that it did not go as far as initially anticipated towards Fineman’s ‘protective’ position and in actual fact it seems to be far from adequate from that perspective. Furthermore, from Deech’s position, this complex approach caused evident problems in prompting high levels of litigation and difficulty
advising clients as a result of the uncertainty as to how contributions will be valued. In complete contrast, the focus in England and Wales was very much on future needs followed by equal sharing and compensation and consequently there is a presumption of equality between domestic and financial contributions, although this will be altered if needs are not met, and where needs are very generously interpreted in the context of standard of living. The courts also look at the full impact of care-giving, compensating the care-giver for any sacrifices made to assume responsibility in the home, where assets and circumstances make this appropriate. Furthermore, of all the jurisdictions England and Wales was the only jurisdiction that readily uses maintenance in awards. It was evident that the system protected Fineman’s care-dyad and takes account of the full impact that assuming a homemaker role and raising children can have on a party. However, this system had come under direct criticism from Deech and it was apparent from the empirical results that the danger lies in the fact that it may go beyond protecting the care-dyad and thus not be suitable for other relationship forms like dual earner couples, part-time/fulltime couples and those without children. For Deech, the fear is that it is open to abuse from ‘undeserving wives’.

Thus, this thesis has sought to give these positions a practical framework of effect to determine how effectively they value domestic contributions and whether they achieve a balance between the two divergent positions. Yet none of the jurisdictions managed to achieve an ideal equilibrium in the married context. Australia’s approach appears to be the least successful, falling short of both feminist commentators, by evaluating domestic contributions. New Zealand’s approach was too far rigid, given it completely ignores contributions. Thus, whilst satisfactory for Deech, it failed to meet Fineman’s position. Scotland and England seemed slightly closer to achieving an equilibrium; yet Scotland was seen as unsuitable where there were children, placing too much emphasis on financial contributions, whereas England and Wales went too far the other way potentially reinforcing gendered stereotypes and going beyond protection of the care-dyad.

A need for a principled basis to discretion

While there was no clear balance between the two feminist positions, there were clear lessons to be learnt from the jurisdictions explored in this thesis. This project has provided insight into the benefits and limitations of certainty and discretion. The four jurisdictions have different levels of certainty and discretion at the heart of their jurisdiction: New Zealand and Scotland both adopted equality and, therefore, certainty as the framework for their jurisdiction, while Australia and England both embody discretion, respectively evaluating past contributions and ensuring that needs are met. For Scotland and New Zealand, there were clear procedural benefits associated with formulaic justice. Lawyers in both jurisdictions indicted that the certainty that follows formula resulted in less litigation and consequently lower costs. Formula also allows for a greater level of out-of-court settlement which was reflected in the fact that case law in these jurisdictions often remained unchanged for a great number of years. These were principles that Deech felt were fundamental on property settlement, valuing certainty over fairness.

Yet, the compromise (as emphasised by Deech) was fairness, and it was clear from results that the approach was too narrow, particularly in New Zealand, and to a lesser degree in Scotland. In fact, the concern was that the judges in both jurisdictions had got so preoccupied with equality because it is easier to quantify, that this has led to a narrow application of the discretion provided for within the Act at the homemaker’s (and therefore a gendered) disadvantage. This in itself challenges Deech’s position that a more liberal approach will encourage women to engage more
with the labour market as statistics show that even with a scheme based on formal equality, in New Zealand only 58% of women are employed in comparison to 70.2% of men. In fact, New Zealand lawyers indicated that all the exceptions to equality designed to improve the homemaker’s position had ‘failed at their objective’ due to the narrow interpretation of these discretionary sections. Ten respondents from New Zealand felt the approach was too narrow and did not really consider the future impact of relationship generated disadvantage, and 10 in Scotland, felt that s9(1)(b) was inadequate. While, procedurally, formula has reduced the potential for inequality of bargaining power in out-of-court settlements, the level of rigidity in the system may actually act to dissuade parties from accessing the courts as a result of financial expenses rather than because the tensions between parties have been reduced.

In contrast, England and Australia had a much greater level of discretion in their systems allowing for greater consideration of substantive justice and therefore offered awards that are tailor-made to Fineman’s care-dyad. This was reflected in the empirical analysis where lawyers from both jurisdictions were the most satisfied with how their jurisdiction treated the homemaker/breadwinner relationship model. 10 lawyers from both systems felt that, overall, equality was achieved between the homemaker and breadwinner roles. Yet, discretion had some problems procedurally as both jurisdictions had the lowest number of lawyers who felt that the amount of rigidity/discretion was about right; the majority felt that the approach in England and Wales and Australia was too uncertain. Furthermore, there was indication that greater discretion leads to greater litigation, greater conflict and an inequality of bargaining power for those who settle outside of the courts. There were also concerns that the judges’ approach was not consistent and that this was causing difficulties when advising clients (although this was far more prevalent in Australia which may be due to the greater guidelines that now exist over the interpretation of s25 after White in England and Wales). This uncertainty creates difficulties for the economically weaker spouse those who is unable to financially access the courts and thus must settle outside instead. Therefore there were calls for a greater level of predictability or guidelines to be able to give better advice to clients to prevent cases unnecessarily going to court.

From these jurisdictions, it is clear to see the pros and cons of certainty and discretion. One interesting observation from all four of these jurisdictions is that where discretion is used, it seems that in the absence of clear guiding principles it may be open to mishandling. In New Zealand and Scotland, the judges were criticised for narrowly interpreting the discretion within the jurisdictions. In contrast, in Australia and England and Wales, the lack of a guiding principle meant that there were inconsistencies between the judges particularly in big asset cases where there lacked a clear rationale. This was less of a problem in England and Wales, which may be attributable to rationale for interpreting and applying s25. To avoid these difficulties within all these jurisdictions, it seems that the use of discretion requires firm guidelines and a clear underlying rationale to help the courts apply it in an adequate manner.

Furthermore, the lawyers from England and Wales highlighted

Consequently, it seems that spousal support requires clearer principles to limit the problems that discretion can cause.
7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

It was evident from my analysis of New Zealand’s jurisdiction that compensation of loss caused by the relationship posed serious practical and conceptual difficulties which is particularly disadvantageous to the homemaking/primary caregiving spouse. S15 of the Property (Relationships) Act 1976 in New Zealand provides the courts with the discretion to rebalance economic disparities that arise as a result of the division of functions within the relationship. This is essentially a compensatory provision and although s15 is to redress only prospective economic disparity, the basis of a s 15 award is retrospective, which looks at the effects of the past relationship roles. Joanna Miles’ 2003 observed that there are two types of economic disparity that can be measured under s 15 (which have been accepted within case law): ‘but for’, where the party has suffered economically as a result of the division of functions, and ‘economic enhancement’, where a party has been enhanced as a result of the division of functions. Consequently, New Zealand’s approach to ‘needs’ in this context is to ‘measure the loss’ that has arisen from the relationship by redressing any economic disparity in income or standard of living which has been caused by the relationship.

Yet, both the doctrinal and empirical analysis of this section revealed a number of difficulties, some of which related to the retrospective application of the section; linking ‘but for’ and ‘economic enhancement’ disparities to the division of relationship functions is not a simple task. In the former context, how does a claimant effectively establish that their low income is a direct consequence of assuming a care-giving role? What if they had only been stacking shelves before they gave up their career? Section 15 appears to only really be applicable in large asset cases where the claimant can demonstrate that they gave up a lucrative career for the relationship. In the latter context, linking ‘economic enhancement’ back to the divisions of the functions may be a more difficult task. Furthermore, this nexus or causal requirement between economic disparity and past relationship functions is fundamental to s 15, and without which a claim will fail. Thus, it is not possible to

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48 Cunningham v Cunningham HC AK CIV 2003-404-2392 28 November 2003;
47 Law Commission, Matrimonial Property, Needs and Agreements, Law Com CP 208 (TSO, 2012) at para 4.32
rebalance just any economic disparity between the parties, and consequently a s 15 claim will not stand if it is established that the economic disparity is only attributed to one party’s talents or wealth, or where the division of functions is a ‘spent force’\(^{50}\) and therefore the disparity is caused by external factors. As Miles notes, this means that economic disparity as a result of age, ill health or incompetence will not be sufficient to successfully invoke s 15,\(^{51}\) and it may also exclude those who displayed a desire not to return to work.\(^{52}\) Additionally, Miles points out that this retrospective focus means that those who are pregnant for the first time at the end of the relationship and have not yet had to assume child-care activities will not be able to use s 15.\(^{53}\) Therefore s 15 only seems to arbitrarily focus on economic disparity at the time of separation rather than on foreseeable disparity which has not yet occurred. By requiring a significant disparity at the time of relationship breakdown, s 15 surely overlooks the long-term impact that role division can have on the economic prospects of the parties and the fact that men recover far quicker financially post-separation than women. However, in \(\text{Speller v Chang,}^{54}\) the court stressed that s 15 was not to give the courts discretion to redress all economic disparities, nor to achieve generalised social justice or gender equality objectives. The requirement of a relationship generated disparity in this manner severely restricts the flexibility of s 15 to the detriment of the primary care-giver in most run of the mill cases.

The empirical analysis also reflected these concerns. While the lawyers were generally happy with the deferred community of property approach within New Zealand system, there very strong concerns that the system was far ‘too rigid’ in places and the practitioners clearly wanted greater flexibility. Most notably, the respondents heavily criticised s 15 for failing to adequately recognise the future economic impact of the homemaking role. Furthermore a few lawyers were concerned that s 15 was not wide enough as measuring loss as a result of the relationship is only able to really compensate someone for a career loss, thus is limited to those who had the clear potential of a high flying career:

\[\ldots\text{some of the cases talk about a career break...that’s fine if you’re talking about a homemaker who has a university degree and was a professional whatever. But, you know, that’s only }3\%\text{ of the population… (NZLaw13)}\]

Yet, a large proportion of the lawyers also indicated that there were practical difficulties with s 15 and the compensatory provision that meant that the judges avoided the discussion of s 15:

\[\ldots\text{it’s really hard to prove a career break because it’s really hard to get any evidence about what the career would have been. And, um, in practice the economic disparity provisions haven’t worked out as I believe, um, the people who came up with them (laughs) first envisaged… (NZLaw13)}\]

The physical task of proving this loss is actually extraordinarily difficult. Most practitioners felt that the limited application of ss 13 and 15 therefore failed to protect the typically female homemaker.


\(^{52}\) X v X (2007) NZFLR 502 (High Court) per Judge Priestly


\(^{54}\) \(\text{Speller v Chang [2003] NZFLR 385}\)

\(^{55}\) See Figgins v Figgins (2002) Fam CA 688.

\(^{56}\) Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 1 FLR 1186 identified that fairness consisted of needs, compensation and sharing.

\(^{57}\) McFarlane v McFarlane [2006] UKHL 24, [2006] 1 FLR 1186 Mrs McFarlane gave up a career equally lucrative to her husband and thus was granted £250,000 per annum
Evidently, there are some warnings to be taken from an approach which only measures loss arising from a relationship. It is not an easy task, and the empirical data in this study demonstrated the struggle that the courts faced in trying to quantify the economic losses that accompany a career sacrifice; these loses were only really quantifiable in relation to affluent careers. This approach to measuring loss appears to only be suitable to those cases where there are large career sacrifices that have been made rather than for those who require support post separation.

An approach which focuses on calculating loss that solely arises from the relationship may be overly limiting.

In fact, the limitation of compensation was demonstrated in other aspects of the doctoral research. Neither New Zealand nor Scotland considered the needs of the party; instead the focus was on compensating any relationship-generated disadvantage that either party had suffered. New Zealand uses s15 of the Property (Relationships) Act to rebalance any economic disparity relating to the division of relationship responsibilities, and one of Scotland’s principles rebalances any economic advantages and disadvantages made in the interests of the family under s9(1)(b) Family Law (Scotland) Act. Furthermore, Scotland compensated for the economic burden of caring under s9(1)(c). Yet, while compensation is conceptually attractive, lawyers from both these jurisdictions indicated that they were in practice immensely dissatisfied with the way in which this approach fails to meet needs. It is hard to discern whether compensation approach fails because of the shape of the statutory provisions, or just because the discretion has not been used widely enough. Perhaps with greater guidance on these discretionary provisions, more effective protection of the care-dyad may have been achieved.

Yet, Australia, which had a strong history of discretion within its legal framework, also had difficulty with compensation. Australia, had the opportunity to consider future needs under s75(2) of the Family Law Act Cth; however the courts held that this was an inappropriate test and so instead focused on compensation by trying to rebalance any economic disparity. Thus, the provision was more compensatory and holistic in practice. Similarly, England and Wales also use a compensatory provision as one of its strands of fairness with the aim to have a holistic approach. Needs alone had been insufficient within England and Wales prior to White. Yet, respondents from both of these jurisdictions indicated that the legal system did not adequately compensate the primary care-giver where there was a relationship-generated disadvantage. Therefore, compensation as a concept may not be easy to apply. Perhaps the practical difficulties that are associated with quantifying the losses that a career sacrifice has in the labour market prevent the courts from adequately compensating the primary care-giver:

…I don’t think it would fully rebalance future disadvantages, because no one has a crystal ball… (EWLaw6)
…It's really hard to prove a career break because it's really hard to get any evidence about what the career would have been. (NZLaw13)

Furthermore, this practical difficulty may also relate to the typical salaries that are sacrificed by one party. It is unlikely that many will have as large a salary to give up as Mrs McFarlane and consequently, compensation may not prove to be a useful provision for most run of the mill cases. While it may prove more quantifiable and effective in big asset cases where a substantial salary has been forgone, in most cases this will be impractical to measure. Consequently, an approach that is based solely on compensatory provisions may actually not protect the primary care-giver and their dependant. However, that is not to say that compensation should be excluded altogether as it may have a place in a small category of cases such as
Rather, it appears to be ineffective to have relationship-generated disadvantage as the basis of an award in its own right, particularly for these relationships identified as vulnerable.

7.4 In answering the question at paragraph 7.3 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.

Interestingly, the main finding of my thesis was that there should be a difference in the principled basis of spousal support dependant on whether the relationship had children or care dependants. To truly balance these two feminist positions, this study concluded that it is necessary to separate out the legal approaches to those relationships with and without children as a minimum, and potentially to separate those with and without any form of care-dyad. While the care-dyad may include other relationships such as caring for the elderly, for the purposes of my thesis’ conclusion and for reasons based on practicality, this section specifically on a divide between relationships with and without children.

Nearly all the lawyers who took part in this study made it clear that children made a difference due to the on-going needs and dependency that arose from the presence of children:

...you simply can’t compare a situation where somebody’s got childcare obligations and has dedicated a life to doing that as opposed to ... enjoying a slightly more luxurious lifestyles... (Scotlaw16)

Even where lawyers from Scotland and England and Wales wanted cohabiting couples to be treated differently from married couples, in practice, both sets of lawyers wanted greater protection for cohabiting couples than existed in these jurisdictions, especially where there were children. It is suggested that perhaps there is a gap between theory and practice; that while the lawyers feel that some difference ought to exist, in actual fact when faced with the practical realities of the financial implications of relationship breakdown (as was tested in the scenario questions), there is far less weight placed on this difference. Thus it is concluded an approach more similar to that found in the marriage context will in practice achieve the more protective awards that the data show they desire for cohabitants (with Scotland’s ‘half way house’ approach deemed not protective enough in practice particularly where there were children).

58 Children also includes children of the family as defined under s105 Children’s Act 1989 to include step-children as well as children of both the parties. While further consideration where children are not of a cohabiting relationship may be needed, it is feasible that this could be extended to step (cohabiting) parents under the test established in D v D (Child of the Family) (1981) 2 FLR 93 (CA) p. 97 (Oomrod LJ): ‘does the evidence show that the child was treated as a member of the family’. It may be necessary, however, to impose a (flexible) time limitation period on this qualifier for cohabiting couples.
The focus groups in England and Wales also demonstrated a division in the participants’ preference between a Deech-like or pro-Fineman approach according to whether there were children; a higher proportion selected a needs-based remedy only for where children were present:

*I think children should be central to the whole decision making process. I think relationships before there’s children are different to relationships after in terms of how money should be split up because someone’s going to end up looking after the children and that’s going to have huge financial consequences for them* (Katherine, cohabiting women group)

Moreover, the results from the focus groups clearly emphasised that there should be no difference in the legal treatment of cohabiting and married relationships where couples have children, and perhaps more surprisingly even where they do not (subject here to a qualifying period): \(^59\)

*I think that it should be the same irrespective of the … legal status of the relationship if it’s a long term relationship …* (Jake, cohabiting men focus group)

Thus the overwhelming consensus from the Australian and New Zealand lawyers, as well as from members of the general public within England and Wales is that cohabitants without children should be treated (after a length of time) in the same manner as married couples.

While more research is needed to capture the views of the same-sex community on future reform options, this project indicates that nearly all who took part (including the focus groups in England and Wales) agreed that same-sex couples should be able to enter a relationship at least a functionally equivalent to marriage, and that same- and different-sex relationships should be treated in the same manner on relationship breakdown. However, nearly all the lawyers indicated that the presence of children was a reason to treat same- and different-sex couples dissimilarly, therefore confirming the impact that children were perceived to have on relationship dynamics. Consequently, a dividing line based on the presence of children should also apply in the same-sex context.

Therefore, the fundamental conclusion of this thesis is that there needs to be a distinction between the legal treatment of those relationships with and without children rather than a distinction based wholly on relationship status. By re-drawing the dividing line in this manner, the law will be able to both respect and promote financial autonomy, and at the same time recognise the limitations that having children places on the primary care-giver’s ability to engage with the labour force and become financially independent.

While both of these types of relationships should have the same starting point, the basis of spousal support should vary for where there are and are not any children to reflect the on-going financial dependency which arises in relation to children, and the greater ability to assume financial independence where there are not. For relationships without children, the overriding aim of financial provision should be financial autonomy and therefore a clean break through formal equality (as far as possible). For relationships with children, the goal should rather be substantive equality on account of the primary care-giver’s reduced ability to be financially independent. This means that how and when the courts should grant spousal support should depend on whether or not children are present.

\(^59\) This qualifying period is discussed below.
7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

See answer to 7.4 above which discusses the different approaches required for relationships with and without children. Given that a major difference between relationships with and without children lies in the ability to be financially independent, it is important that incentives for autonomy do not severely disadvantage those with on-going care-giving responsibilities.

Both New Zealand and Scotland offer approaches which focus on clean break, economic independence and a rehabilitative approach to maintenance. The model of spousal support in these jurisdictions rebalances economic disparity and compensate the non-owning spouse as in Scotland and New Zealand with only a limited access to maintenance provisions. In fact, these two jurisdictions rarely used periodical payments, and the lawyers voiced the clear benefits from a clean break; it severed ties between parties, allowed the parties to move on and limited hostility in the majority of cases. Where maintenance was applied, the emphasis of all of these jurisdictions was on rehabilitation, and, consequently, the orders were often of short duration.

In New Zealand, it is possible to get maintenance – a needs-based remedy – on separation under s64 (subject to s64A) of the Family Proceedings Act 1980 which may alleviate the restrictive nature of property settlement in New Zealand. This is a separate consideration to property settlement (although it can be heard at the same
time) provides a list of factors that can be taken into consideration and awards made can either be periodical payments or lump sums, again reflecting the clean break principle within New Zealand’s jurisdiction.

Where it is used, s64A reflects Deech’s rationale that maintenance should have a rehabilitative function and imposes the limitation on s64 that the party must resume responsibility for their own needs in a reasonable time at which time they will no longer be able to get maintenance. However, ‘reasonable time’ is not defined by the Act, and it seems that maintenance will only be ongoing in extreme situations, such as the ongoing care of an autistic child and even then the focus will still be on retraining and rehabilitation. When awarding maintenance, the courts consider two elements: whether it is unreasonable for party A to do without maintenance from party B, and whether it is reasonable to require party A to provide maintenance to party B. To determine this, the courts will consider a range of factors including the ages of each party, the effect of the division of functions and duration, ability to self-support and other relevant circumstances.

While this may even go too far for Deech who contends that maintenance should solely be used for those incapable of finding employment rather than a mechanism for retraining, the actual awarding of maintenance is incredibly uncommon as it conflicts with clean break principles even though it can be awarded as a lump sum. Consequently, the courts have a strict interpretation of both the applicant’s ‘reasonable needs’ and ‘actual income’ to determine if this is necessary and also the respondent’s ability to pay.

Yet, this restrictive approach to maintenance means that the courts limit extensive financial dependency post-separation and instead encourage the principles that Deech advocates: rehabilitation, self-sufficiency and joint economic responsibility for any children of the relationship. However, from Fineman’s position, this approach is potentially over simplistic. Fineman argues that financial autonomy through self-sufficiency is unattainable without equality of resources. Yet, the narrow application of maintenance provisions in New Zealand limits the extent and the frequency with which this form of equality can be achieved. Consequently, this approach fails to enable Fineman’s care-dyad to achieve economic autonomy in the majority of cases. The provision of maintenance in Scotland is, like New Zealand, designed to be rehabilitative in accordance with Deech’s beliefs of awarding maintenance. Yet, this represents the assumption that women should be engaged within the labour market, which ignores the gendered lives that are lived in the private sphere. This section is designed to be in addition to the above principles, and therefore will only be awarded if it is felt that the other principles do not cover this requirement already. However, the courts under s9(1)(d), unlike the previous sections, can award periodical payments although this is capped at a maximum period of three years. S11(4) sets out the factors that the court must have regard to when considering this principle. As Thompson in points out, this provision is based on fairness and equity rather than entitlement; therefore behaviour will be taken into account when deciding whether it would be equitable or not to make an award under this section. Furthermore, the award will hinge on whether the claiming party has found fulltime or even part-time employment. Therefore, the courts try to limit this section’s interference with the

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60 S32 P(R)A
63 S64A(2)(a) Family Proceedings Act 1980
64 S64A(2)(b) Family Proceedings Act 1980
65 S64A(3) Family Proceedings Act 1980
68 FL(S)A 1985, s11(7)(b)
69 Sheret v Sheret [1990] SCLR 799
principle of clean break by ensuring that the award is not a perpetual financial burden, that it will help to retrain the claimant and that it is only awarded where necessary. This three year cap consequently means that the scope for maintenance is much more limited than in New Zealand. While there is an option for a longer period of maintenance under s9(1)(e), the requirements are much stricter and thus the Scottish courts are unable to grant maintenance where necessary for a period of longer than three years. This, from Fineman’s position, fails to disrupt forms of inequality and consequently protection is extremely limited and focused on ensuring women engage with the market force to the detriment of care relationships.

S9(1)(e) allows for ongoing maintenance for a reasonable period. Under this principle the courts must have regard to factors and again, behaviour will be a consideration. This provision is specifically to grant ongoing support designed to deal with age or illness and therefore incapacity to work. Thompson notes that this provision is extremely rare, although the courts have sometimes granted it to middle-aged women where they had not received a s9(1)(b) award and as a result, the courts were concerned with their ability to survive. Moreover, s9(1)(e) requires severe hardship which is strictly interpreted. This strict interpretation and application of maintenance is exactly how Deech believes it should be awarded. Yet, as discussed above, from Fineman’s perspective, it indicates a severe limitation on protecting and recognising the operation of dependents within the private sphere and the impact that this may have long-term on those who are characterised by dependency.

Thus it seems that in fact financial provision for married couples is weighted towards Deech’s position and does not go far enough to protect Fineman’s care-dyad. These provisions were extremely rare to use and where they were, the awards were small and modest, allowing for the parties to go their separate ways post-divorce. While the lawyers from both jurisdictions were content with the incentives for financial independence, it was evident that there were a category of individuals for whom this rehabilitative approach failed to protect and consequently severely disadvantaged.

The results from Scotland clearly demonstrated that maintenance provision under principles 9(1)(c)–(e) was rarely awarded and thus the majority of awards embraced clean break. For a large proportion of the lawyers, this was the most appropriate approach at the end of the relationship. However, there was consensus from almost all the participants that while it worked generally well, there were situations where it was inappropriate, namely where there was a greater level of financial enmeshing and dependency: those who were out of employment; those with children and also the age/length of the relationship. Although six lawyers felt that the current provisions were too restrictive (again due to the courts’ interpretation). This disadvantage was felt to be gendered and particularly for women who had been out of the workforce:

I suspect that the...way the legislation has been interpreted over the years is in a lot of cases probably too harsh for one party that has...given up the employment and it may well be a need to review that in terms of financial support for a greater period on divorce. (ScotLaw2)

Similarly in New Zealand most respondents recognised that there were certain situations where maintenance should be awarded. These situations related to the parties’ earning potential, the length of the relationship, the age of the parties (namely older parties nearer retirement age) and the presence of any children:

...there are two major groups of generally women, the much older age group within 5-10 years of retirement, and the much younger age group stuck at...

70 S11(5)
71 Johnstone v Johnstone (1990) SCLR 358
72 J Thompson, Family Law in Scotland (4th edn, Butterworths Lexis Nexis 2002), 965
74 Barclay v Barclay [1991] SCLR 205
home with kids. Both two groups in particular need help and just don’t have the capability to be financially independent. (NZLaw7)

Half the respondents suggested that the concept of partnership meant that it is the parties’ obligation to provide support to one another:

...financial dependence is either explicitly or implicitly part of the bargain while they’re together. (NZLaw13)

Yet, where the participants thought that maintenance should be awarded, most argued that maintenance should only be rehabilitative rather than ongoing:

I guess, to a certain extent, things like spousal maintenance can go some way to redress inequity if you look at what the earning potential, uh, one of the partners could have been had they continued in their role as opposed to, uh, what they did by doing domestic work in the house. (NZLaw3)

Generally, the respondents were content with the rehabilitative approach in New Zealand. However, some felt that in certain situations, maintenance awards were very small and insufficient particularly where there were children:

....well there is spousal maintenance, you can apply for it, but it's pretty...low and it lasts for a couple years if you’re lucky. (NZLaw2)

Overall, such incentives are generally seen as a positive way to enable clean break. However, if spousal support is to include financial incentives, it is important that this does not disadvantage the vulnerable; namely those with children and who have a limited ability to engage with the labour market. A time limit for those without children (similarly to Scotland) could be a way to incentivise those who have the ability to be financially independent to do so.

7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments
IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

   (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

   (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

   (c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

Out of my doctoral research, the fundamental conclusion was that a different approach to needs is required for where there are and are not children.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

For section 7.8(1) see 7.6 above. It is possible that a separation in approach for those with and without children may provide a means through which it is possible to
incentivise those without children to become financially independent.

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

NON-MATRIMONIAL PROPERTY

7.11 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?
This limitation on the definition of relationship property generally seems to be a necessary measure to protect the interests of the owning spouse. From my doctoral research, both New Zealand and Scotland have clear approaches to matrimonial assets. New Zealand has the narrowest conception of relationship property limited only to the family home and chattels,75 followed by Scotland. Scotland defines matrimonial property as all property acquired throughout the relationship76 which could be limited by the source of funds argument, pre-marital agreements and usage. In comparison, Australia and England and Wales are able to consider all property and also have conceptual problems where the courts have tried to limit claims to one party’s substantial financial assets.77

Property settlement in Australia is the fundamental way in which assets are distributed on relationship breakdown with property adjustment orders coming under s80 FLA which applies to all property owned by either spouse. Sections 79 and s79(2) provide a wide discretion for the courts in altering property interests, and s79(4)(a)–(g) (which is similar to England and Wales’ s25 MCA) and s75(2)78 provide a list of factors that must be taken into consideration.

Hickey v Hickey,79 held that there is a four-step procedure for the analysis of interests in property settlement:

1) Identify the ‘value of the property, liabilities and financial resources of the parties at the date of the hearing.’
2) Assess the parties’ contributions to the property and to the welfare of the family (which considers s79(4)(a)–(c) factors)
3) Consider s79(4)(d)–(g) factors including (as s79(4)(e) stipulates) s75(2) factors
4) Consider s79(2)’s requirement for a ‘just and equitable’ order.

Property is broadly interpreted by the Australian courts as ‘indicative and descriptive of every possible interest which the party can have’80 and is valued at the date of the hearing. Furthermore, Australia has no core guiding principle exists and no presumption of equality between the parties exists either.81 Consequently, none of the s79 factors supersede one another; it is for the court to judge the relevant factors to achieve a just and equitable outcome. Instead, Step 2 (which considers financial82 and non-financial83 contributions to the property as well as contributions to the welfare of the family)84 is pivotal in determining how the courts should divide property on relationship breakdown by stating a percentage based on the value or weight given to their contributions. Step 3 considers any additional factors which include future needs and requirements of the parties, yet for the majority of financial awards, Step 2 makes the decisive proportion of property division. Therefore, the emphasis of the courts lies on ascertaining a retrospective value of financial and non-financial contributions which completely differs from Scotland and New Zealand, who both avoid placing any value on contributions.

Nevertheless, this lack of an overarching principle combined with a broad
interpretation of property has caused a mixture of approaches to develop within the courts. Fehlberg defines them as the evaluative approach (where the courts evaluate asset-by-asset) and the partnership approach (where the courts will use global accounting). These two approaches, have conflicting rationales. The former is an individualistic ideal, aligning more with Deech’s contentions, which calculates the entitlement of a party by directly comparing their respective financial and non-financial contributions. The latter approach, on the other hand, adopts a vision of marriage as a socio-economic partnership between equals which will look at the overall contributions made within marriage, and view breadwinning and homemaking as reciprocal arrangements. The courts look at the collective contributions and assume that both parties have contributed more or less equally, thus justice and equity demands an equal division of the assets. Yet, it seems that these two approaches to dividing assets are philosophically opposed and thus it is confusing that they exist alongside each other and it is unclear how they are approached and when they will arise.

Having a more restrictive definition of relationship property may avoid some of the difficulties seen in Australia and England and Wales and may alleviate some of Deech’s criticisms. Yet, this definition has to be carefully considered as, equally, an overly-narrow concept (such as in New Zealand) may actually impact detrimentally on the care-dyad.

Furthermore, the extent by which the focus group participants viewed partnership at the end of a relationship was demonstrated also through their definition of relationship property. Some believed that all property should be considered to be relationship property and thus awards should be made on the grounds of fairness. However, the majority felt that it should be more restrictively defined and generally that inheritances, gifts, business assets and initial contributions should not automatically be included within the relationship’s asset pool. This advocates Baroness Hale’s approach in *Miller* and the definition in New Zealand which looks at ‘family assets’ as relationship property subject to division on relationship breakdown.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

As a general rule, the family home should be excluded from the definition of non-matrimonial property. To define the family home as non-matrimonial would potentially undermine the concept of partnership within marriage. Where the home is shared equally between parties, the starting presumption is that both spouses contributed equally to the family regardless and that this is regardless of the types of contributions that both made. Consequently, homemaking and breadwinning are placed on an equal footing. To start with the presumption that it could be non-

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86 Ferraro v Ferraro [1992] 16 Fam LR 1, 40
87 B Fehlberg and J Behrens, Australian Family Law: The Contemporary Context (OUP 2008) 453
89 Miller v Miller; McFarlane v McFarlane [2006] 2 FCR 213,
matrimonial would place the non-owning spouse, typically the female care-giver at a severe financial disadvantage, particularly when the matrimonial home is often the only substantial asset to be divided. However, there are difficulties that are posed whereby inheritance and gifts are used to purchase the family property, or where the property is being used as business premises, particularly where it may be a working farm. In these instances, such a blanket approach may be extremely detrimental to the owning spouse.

Perhaps the answer lies in the Scottish approach towards the definition of matrimonial property. The first principle under the Family Law (Scotland) Act is that there is to be fair sharing of matrimonial assets. Fair sharing has been defined as equal sharing under the FL(S)A90 to reflect that marriage is an equal partnership,91 thus the ‘fruits’ of that union are to be shared equally between the parties. The definition of matrimonial property includes the family home and family chattels92 and any property acquired during the marriage, but before the date of separation93 (although this excludes gifts or inheritance from third parties unless it is used to buy the matrimonial home).94 However, recognising that formal equality is not always equity, Scotland has a number of ‘special circumstances’ under s10(6)(a) – (e) where equality can be departed95 (not including the four other s9 principles) although these are to be used minimally.96 Two of these are firstly the source of funds under s10(6)(b) and secondly through an analysis of the usage of property under s10(6)(d).

The source of funds argument means that if an asset has been purchased, for example, with property owned by one party prior to the marriage or through an inheritance or gift, then it can be excluded from the pool of matrimonial assets.97 It acts as a limitation to excessive gain of assets by the non-owning spouse, such as the expansion of businesses or purchasing shares through pre-marital business assets. Again, this seems to be weighted in favour of the breadwinner and while this can serve to protect the financial autonomy of both the husband and wife, it can also negatively impact the care-dyad. In Jesner v Jesner98 the matrimonial home (in joint names) had been purchased through the breadwinner’s (the husband’s) assets which had been held on trust for him and was therefore held to be an exception to equal sharing. This was even though Mrs Jesner, as a result of being the homemaker, was in a far weaker financial position and in so doing would leave her situation far more precarious without a limited share in the matrimonial home. Consequently, there is a very real possibility that it may disadvantage the care-giving or homemaking spouse.

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90 S10(2) FL(S)A
92 S10(4) (a)
93 S10(4) (b) and S10(3) Family Law (Scotland) Act 1985 - The relevant date is either the date they ceased to cohabit or the date of the service of the summons in action of divorce.
94 Davidson v Davidson [1994] SLT 506 per Lord Maclean ‘...any property acquired by the parties during the marriage but before separation is matrimonial property even if it is purchased with funds which one of the parties has acquired by way of gift or succession’
95 Examples of the court having had to give consideration to the question of whether or not special circumstances pointed to fair sharing being unequal sharing can be found in cases such as Little v Little [1990] SLT 785, McLean v McLean [2001] Fam LR 118, R v R [2000] Fam LR 43, Sweeney v Sweeney (No2) [2006] SC 82(resources – business) and McConnell v McConnell (No2) [1997] Fam LR 108.
97 However, this does not include it being bought by one party’s income or efforts during the marriage.
98 Jesner v Jesner, [1992] SLT 999
99 Peacock v Peacock (1994) SLT 40
100 See for example in Adams v Adams (No 1) [1997] SLT 144) where Lord Ordinary Gill would not transfer the large house to the wife who would be the primary care-giver on account of the fact that she could not afford to run it as it was too big. Thus, there is a limit on how far the courts are willing to go financially speaking for the homemaker.
101 R Deech, ‘What’s a Woman Worth?’ (2009a) 39 Family Law 1140, 1145
103 Jaques v Jaques (1997) SC (HL) [20] (Lord Clyde)
104 Sweeney v Sweeney (No2) [2006] SC 82 [18] (Lord Hamilton)
105 S8(2) FL(S)A 1985
S10(6)(d) provides that the courts can look at the use of the matrimonial property and so can consider the impact that dividing it will have on the parties. For example, if a home is being used by the breadwinner as a business and to share it equally would have huge repercussions on the viability of the business, the courts may depart from strict equal sharing and instead grant another award such as a capital sum allowance through a second mortgage. In contrast, the courts may also depart on the grounds that the children need a home especially where couples have limited assets. For example, in Peacock v Peacock⁹⁹ the wife received the family home to provide a house for her children, but the courts rebalanced this by relinquishing her interest in a small life insurance policy; the overall financial aspect of equality is still achieved, but not necessarily through the matrimonial property. Thus, the courts recognise the importance of not compromising the financial autonomy of one party in one context, and at the same time appreciate Fineman’s care-dyad, providing housing where necessary to recognise the needs of the children where the claimants’ resources are unable to meet needs.¹⁰⁰ This arguably does not compromise Deech’s position either, as she recognises that in situations (only) where there are young children the care-giver may require further (short-lived) support.¹⁰¹ Usage, therefore may be a balance between the competing interests of the owning and non-owning spouse.

Nevertheless, it is important to note that these exceptions are intended for minimal use¹⁰² and in fact just because these special circumstances may arise does not necessarily mean that the courts will automatically depart from equality.¹⁰³ They must first establish if it is justifiable to depart from equality.¹⁰⁴ Furthermore, anything considered non-matrimonial and not subject to equal division is not completely removed from the court’s consideration; this property still counts as a resource of the party¹⁰⁵ that the courts can use when adjusting shares under the other s9 principles. Thus it seems that in actuality a balance has been achieved here between autonomy and protection. While this tries to ensure that financial assets are not subject to ‘gold-digging’, at the same time it does not then serve to place a cap on the financially weaker party. Yet, it still means that the court follows financial rather than domestic contributions at the outset; the care-dyad is not central, but is more protected than within New Zealand.

7.13 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.

<table>
<thead>
<tr>
<th>Supplementary Consultation Paper, Part 6, paragraph 6.59</th>
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<td>Property acquired throughout the cohabitation should be excluded from the definition of non-matrimonial property. The definition of matrimonial property should reflect the relation as being a partnership and this partnership begins before the marriage.</td>
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7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

It would depend on the manner of usage, but also the degree of nexus between the family and the property. What if the non-owning spouse has looked after the family so that the owning-spouse could develop/tend to their assets?

New Zealand also has a clear definition of what is and is not relationship property. Section 8(a) – (l) sets out the definition of relationship property which includes the family home, family chattels, and gifts or inheritances which are treated by the parties as relationship property. Section 9 defines separate property as anything which is not relationship property which includes any property that was acquired before the relationship (unless it is then treated as relationship property) and income generated from separate property. Separate property is not subject to equal division. However, a rigid definition of relationship property was believed to unfairly ignore situations where the non-owning spouse’s contributions had led to an increase in the value of the owning spouse’s separate property. Consequently, the P(R)AA introduced s 9A which was designed to bring greater flexibility into the definition of relationship property, although Margaret Briggs and Nicola Peart have criticised the ‘fairness’ or discretion available through s 9A for diluting formal equality and for being conceptually incompatible with the aims of the P(R)A. Nevertheless, it is now possible for separate property to become relationship property if an increase in the value of separate property or income received from it is attributable to an investment of relationship property or the actions of the other spouse. If a relationship is found, the non-owning spouse’s share is limited to the increase in value which reflects their contributions rather than the whole separate property being subject to formal equality. However, it is difficult to fully assess the effectiveness of this provision as cases concerning matrimonial property are rarely heard within the appellate courts.

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108 s 9A(2)(b) Property (Relationships) Act 1976
109 Rt Hon Dame Sian Elias, ‘Separate property – Rose v Rose – Courts of New Zealand’, Keynote Address (Family Court Conference, Copthorne Hotel, oriental bay, Wellington, 5 August 2011), available at
and Rose v Rose\textsuperscript{110} is the only case concerning s 9A so far that has been to the Supreme Court. In Rose, (a 25-year-long marriage) Mr Rose had established a successful wine-making business on the farm and at the time of separation, his separate property amounted to NZ$2.8 million. While s 9 P(R)A states that this would be separate property and thus not subject to equal sharing, Mrs Rose argued that her child-care, household contributions and the income she earned ‘off-farm’ (which amounted to a significant proportion of the household income) had indirectly contributed to the increase in value of the separate property as it enabled Mr Rose to work on his farm and business. Consequently, Mrs Rose argued that this should qualify under s 9A. The court agreed and awarded her 40% of the increased farm value and 50% of the increased business value which altogether amounted to 20% of the NZ$2.8 million assets.

While s 9A clearly offers the courts a chance to give greater recognition to caregiving activities undertaken within the domestic sphere, and it also introduces greater flexibility into the application of property settlement in New Zealand, it is questionable how far this section really achieves greater fairness. The modest award reached in Rose (despite being a revolutionary case) seems particularly small given that her dual role of both caregiving and breadwinning meant that she made a significant contribution to the family for nearly a quarter of a century; arguably a 20% share is therefore not reflective of the extent of Mrs Rose’s contribution. Furthermore, Rose is generally considered to be a ground-breaking case with regards to relationship property, and therefore such variations under s 9A are uncommon; the narrow approach to separate property contained within s 9 is typically applied. Thus, for the most part, there is a clear and certain division between relationship and separate property within New Zealand, and litigation on this matter is rare. However, the limited operation of s9A may be the result of New Zealand’s lack of interaction with discretion and preference for certainty. Consequently, it is possible that the courts in England and Wales who are much more acquainted with complex discretionary issues may not apply it so rigidly and infrequently. Nevertheless, such a provision may be necessary to reflect the fact that non-matrimonial assets may receive help and contributions from the non-owning spouse.

While generally the focus group participants from my doctoral research wanted to see a narrower definition of this property, it was evident that the respondents felt non-family assets should become relationship property if there was either a nexus (as in Australia) between a contribution and the asset or as a result of usage. This is akin to the approach currently taken in Scotland.

\textit{…if you’re running a business, if you’re earning a salary whatever, you’re enabled to that by your other, by your relationship like someone who is looking after the kids or worked for two years through the training} (Mark, married men group)
\textit{Categorising it with heirlooms or business you could say has it contributed to your relationship, have you both benefitted from it…} (Christine, married women group)

It seems that this definition is a balance between Deech’s and Fineman’s position between protecting the breadwinner’s assets and encouraging ‘self-dependency’ and ‘caring for the care-giver’ where it would impinge on their lifestyle to a greater degree, based on the use of that asset.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88
7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100
This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

NO

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

N/A

As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
PRINCIPLED REFORM

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

In general, I agree that a reform to achieve a principled basis for spousal support is desirable. Empirical research I have undertaken in a number of projects looking at social attitudes indicates that marriage is primarily viewed as a joint enterprise or partnership and equal sharing of assets is widely assumed to be a natural consequence of marriage, although people are less clear on which assets should be shared equally, when they are pushed on this. I fully agree that an explanation which sets out the parameters of what has to be paid (over and above child support where that is appropriate), the ways in which the spousal support obligation can be met and of the length of time for which it should be paid in generalised circumstances would be helpful. Indeed, the fact that legal aid for private family law issues is to be withdrawn as of April 2013 and that a nationally representative omnibus survey of those separating since 1996 shows as part of my current research (ESRC-funded Mapping Paths to Family Justice project) shows 46% of all separating couples (and 38% of divorcing spouses) currently sort matters out without taking any legal advice whatsoever, adds to the case for clarity on this issue. However, I think it is important to resist a CSA-style rigid formula approach and to ensure that we retain the ability to meet spousal support from both income and capital as may be appropriate to the couple’s circumstances. This is all-important if needs are to be defined as including housing needs.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

Whilst compensation of loss caused by the relationship (or relationship-generated disadvantage) is conceptually attractive, I take the view that spousal support should not be restricted to this as in most cases it will be very difficult to quantify and the process of attempting quantification will rule out loss that is too remote but nonetheless has had a real impact. Whilst the career trajectory of professionals who give up or interrupt their career to take on family responsibilities as in the case of Mrs McFarlane (Miller; McFarlane [2006] UKHL 24) might be relatively predictable, those who marry before having established a career yet and who may well have made other financial and career choices if they had remained single, would not be able to prove their loss was caused by the relationship as such. Yet they would still not be free or able to start on a new path post-divorce, especially where there...
are continuing caring responsibilities which will inevitably affect their choices and deny them opportunities which are incompatible with the continuing caring role. Thus in my view the preferable option is the unravelling of the merger over time, redressing the lifestyle disparity between the couple post-divorce, with a view to them each achieving financial independence. This also reflects the joint enterprise or partnership nature and spirit of marriage which couples embark on together and which, as a result of (healthy) optimistic assumptions that the marriage will last, often involve one partner making the lion’s share of domestic contributions, either giving up work or working part-time, whilst the other’s greater financial contributions means they have not suffered financial setbacks in career terms. Indeed they may have benefited from the fact that their spouse is taking care of the children, leaving them free to concentrate on their career.

US studies consistently show that married men earn significantly more than single men (and divorced men). Chun and Lee’s study ‘Why Do Married Men Earn More: Productivity or Marriage Selection?’ *Economic Inquiry*, 2001, vol. 39, issue 2, pages 307-19, found that the marriage wage premium cannot be attributed to the unobservable higher earnings capability of married men. Instead, wage gains from marriage are explained by the degree of specialization within the household, stating their findings cast doubt on the argument that the selection of high-ability men into marriage is the cause of the marriage wage premium. This goes some way to showing that domestic contributions to a marriage do have financial value, which should be clearly recognised at the point of divorce where such assets/income exist by a sharing principle which does not have to be based on compensation.

In practice, therefore, I think the second option is definitely most appropriate where there were children of the relationship.

I can see clearer arguments for a compensation approach where there are no children (or other caring responsibilities undertaken unevenly for the benefit of the family) and public attitudinal research tends to support a regulatory division between those who have (or have had) children of the relationship and those who have not (e.g. in the Common law marriage myth revisited research, the primary carer within a cohabitating couple with a child after 2 years were seen as more deserving of financial provision on separation than the two year married childless couple in the BSA study (see Barlow and Smithson [2010] CFLQ 328-350)). However, over time, the acceptance of such a distinction becomes less clear and the recognition of likely financial solidarity of such a couple gains ground.

Thus, to answer the points raised in 7.4:-

1) Where there are no children, the length of marriage is absolutely key, in my view. Pre-nuptial agreements research clearly shows the longer the relationship without children, the more the post-divorce sharing seems appropriate, leading people to want a court to be able to override the pre-nup (see CFLQ 2012). After a 2 year marriage with no children, 60% of the nationally representative study were happy to accept that the financially weaker spouse who had signed up to a pre-nup preventing her make any sort of claim on her partner should be held to it. This reduced to 46% where the same marriage had lasted 20 years (although whilst the first response was gender neutral, in the second scenario 50% of men and only 40% of women agreed). There seems to be a gendered dimension to the perceptions of post-divorce obligations in this research.
2) The marital standard of living is always relevant as a starting point, but gains importance over time partly because of the increased financial solidarity (or merger of assets and income) over time and partly reflecting the acceptance of the joint enterprise nature of marriage (pre-nup situation excepted). Where there are assets which are available but not accessed during the marriage, this

3) The ‘family business of caring’ is critical to what marriage is widely understood to be about and all my empirical studies reflect this. Where there are minor children, the post-divorce standard of living of both partners and particularly the primary carer affects in practice the children’s standard of living and most people accept, albeit grudgingly, that they should decide financial arrangements around this. The financial consequences of unevenly sharing the responsibilities of childcare or elder care during the marriage are accepted as a key factor in why assets should be shared, again reflecting the joint enterprise nature of marriage.

4) Occupation of the matrimonial home. Following divorce, most people accept in the studies I have undertaken that where there are children that it is best for the children to remain in the matrimonial home or in its vicinity to reduce disruption of schooling, friendships etc at a difficult time for them, where this is possible. However, this often means the non-primary caring parent is forced into reduced circumstances, but as Fisher and Low’s research shows, men recover quickly from divorce compared to women (most often the primary carer) in this situation. With more shared care orders being made on divorce, this may well affect the appropriateness of one partner retaining occupation of the matrimonial home as both partners will need accommodation appropriate for the children. This is likely to have consequences of financial settlements and orders which it might be useful for the Law Commission to address at this stage.

Delayed sorting out of home can raise problems for people later on, when mortgage capacity is less, so clean break is ideal and as a minimum primary carer must have right to occupy family home until children finish education. Expansion of state-funded childcare which would solve the inequalities between spouses and then equal sharing or staged equal sharing would become appropriate.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

See Above
7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

On balance, I would like to see a radically reformed discretionary approach with strict principled guidelines rather than a rigid formula. I would say a strict formulaic calculation will produce an average justice which, like child support at its inception, will throw up anomalies with far-reaching consequences for children as well as partners. In the absence of state-funded child care which leaves a couple on an even footing vis-a-vis the labour market and stresses the need for inter-spousal financial independence, stronger guidelines within the discretionary approach which people can apply themselves is what should be aimed for. Mediation/collaborative law will have a key role here but something which gives examples which people who are not in the ‘big-money case’ category can negotiate around is what people are crying out for in our Mapping study (see above). This shows issues like guilt or fear/pressure from an abusive or controlling relationship mean people settle on unsatisfactory terms and guidelines and examples of when rules should be departed from would help all concerned.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117
Yes, in principle this should apply, and certainly where there are no children, but only where childcare costs are factored in and not where there are disabled children or disabled spouse. Where there is to be shared care, this should be done in the children’s best interests, not just to reduce spousal support. It all depends on how disposable the ostensibly life-long marriage bargain is supposed to be. If the financial solidarity within marriage has only minimal recognition post-divorce, there is little distinction with cohabitation financially, where the home is jointly owned, and although maintenance is rarely paid, it does often affect the bargaining position of the weaker spouse to enhance their capital asset split under a clean break arrangement. Until the state takes responsibility for childcare, it is important to recognise the value of domestic contributions to marriage post-divorce in terms of childcare. To dismiss it on the basis everyone should work without affordable childcare is to devalue the typically female contributions to marriage and to ignore the gendered nature of childcare and the labour market. The consequences for children who can be plunged into poverty should be factored in. The situation is different where there are no children or arguably post children, providing transition is allowed. People need to be warned in advance so that they don’t make decisions which place them at a disadvantage, but such decisions are not made in a legally rational way but on a rationality for the family collective at the time (often thinking of what is best for the children) and these shouldn’t make the vulnerable spouse more vulnerable on divorce.

In the pre-nups study (see slides and Barlow and Smithson [2012] CFLQ 304-319), our scenario where after a 20 year marriage with 2 grown up children the pre-nup provided for no share of the home inherited by the husband for wife only 16% agreed the agreement should be binding (18% men and 12% of women) but this only increased to 28% where accommodation in the home was provided for the wife for years post-divorce.(38% men and 24% women), revealing limited acceptance of this approach after a long marriage where there had been children but there are now no impediments to finding employment. Thus the longer the marriage where there are children, the greater the need to provide for more than limited needs in the mind of the public, even where the home was inherited by the husband prior to marriage. Again this reflects an acceptance of financial solidarity post-divorce, at least where there are children.
7.7 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?

Supplementary Consultation Paper, Part 4, paragraph 4.118

1. I suggest an inter-disciplinary team of academics with critical input from an advisory group comprising policy makers and practitioners (including mediators, lawyers, judges working in the family field) would be ideal. I think any approach should be road tested on real cases to compare outcomes and views on outcomes by parties and practitioners on ease of calculations and comparative ‘fairness’ across different asset ranges.

2. This would need thinking through depending on what the proposals were, but I suggest two sample groups of parties going through the divorce process who agree to take part in the research who are matched for comparability in terms of assets, children etc who are either settling themselves and/or going through mediation or collab law and one set use the new guidelines and the other the current law. You can then compare the outcomes, time it takes, degree of hostility, ease of agreement. You could then undertake focus groups of practitioners to a) gather their experiences of the new guidelines and b) a separate group to see how easily they feel the guidelines could be applied to case studies provided and recent cases they have conducted.

3. Probably two years minimum to do it properly.
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments

A.
I suggest where there are no children and a short marriage (but I would say a short marriage should be for up to 5 years, and 6 year is on the cusp of ‘medium length’ as people acclimatise to the new living standard and take decisions on the basis that the marriage is a joint enterprise in which they are sharing equally), option 2 is appropriate for Michael. Where there is a medium- to long-term marriage (5-15 years), option three- option of graduated transition to independence is the best – with a graduated amount of time needed for the transition proportionate to the length of the marriage. (NB, presumably pre-marital cohabitation needs to be taken into account here in terms of the length of time, perhaps ignoring the first two years?). Very long term marriages should aim for the third option too, but too short a time bar for achieving financial independence could cause hardship in some situations pension decisions have been made on the basis that the marriage will continue. Generally in medium to long term marriages, I would suggest 3-5 years would be the normal time frame for continued support where there is income disparity in addition to capital provision. Where there is a very long marriage or where one partner has facilitated the other’s career by moving or giving up their own career, then a longer term adjustment period should be afforded- perhaps 10 years maximum, with that being the exception rather than the rule, although capitalisation of this claim should be the norm to achieve a clean break.

B.
I think it should be subtracted from the value and they share what is left. However, the sums can change radically depending on the figures and the value of the home. 

C

This is similar to the scenario in the Pre-nups research study. 68% of the respondents to the national survey thought needs should be provided for by the other spouse at least for a period there, even though they had signed a pre-nup agreeing not to make any claim against the other for financial relief. This shows that there are some remnants of the ‘in sickness and in health’ part of the marriage bargain in that the moral obligation should be backed up with some legal force. However, we also saw a gendered response with 38% of men and 27% of women agreeing that the pre-nup should be binding, even though in our scenario it was the man who suffered chronic ill-health and the wife who was more financially secure. Thus some time-limited obligation would accord with public sentiments on this difficult issue and retain some essence of the moral obligation of the marriage bargain, post divorce.

In the follow-up study some reasoning for the differing standpoints was apparent: Some had traditional marriage view ‘if I was married to someone who became ill, I don’t think it would be right for me to run off and leave them. That’s my responsibility.’ William, single father of 2. Yet, Ellen, ‘Well they’ve only been married 10 years, so what are you putting on the other party? A life sentence to look after a disabled party? Sean, ‘I don’t like to see people responsible for other people once they’ve split up. It doesn’t make sense to me.’

Clearly views are mixed, but perhaps I would suggest for a medium – long term marriage, some obligation to support for a period of time would be appropriate.

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D.

In reality we are finding in phase 2 of the Mapping study that people negotiate at the present time and people are seeking individual solutions. I think a move to average justice would not be well received. However a range around which they can negotiate with the help of a mediator or lawyer where they have that choice would work well for most people. Often, they are saying in the Mapping project that they didn’t know where to start and as mediators do not advise, they don’t know if they are even in the right ballpark area unless they have taken legal advice first, which will not be happening after April 2013. People expect to have to negotiate but are crying out for assistance on what is appropriate to their situation. They are not asking for rigid formulae, though. They seem to want to know the parameters so that they can settle within those.

E.

As Fisher and Low’s research shows, re-partnering is often the way that financial
independence from the ex-spouse is achieved. Where there are no children, then I think financial independence is an appropriate goal as indicated above. Where there are children or other caring responsibilities, this should be aimed for but over a longer period of time to permit adjustment and to ensure the children are not unduly impoverished by the reduced circumstances of the primary carer. Where there is a shared care situation which are more common, both parties need to work towards financial independence but time will be critical, as well as labour market conditions, tax credits and welfare benefit conditions. The priority must be for children to be well cared for and housing to be secure wherever possible.

Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

F. I think length of relationship should have most impact where there are no children as indicated above. So yes it would affect

G. The marital standard of living will not normally be achievable post divorce but where
there are children the disparity between the parents post divorce should not be too
great as this will impact on the children's standard of living, too.

H. Continuing responsibilities are critical but where children are grown up and there is
financial disparity between the spouses, this should be factored in either through
length of marriage adjustment following the merger over time route or support based
on compensation if that were favoured. This flags the joint enterprise of marriage
which should carry continuing obligations towards the weaker spouse for a time and
given demerger is more difficult the longer the parties have been married where there
has been different role divisions, then this should be reflected in the calculations.

I. Where there are children, then if possible they should be able to remain in their home
as indicated above and that reflects feelings by many people who feel children
should be put first and their home is their greatest concern in many cases. Sarah
should be able to stay.
Ian should not have priority here. He can look after himself more easily as he does
not have full caring responsibilities. It would be more difficult if they were sharing
care post-divorce, but he can rent in the interim and is likely to recover. Sophia
should be able to stay if she can buy Ian out

Neither Sophia nor Michael should have the right to stay in the home unless they can
buy the other out which only Sophia might be able to. Neither has priority over the
other and there is no primary carer or children to give first consideration to.
IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

Given the push following the Family Justice Review and the government response to it to encourage settlement through use of website information, mediation and generally avoid use of the courts, authoritative guidance which is accessible to all and has clear aims and parameters would seem to be the best way forward in my view. Statutory reform in the manner suggested would not be unwelcome but may perhaps encourage litigation, either in big money cases which will distort the message that will filter through and encourage litigation in person, in the absence of legal aid. I think the list in 5.43-5.48 is a good starting point. The priority and solution list is more difficult, although a bank of illustrations/case studies might work well with
mediation or other dispute resolution advice where that is available. It would be very difficult for a divorcing couple to find their own way through this in practice. The loss of legal aid and advice prior to mediation is a big problem in this context.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

A publicly funded system of high quality childcare would of course make spouses post-divorce much more able to become truly financially independent of each other. The major problems that the law faces in this context are born out of an uneven distribution of financial and non-financial contributions to a marriage, which leaves one spouse financially weaker and looking to the other spouse or the welfare benefit system for assistance to meet their needs. If we want to achieve substantive equality between the spouses alongside financial independence this would greatly assist alongside (for example) a Swedish-style community of property scheme, which divides the assets equally between the spouses on divorce after a 5 year marriage (with proportionate reductions of the share of the weaker financial spouse for each year less than five).

7.10 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.
Yes, I think this is essential if the joint enterprise nature of marriage which entails mutual obligations is not to become meaningless as spouses would become disposable at will, with no matching of the perceived moral and legal obligations that such an ostensibly serious commitment would entail. This is particularly the case where there are children. I think where there are no children, there are arguments that a compensatory approach should apply. I think this would work for short marriages but is more difficult for longer marriages due to the merger over time issue that has been identified and which fits with the joint enterprise nature of marriage.

**NON-MATRIMONIAL PROPERTY**

7.11 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?

I agree, save for the family home. The pre-nup study and the community of property study (Cooke et al, 2006) which involved a pre-acquired home by one spouse reveal mixed public attitudes on this. However, it must be available to meet needs and particularly where there are children.
7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

Yes, I think this would fit with most people’s thinking where there are children although there may be an issue around whether this can be excluded by means of a pre-nup and whether it should be divided equally in short marriages. In either case, the financially weaker partner’s needs should still encompass a value equivalent to their re-housing costs and where the matrimonial home belongs to one spouse, as this arrangement, in effect, through the joint enterprise mindset deters the other from achieving their own housing independence and a family home involves a psychological investment by the non-owner spouse as well as often investments in décor choices etc which would not give them any sort of beneficial interest.

The community of property study (Cooke, Barlow and Callus, 2006) showed automatic ownership of the matrimonial home was popular and this was echoed more recently with attitudes in the pre-nup study where at least over time and where there were grown up children an inherited family home was considered an asset that should be shared by the majority of respondents (84%) despite a pre-nup ring-fencing the inheritance. After a 20 year marriage with no children, 54% thought it should be shared. However, there was more equivocation in the qualitative study around whether it should be shared equally, but certainly shared in a way that met both parties housing needs as much as possible. Again it reflects joint enterprise thinking about marriage where there were children or where the marriage had lasted a long time.

7.13 We ask for consultees’ views on whether property acquired by one party during cohabitation with the other party should be excluded from the definition
Where there are children, my research over a number of years (e.g. Community of Property Study (Cooke et al, 2006) and both common law marriage myth studies (Barlow et al, 2005, 2008, and Barlow and Smithson 2010) shows clearly that the majority of people support a functional approach to financial provision and so I think where the couple subsequently marry, property acquired during cohabitation should be treated as matrimonial property, unless otherwise agreed in a pre-nup. Where there are no children, I think the same reasoning applies for medium- long term relationships (more than 5 years) and I would count the cohabitation period into the length of marriage to judge this.

7.14 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?

With the exception of the family home, yes.
7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Yes, that seems appropriate to me.

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7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

Yes, unless excluded by a marital agreement from being matrimonial property.
7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

Well the joint enterprise nature of that kind of investment means that at least the increase in value should be shared at least equally or perhaps to reflect the respective efforts of the spouses. However, the latter would be difficult to calculate so the joint enterprise approach of equal sharing would be most appropriate and practical. I see no reason why increase in value of such assets could not be ringfenced from inclusion in the matrimonial property in a pre-nup if that was agreed, with the proviso that a needs safety net as envisaged would enable its value to be applied to meet needs.
Non-Matrimonial Assets, Indexation and Value Increases – The Pillarisation of Ancillary Relief?

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I. General introductory remarks

This article provides a comparative overview of the way non-matrimonial assets are treated by the European continental matrimonial property regimes and Scotland as well as some common law jurisdictions, where non-matrimonial assets are given special consideration. It then attempts to forecast the future treatment of pre-marital assets and other non-matrimonial assets in England and Wales. It thus hopes to inform the debate on possible law reform in England and Wales triggered by the practical problems the current law poses as well as the Law Commission’s Supplementary Consultation Paper ‘Matrimonial Property, Needs and Agreements’.

But before doing so it is necessary to state the seemingly obvious at the outset: that the approach to the financial consequences of divorce on the Continent is very different from that taken in England and Wales (and indeed most common law jurisdictions, although less so). While in England and Wales the approach is a ‘holistic one’ and the entirety of the remedies in principle are awarded at the discretion of the court, the continental systems operate with what has been called a ‘pillar’ approach; the financial consequences of divorce are dealt with by reference to distinct and separate legal remedies, of which the division of the assets according to the respective matrimonial property regime is only one. The other pillars, depending on the jurisdiction, comprise maintenance, pension sharing and allocation of the right to use (rather than ownership) of the household goods and the family home. In some jurisdictions, such as France (prestation compensatoire) and the federal law of Spain (pension compensatoria), there even is a further proprietary remedy.

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Of course all these jurisdictions aim for an overall fair outcome for the financial consequences of divorce (and naturally what is regarded as fair differs from jurisdiction to jurisdiction), but they do so not only through the matrimonial property regime but also through the other ‘pillars’. Thus the individual pillars do not necessarily have the same policy aims. Roughly speaking, one of the main policy aims of the matrimonial property regimes is to provide certainty as to a) who owns what and b) who can claim what from the other spouse rather than to ensure an overall fair outcome. Therefore it is crucial to remember that only looking at all the financial consequences of divorce in a jurisdiction and thus the overall outcome, and not merely the outcome of the division of the assets according to the matrimonial property regime, will be able to give a ‘full picture’ of the financial consequences of divorce and the ‘fairness’ of a system. The treatment of pre-marital and other non-matrimonial assets in the respective jurisdictions therefore needs to be understood accordingly.

II. Continental European matrimonial property regimes

Many different varieties of matrimonial property regimes can be found in the continental European jurisdictions, but they can be divided into two groups according to the effect the marriage has upon the property relations of the spouses and the ownership\(^6\) of their assets. In the first group (‘separation of property jurisdictions’), the marriage as such does not change the property relations of the spouses. Whoever had ownership before the marriage retains this ownership, and assets acquired by one spouse during the marriage are owned by that spouse. But in the event of divorce there are legal mechanisms that allow a spouse to gain a share of the other’s property (see II.1. below). In the second group (‘community of property jurisdictions’), through marriage some form of community of property of the spouses is created, and some or all of the assets therefore are jointly owned. In these jurisdictions marriage therefore has an immediate proprietary effect, and in the event of divorce the joint property is to be shared (see II.2. below).

1. Separation of property jurisdictions

\(^6\) The civil law jurisdictions of Europe do not distinguish between legal and beneficial ownership. Hence when ‘ownership’ is referred to for those jurisdictions (or ‘his or her property’), this means complete ownership as beneficial interests cannot arise according to the laws of these jurisdictions.
1.1 Germany: community of accrued gains

In Germany the default matrimonial property regime is that of a community of accrued gains (Zugewinngemeinschaft). The term is actually rather misleading, as at no time – even in the event of divorce – any form of ‘community’ of property actually exists. Instead there are ‘statutory compensation clauses’ and thus monetary (rather than proprietary) claims upon divorce.

1.1.1 Basic Approach

The German community of accrued gains is designed to be a purely mathematical property regime and not overly concerned with notions of ‘fairness’, which are dealt with by the other pillars, particularly maintenance and pension sharing. In the event of divorce the accrued gain of each spouse is calculated by subtracting the ‘final assets’ (Endvermögen, i.e. the value of the assets owned by a spouse on the day that the divorce petition was made rechtshängig [pending]) from the ‘initial assets’ (Anfangsvermögen, i.e. the value of the assets owned by a spouse on the day that marriage commenced). The latter not only comprises all the assets a spouse owned at the time of marriage but also gifts and inheritances received during the marriage; any asset that is not proved to be part of the initial assets is assumed to be a final asset. Once the gain accrued during the marriage has been calculated for each spouse, the accrued gain of the spouses is ‘equalised’: the gains of both spouses are added together and divided by two. This is the accrued gain to which each spouse is entitled, and the spouse having the greater accrued gain must therefore pay the other spouse the difference.

The basic policy idea behind these rules is that all of the assets deemed to be ‘initial’ are not connected to the marriage as such as they are not ‘fruits of joint labour’. Therefore they should not be shared in the event of divorce. The German community of accrued gains is – practically difficult issues of valuation of the assets notwithstanding – relatively easy to administer, but it is also somewhat crude because it does not consider the reason for, or source of, the accrued gain. Hence an increase in value of an asset owned before the marriage during the marriage will become part of the accrued gain and must therefore be shared, as must, for example, damages received for pain and suffering during the marriage.

Despite the apparent problems this raises, this approach was expressly affirmed by the legislature during recent reforms. The justification for this was that as long as the gain actually accrued during

\[7\] On the financial consequences in Germany more generally see eg A Dutta, above fn 3.
the marriage, the source of the gain should not be relevant, and that there was no obvious justification for treating, for example, real estate differently from shares, interests from bonds etc.8

The courts do not have any real discretion to order anything other than equal sharing of the accrued gains. However, a spouse who would be obliged to make payments under the rules explained above can attempt to claim that an obligation to make these payments would be grossly inequitable (grob unbillig). But the Federal Court has interpreted this exception extremely narrowly in the past.9

It is interesting to note that matrimonial property regimes with certain similarities to the German one (like the Swiss and Greek participation in acquests regimes)10 do not include the value increase in the ‘sharing’ of assets in case of divorce. This is so because the assets as such are excluded and therefore the issue of sharing the value increase does not arise.

1.1.2 Indexation and increases in value

The purely mathematical approach of the accrual of gains community faces certain difficulties with regard to what in Germany is called Scheingewinn (fictitious gain). Because the value of each asset is, in principle, calculated at two points in time (marriage/date of pendency of the divorce petition) between which a significant length of time can pass, much of the gain may be ‘fictitious’ in the sense that it merely reflects inflation. It is generally accepted that having to share this fictitious gain is contrary to the policy behind the system of the community of accrued gains, as this could effectively mean that a spouse would leave the marriage with less than he/she had when she entered into it, i.e. a reduction of the initial assets.11

There is considerable debate as to how exactly this problem ought to be resolved,12 but the German Bundesgerichtshof (Federal Court of Justice) has adopted a formulaic approach using the Lebenshaltungskostenindex (cost of living index; sometimes also referred to as Lebenshaltungsfaktor).

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8 It is interesting to note, however, that in the recently concluded bilateral treaty between Germany and France on the introduction of an optional matrimonial property regime, the value increase of real estate was indeed excluded from the final assets. On this treaty see eg T Klippstein, ‘Der deutsch-französische Wahlgüterstand der Wahl-Zugewinngemeinschaft’ Familie Partnerschaft Recht (FPR) 2011, 510 ff; E Becker, ‘Ein europäischer Güterstand? Der deutsch-französische Wahlgüterstand’ ERA Forum (2011):12, 103 ff; N Meyer, ‘Der deutsch-französische Wahlgüterstand’ FamRZ 2010, 612 ff and esp N Dethloff, ‘Der deutsch-französische Wahlgüterstand’ RabelsZ (76) 2012, 509 ff.
10 Cf the answers to Questions 57 ff for Greece (by A Koutsouradis, S Kotronis and F Hatzantonis) and Switzerland (by I Schwenzer and A Bock) in Boele-Woelki, Braat and Curry-Sumner, above fn 2, and Scherpe, above fn 2, p 458 ff.
11 Schwab, Familienrecht, above fn 9, p 134 f.; Schwab, Handbuch, above fn 9, p 1828 f.
12 Schwab, Handbuch, above fn 9, p 1829.
or *Verbraucherpreisindex* of the *Statistische Bundesamt* (Federal Statistical Office), which is essentially a consumer index. The formula is as follows:

\[
\text{adjusted initial asset} = \frac{\text{nominal initial asset} \times \text{index on day of petition of divorce} - \text{index on day of marriage}}{\text{index on day of marriage}}
\]

The adjusted initial asset is then used for the calculation of the accrued gain. No distinction is made between different types of assets. While this rather blunt approach is not without problems and has been criticised,\(^{13}\) it is authoritative for the time being. In individual and exceptional cases, such as where real estate and significant assets are held outside of Germany, the courts have applied the local indices where that was considered more appropriate.\(^{14}\)

### 1.2 Nordic Countries: Deferred Community of Property

It has often been said that the matrimonial property systems of the Nordic Countries\(^ {15}\) are rather similar to ancillary relief in England and Wales, and on a superficial level there indeed are significant similarities. However, as pointed out above, the matrimonial property regime is merely one of the pillars of the financial consequences of divorce and, more importantly, the Nordic societal context is very different to that of England and Wales. For example, in Nordic countries post-marital ‘need’ including housing is very clearly regarded as the State’s responsibility, and not something which the former spouse ought to cover; thus, for example, maintenance payments over a longer period of time are quite unusual.\(^ {16}\)

#### 1.2.1 Basic Approach

There is a certain similarity between ancillary relief in England and Wales and the deferred community of property in that while there is a separation of property during the marriage, in the event of divorce all assets (including certain pension rights in some jurisdictions) of both spouses in

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\(^{14}\) Schwab, *Handbuch*, above fn 9, p 1830.

\(^{15}\) While the structures of the default matrimonial property regimes in the Nordic Countries are very similar, there are significant differences in the details. Norway substantially reformed its matrimonial property regime in 1991, and far-reaching reforms are currently under consideration in Denmark. For a more comprehensive account of the financial consequences of divorce in the Nordic Countries see eg M Jänterä-Jareborg, ‘Marital Agreements and Private Autonomy in Sweden’, in JM Scherpe, above fn 2, p 370 ff; JM Scherpe, ‘Privatautonomie und Familienrecht in den nordischen Ländern’ in S Hofer, D Schwab and D Henrich (eds), *From Status to Contract? – Die Bedeutung des Vertrages im Familienrecht* (Gieseking, 2005), p 209 ff and esp A Agell, *Nordisk äktenskapsrätt* (Nordiska Ministeriädet, 2003).

principle become communal property and thus susceptible to sharing. So the deferred community of property is a universal one, meaning that in principle all pre-marital property is included. Only assets acquired by gift or inheritance with the express stipulation that they should become separate/personal property will be treated as such and are exempt from sharing, as are assets stipulated to be separate/personal property by marital agreement.\textsuperscript{17}

Upon divorce (only) the communal property is to be shared equally. But, importantly, a departure from the equal sharing of communal property is possible in all Nordic jurisdictions – at the discretion of the court. In short, one could say that the courts will deviate from equal sharing if an equal division would be inequitable. However, the understanding of what is inequitable varies from jurisdiction to jurisdiction.\textsuperscript{18}

The Danish interpretation of inequity is narrowest, which is one of the reasons why reform currently is being considered. Under Danish law, a deviation from equal sharing will only be considered when the marriage was short (which is generally assumed to be a marriage of less than five years), did not involve an economic community and where there was a considerable asset disparity between the parties at the beginning of the marriage or a disparity was created during the marriage through an inheritance of gifts received by one of the spouses. If these cumulative requirements are fulfilled, some assets can be ‘taken out’ of the matrimonial property pool by the court and do not have to be shared.

In Sweden and Finland the criteria are much wider and simply allow for an unequal division if, ‘considering the economic situation of the spouses, it would be inequitable to come to an equal division’. Finland even has an additional provision that there should not be an equal division if this would result in an ‘improper economic advantage for one of the spouses’. In Iceland, the general clause for unequal division is even wider, and allows for a departure from equal division if dividing the assets equally would be ‘unreasonable’.

Nevertheless, unequal division in these jurisdictions is supposed to be an exception and mainly applicable in cases of short marriages, and also, to a more limited extent, if the assets were acquired before the marriage or by gift or inheritance. Furthermore, even assets that are separate/personal property of the spouses (e.g. because of marital agreements) can still be taken into account in the

\textsuperscript{17} On marital agreements in the Nordic Countries see M Jänterä-Jareborg, above fn 15; JM Scherpe, above fn 15.

\textsuperscript{18} Cf Agell, above fn 15, p 376 ff and Scherpe, above fn 15, p 214 ff.
sense that the court, under certain circumstances, has the power to re-allocate the personal property of the spouses.

Since its most recent reforms of 1991, Norway takes a slightly different approach: each spouse has the right to have the pre-marital property (and gifts and inheritances received during marriage) excluded from the matrimonial property pool; the burden of proof that the assets are pre-marital/gifts/inherited lies on the spouse asserting this exclusion right. This also applies to assets acquired during the marriage but replacing personal property (surrogates). Then such assets/property will be excluded from equal division, unless the other spouse can claim that it would be inequitable to do so. Such property can thus still be shared, but the burden of proof for providing equitable reasons to do so rests on the spouse claiming property. In comparison to the other Nordic countries the burden of proof is therefore effectively reversed.

1.2.2 Indexation and increases in value
Since the matrimonial property regime is a deferred community of property, questions with regard to indexation and increases in value are of much more limited importance than, for example, in Germany. But the issue can nevertheless arise for separate property or when the court decides to exclude certain assets from the property. If specific assets are excluded, once again the problem will not necessarily arise as the respective asset (for example a summer cottage owned before the marriage) could be excluded in full. Hence a question of indexation/taking into account inflation etc. could really only be relevant if the specific asset in question has become intermingled with the communal property, for example cash owned at the time of the wedding which is now in a joint account. In the first instance one would try to trace the assets/the surrogates, and if that is possible then these assets would be excluded from the sharing as above. If tracing is not possible it is very likely that the assets would be included in the sharing exercise. In any event, increases in the value of investments in communal property seem not to be considered and are therefore likely to be shared; indexation is apparently not discussed in this context.

2. Community of acquest
The community of acquest is the default matrimonial property regime of the majority of jurisdictions in Europe and prevalent in most of the Romanic and Eastern European jurisdictions.

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19 Defined differently in each jurisdiction, but essentially if not doing so would be grossly inequitable.
20 In Europe only the Netherlands operates a default system of universal community of property, meaning that upon marriage all assets of the parties become communal property. Unsurprisingly, matrimonial property
2.1 Basic Approach

The community of acquest is in essence a limited community of property: everything that is acquired during the marriage (except through gift and inheritance) becomes part of the communal property, everything else is considered to be separate/personal property of the respective spouse. In most community of acquest jurisdictions, income derived from separate/personal property also becomes communal property. In those jurisdictions where this is not the case, the reasoning is that such income cannot really be regarded as ‘fruits of joint labour’ and therefore should not be shared.

In a marriage subject to the community of acquest regime there will be three groups of assets: the communal property and the separate/personal properties of each spouse. In the event of divorce only the communal property is to be shared equally under this matrimonial property regime, and the spouses of course keep their separate property. But before the communal property is shared, all payments from/to the separate properties need to be taken into account to establish the ‘real’ communal property. For example, if the wife the paid for a new roof for the house (which happens to be communal property) from her separate property, she needs to be ‘paid back’ by the communal property before that communal property is shared equally. There are differences between the jurisdictions with regard to the calculation of these payments (see II.2.2. below).

2.2 Indexation and increases in value

For community of acquest jurisdictions, the issue of indexation/value increase does not arise for non-matrimonial assets because the assets themselves are excluded from the sharing exercise. In short, they are not considered to be acquired by ‘joint labour’ and therefore should not be shared.

However, in theory the issue of indexation could arise when the non-matrimonial assets are ‘intermingled’ with the communal assets. Yet, indexation is not used as such in these situations but rather the payments from/to the communal property will be calculated before the sharing of the communal assets. For example, the wife pays 50,000 towards the overall purchase price of the house of 500,000 from her separate/personal property. At the time of the divorce the value of the house is 600,000. In most community of acquest jurisdictions the value to be subtracted from the communal benefit and ‘transferred’ to her separate property would be the nominal one, i.e. only the 50,000 she put in; thus no “indexation” or equivalent takes place. However, some jurisdictions (including France and Belgium) would include the value increase of the goods/assets in which that

agreements are very common in the Netherlands; see K Boele-Woelki and B Braat, ‘Marital Agreements and Private Autonomy in the Netherlands’, in JM Scherpe, above fn 2, p 229 ff.
money was invested. Therefore, in the example above, the 20% value increase of the house would also apply to the wife's investment, and her claim against the communal property before the division would be 60,000. In that sense, there is a certain 'indexation' for the parts of the separate property that were 'incorporated' into the communal property.

III. Approach to non-matrimonial property in some other common law jurisdictions and Scotland

1. New Zealand – Relationship Property
In New Zealand the default regime not only applies to marriages, but also to civil unions and even – under certain conditions – to de facto relationships (hence the Act speaks of 'relationship property'). Section 8(1) of the Property (Relationships) Act 1976 defines relationship property as follows:

Relationship property shall consist of—
(a) the family home whenever acquired; and
(b) the family chattels whenever acquired; and
(c) all property owned jointly or in common in equal shares by the husband and the wife or by the partners; and
(d) all property owned by either spouse or partner immediately before their marriage, civil union, or de facto relationship began, if—
(i) the property was acquired in contemplation of the marriage, civil union, or de facto relationship; and
(ii) the property was intended for the common use or common benefit of both spouses or partners; and
(e) subject to sections 9(2) to (6), 9A, and 10, all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and
(ee) subject to sections 9(3) to (6), 9A, and 10, all property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—
(i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or
(ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; and
(f) [repealed]
(g) the proportion of the value of any life insurance policy (as defined in section 2), or of the proceeds of such a policy, that is attributable to the marriage, civil union, or de facto relationship; and
(h) any policy of insurance in respect of any property described in paragraphs (a) to (ee); and
(i) the proportion of the value of any superannuation scheme entitlements (as defined in section 2) that is attributable to the marriage, civil union, or de facto relationship; and
(j) all other property that is relationship property under an agreement made under Part 6; and

21 It needs to be repeated here that this of course is not a question of legal or beneficial ownership in any sense, see also fn 6 above.
(k) any other property that is relationship property by virtue of any other provision of this Act or by virtue of any other Act; and
(l) any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).

The relationship property in the case of a marriage thus roughly comprises what can be called the marital acquest (assets acquired during the marriage, including pension rights), but also all assets that were acquired before the marriage for the benefit of the family, and the family home and household goods, irrespective of when they were acquired. But crucially all other non-relationship which is not intermingled with the relationship property remains the personal property of the spouses.

The basic statutory rule is that all relationship property, but not the parties’ personal property, is to be shared equally upon divorce, unless one of the very narrow exceptions applies; these are, for example, marriages of short duration or where equal sharing would be repugnant to justice under the given circumstances.

It is important to note that in addition to the division of the relationship property, the courts have the discretionary power to make a further award based on notions of compensation if, after the division of property, the income and living standards of one partner are likely to be significantly higher than those of the other partner because of the division of functions within the relationship. This would apply, for example, if one of the spouses gave up his or her career to take care of the children. However, it appears that the courts in New Zealand have been rather cautious in using this discretionary power, and one of the reasons for this may be the further power that the courts have to award post-marital maintenance to meet the ‘reasonable needs’ of the other spouse. The Act does not contain any provision to clarify the relationship between compensatory and maintenance awards, and there are apparently no cases on this point.

The issue of value increase and indexation does not really arise in New Zealand. If the property is separate property (i.e. not relationship property) it will not be shared, nor will any increase in value; if the property has become relationship property (which includes separate property that has become ‘intermingled’ with relationship property) it is to be shared, irrespective of value increase etc.

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26 Cf Briggs, above fn. 22, p 263 ff.
28 Cf s 8[1](l) Property (Relationships) Act 1976.
2. Singapore – Matrimonial Assets

While the overarching aim in Singapore, similar England & Wales, is to achieve a ‘just and equitable outcome’ for financial relief in case of divorce, there is an express statutory provision which regulates which property is to be shared in the relevant legislation (which for historical reasons is called the ‘Women’s Charter’).29 Section 112(1) Women’s Charter confers a power on the courts to re-allocate ‘matrimonial assets’ in the event of divorce, and Section 112(10) defines matrimonial assets as follows:

For the purposes of this section, “matrimonial asset” means —
(a) any asset acquired before the marriage by one party or both parties to the marriage —
   (i) ordinarily used or enjoyed by both parties or one or more of their children while the parties are residing together for shelter or transportation or for household, education, recreational, social or aesthetic purposes; or
   (ii) which has been substantially improved during the marriage by the other party or by both parties to the marriage; and
(b) any other asset of any nature acquired during the marriage by one party or both parties to the marriage,

but does not include any asset (not being a matrimonial home) that has been acquired by one party at any time by gift or inheritance and that has not been substantially improved during the marriage by the other party or by both parties to the marriage.

Thus non-matrimonial assets that are not in any way associated with the family, no matter how significant and substantial, will not be shared. However, once such an ‘intermingling’ has taken place, they will be considered matrimonial assets and consequently be subject to sharing.

Arguments seeking to rely on the non-matrimonial nature could then only be raised with regard to the discretionary division of the matrimonial assets, and that it would not be ‘just and equitable’ to disregard the source of the assets. There appears to be a reasonable prospect of such arguments succeeding – at least to a certain extent.

Because assets are categorised so clearly, indexation/value increases do not so far really play a role in Singapore, although the law would in theory allow for such a development.

3. Scotland – Matrimonial Property

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Scotland is of course not a common law jurisdiction, but the approach taken in this jurisdiction justifies including Scotland in this part of the article rather than in part II.

In Scotland, financial relief upon divorce is in principle discretionary. Statutory principles are to guide the exercise of this discretion by the courts in s 9 Family Law (Scotland) Act 1985, the first and arguably most important and most widely used of which relates specifically to matrimonial property:30

9 Principles to be applied

(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that—

(a) the net value of the matrimonial property should be shared fairly between the parties to the marriage or as the case may be the net value of the partnership property should be so shared between the partners in the civil partnership;

(b) fair account should be taken of any economic advantage derived by either person from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other person or of the family;

(c) any economic burden of caring, should be shared fairly between the persons—

(i) after divorce, for a child of the marriage under the age of 16 years;

(ii) after dissolution of the civil partnership, for a child under that age who has been accepted by both partners as a child of the family or in respect of whom they are, by virtue of sections 33 and 42 of the Human Fertilisation and Embryology Act 2008, the parents.

(d) a person who has been dependent to a substantial degree on the financial support of the other person should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from—

(i) the date of the decree of divorce, to the loss of that support on divorce;

(ii) the date of the decree of dissolution of the civil partnership, to the loss of that support on dissolution.

(e) a person who at the time of the divorce or of the dissolution of the civil partnership, seems likely to suffer serious financial hardship as a result of the divorce or dissolution should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.

(...)

S 10 Family Law (Scotland) Act 1985 the deals specifically with the sharing of matrimonial property, defining it in s (10(4) and establishing a presumption that equal sharing of this property is fair in s 10(1):

10 Sharing of value of matrimonial property

(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property or partnership property shall be taken to be shared fairly between persons when it is shared equally or in such other proportions as are justified by special circumstances.

(...)
(4) Subject to subsections (5) and (5A) below, in this section and in section 11 of this Act “the matrimonial property” means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)—
   (a) before the marriage for use by them as a family home or as furniture or plenishings for such home; or
   (b) during the marriage but before the relevant date.

(5) The proportion of any rights or interests of either person
   (a) under a life policy or similar arrangement; and
   (b) in any benefits under a pension arrangement which either person has or may have
      (including such benefits payable in respect of the death of either person),
which is referable to the period to which subsection (4)(b) or (4A)(b) above refers shall be taken to
form part of the matrimonial property or partnership property.

(6) In subsection (1) above “special circumstances”, without prejudice to the generality of the words, may include—
   (a) the terms of any agreement between the persons on the ownership or division of any of
      the matrimonial property or partnership property;
   (b) the source of the funds or assets used to acquire any of the matrimonial property or
      partnership property where those funds or assets were not derived from the income or
      efforts of the persons during the marriage or partnership;
   (c) any destruction, dissipation or alienation of property by either person;
   (d) the nature of the family property or partnership property, the use made of it (including
      use for business purposes or as a family home) and the extent to which it is reasonable to
      expect it to be realised or divided or used as security;
   (e) the actual or prospective liability for any expenses of valuation or transfer of property in
      connection with the divorce or the dissolution of the civil partnership.

Hence, the matrimonial property to be shared in principle comprises what can be described as the
‘marital acquest’. It therefore does not include pre-marital property (or property acquired during
the marriage through gift or inheritance), unless such property is the family home/household goods
used by the family. In addition to this sharing rule, the courts also have a further discretionary power
to make compensatory awards to take ‘fair account’ of ‘any economic advantage derived by either
party from contributions, whether financial or otherwise, of the other, and of any economic
disadvantages suffered by either party in the interests of the other party or of the family’.

As in New Zealand and Singapore, issues of indexation and valuation do not really arise in Scotland
because of the clear distinction between matrimonial and other property, and do not seem to be
discussed.

IV. Comparison

31 Norrie, above fn 30, p 294.
1. Non-matrimonial property and sharing
The result of this (admittedly limited) comparative overview is surprisingly clear: in the jurisdictions examined, non-matrimonial property is given special consideration and, in principle, not to be shared in case of divorce. The underlying policy reason for this is that this property was not really part of the marriage as such – it was not created by common endeavour or is not a ‘fruit of joint labour’. Hence it should, in principle, not be shared in the event of divorce.

That said, many jurisdictions make special provision to ‘convert’ non-matrimonial property to matrimonial property, for example if the property in question was mixed with or used as matrimonial/family property, for example as the matrimonial home. In addition, even though it is not subject to sharing, the non-matrimonial property is subject to further considerations such as need and compensation in some jurisdictions. It also needs repeating here that for the continental European jurisdictions of course financial relief upon divorce does not with the division of assets according to the matrimonial property regime, but that other ‘pillars’ still need to be considered.

2. Indexation and increase in value
The question of indexation/value increases of non-matrimonial property is of course moot where such property is not shared. In most jurisdictions questions of value increase and indexation generally therefore do not arise. But the central finding of this comparative exercise is not that value increases of non-matrimonial assets and inflation are disregarded; on the contrary it generally is safeguarded because the asset itself, if defined as non-matrimonial property, is excluded from the sharing exercise for most intents and purposes.

The German matrimonial property regime is somewhat different, as it does not exclude the assets as such but purely their value at the time of the marriage. Therefore here indexation is crucial to calculating the ‘real’ accrued gain. The German system, like most of the other jurisdictions which have been considered here, is based upon the idea that only the ‘fruits of joint labour’ should be shared. Failing to give weight to a value increase which arises purely as a result of inflation would be contrary to that policy.
V. A distinction between matrimonial and non-matrimonial property in England and Wales?

As of course all readers of this journal will know, the financial consequences of divorce in England and Wales, embodied in Part II of the Matrimonial Causes Act 1973, are largely discretionary; the overarching principle is to achieve fairness, which is a rather vague term, and s 25 of the Act does little to instil more certainty.\textsuperscript{32} There is no definition of (non) matrimonial property in any shape or form, but the ‘source of the assets’ can be taken into account as ‘one of the circumstances of the case’, as Lord Nicholls made clear in the seminal case of White v. White\textsuperscript{33} (after considering Scots and New Zealand legislation distinguishing between matrimonial and non-matrimonial property, on which see above):\textsuperscript{34}

This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.

While the decision confirmed the primacy of financial needs of the spouses, it opened the gate for differential treatment of marital and non-marital property – and left it for future decisions to refine the technical approach to this distinction.

\textsuperscript{32} For an overview with regard to the treatment of non-matrimonial property see Law Commission, above fn 1, p 86 ff.
\textsuperscript{33} [2001] 1 AC 596, [2000] 2 FLR 981.
\textsuperscript{34} At p 610/994E-G.
In the next case concerning the financial consequences of divorce which reached the highest court level, Miller v. Miller; McFarlane v. McFarlane, need, compensation and sharing were identified as the guiding rationales or strands of fairness. In their speeches, both Baroness Hale and Lord Nicholls categorised the assets into two groups, although in the details of the categorisation there are or at least seem to be some differences. But they appear to be in agreement that assets owned before the marriage or acquired during the marriage through gift or inheritance could (or should) be treated differently from other assets with regard to sharing in the event of divorce, but that the family home should always be subject to sharing. The latter certainly is in line with all of the jurisdictions discussed in III. above, and the categorisation of pre-marital assets/gifts/inheritances as ‘non-matrimonial’ in principle can be found in all the jurisdictions discussed above. The policy reasons for making the distinction between the two groups of assets appear to be rather similar to that used in other jurisdictions and by Lord Nicholls in the quote from White given above: in Miller/McFarlane there is a total of nine references to the ‘fruits’ of the marriage/matrimonial partnership/the couple’s labours and three to the ‘joint/common endeavours’ of the spouses.

Thus the law of England and Wales was set on a path that distinguishes between matrimonial and non-matrimonial property. That this path is being followed is evidenced subsequent decision in which non-matrimonial property was not shared equally (or at all). Indeed, as has been pointed out by Wilson LJ (as he then was) in K v. L, until now there does not seem to be a single ‘reported

37 But also, for example, with Austria, cf S Ferrari, ‘Marital Agreements and Private Autonomy in Austria’, in JM Scherpe, above fn 2, p 51 ff. It is also important to note that in many jurisdictions the issue of housing either does not arise because of the social circumstances or because a preferential allocation use of the family home is possible. See e.g. for Germany ss. 1568a, 1568b BGB (German Civil Code); on this see A Dutta, above n.3, p 165 ff, and for Spain and Catalonia Art. 96 Código Civil (Spanish Civil Code)/Art. 220-20.2 and 3 Codi civil de Catalunya (Civil Code of Catalonia); on this see J Ferrer-Riba, above fn. 5, p 365 ff. See also J Miles and JM Scherpe, ‘The Future of Family Property in Europe’, in Boele-Woelki, Miles and Scherpe, above fn 2, p 428 and Cooke, Barlow and Callus, above fn 2, esp p 28 ff.
38 At [17], [19], [20], [21], [85], [141], [149] and [154] (twice).
39 At [22], [91] and [143].
40 Lord Nicholls’ terminology (although not necessarily definition) seems to have been followed by subsequent case law, see e.g. K v. L (Non-Matrimonial Property: Special Contribution) [2011] EWCA Civ 550; AR v. AR (Treatment of Inherited Wealth) [2011] EWHC 2717 (Fam); N v. F (Financial Orders: Pre-Acquired Wealth) [2011] EWHC 586 (Fam); Jones v. Jones [2011] EWCA Civ 41. On K v. L. see also M. Welstead, ‘The sharing of pre-matrimonial property on divorce: K v L’ [2012] Family Law 185 ff. Although admittedly there is considerable debate on whether matrimonial property can become matrimonial property over time, through usage or intervening events, cf, Lord Nicholls at [25] and Baroness Hale at [148] in Miller v. Miller; McFarlane v. McFarlane [2006] UKHL 24 as well as Wilson LJ (as he then was) in K v. L (Non-Matrimonial Property: Special Contribution) [2011] EWCA Civ 550 at [18] and Law Commission, above fn 1, p 101 ff. See also the definitions of matrimonial/relationship property outlined above for several jurisdictions.
decision in which the assets were entirely non-matrimonial and in which, by reference to the sharing principle, the applicant secured an award in excess of her or his needs’. 42

That said, the technical approaches by various judges to dealing with matrimonial property seem to differ and ‘two schools of thought’ with regard to the sharing principle can be identified, referred to as the ‘guru’ and the ‘boffin’ approach by Chandler. 43

The first (‘guru’) approach could be characterised as ‘more conventional’ as it appears to resist any limitation of the court’s discretion and insists that the nature of family law disputes eschews any firmly principled approach. 44 The other (‘boffin’) approach is more willing to let its discretion be guided by a principled distinction between matrimonial and non-matrimonial property, with the starting point being that the latter is not to be shared – unless fairness and particularly financial needs of the spouses demand otherwise. 45 But irrespective of the inherent differences in the approaches of ‘gurus’ and ‘boffins’, both expressly make use of the distinction between matrimonial and non-matrimonial property – which thus can be considered as accepted in English law.

VI, More principle already: the ‘pillarisation’ of ancillary relief

Arguably the Supreme Court decision in *Radmacher v. Granatino* 46 has already moved the law further towards a more principled approach to the division of property upon divorce. As explained above, the continental European jurisdictions 47 generally follow a ‘pillar’ approach to financial relief upon divorce, with separate claims/remedies of which those deriving from a matrimonial property regime are only one ‘pillar’; by contrast, England and Wales take a ‘holistic’ or ‘package’ approach. But the recent Supreme Court decision in *Radmacher v. Granatino* (which concerned the legal

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42 Above fn 37, at [22]. In the recent case of *Y v. Y* [2012] EWHC 2063 (Fam) Baron J held that ‘[i]n this case needs and the right to share are essentially the same’ (at [47]).
43 See the excellent summary and analysis by A Chandler, ““The Law is now reasonably clear”: the courts’ approach to non-matrimonial assets’ [2012] Family Law 163 ff.
44 For example Ward and Hughes LLJ in *B. v. B.*, above fn 41, and *Robson v. Robson*, above fn 41 (with Patten LJ agreeing) and Moylan J in *AR v. AR*, above fn 40.
45 For example Wilson LJ (as he then was) in *Jones v. Jones* and *K v. L.*, both above fn 40; Mostyn J in *N v. F.*, above fn 40 and *S v AG*, above fn 41 and also David Salter (sitting as a Deputy Judge of the High Court) in *B v B (Assessment of Assets: Pre-Marital Property)* [2012] EWHC 314 (Fam).
relevance of marital agreements) has arguably created a – different – form of ‘pillar’ approach to the financial consequences of divorce in England and Wales.

In the case it was established that the test to be applied to marital agreements now is that a

‘...court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement’. 48

The Supreme Court then gave the further guidance that of the three stands of fairness, a court is most likely to consider a departure from equal sharing as fair, whereas needs and compensation were held to be the strands which most readily could render it unfair to hold the parties to a marital agreement.49 This is very similar to the approach taken in continental European jurisdictions and their ‘pillar’ systems, where contracting out of the property division (i.e. the sharing through the matrimonial property regime) generally is possible, but there are considerable restrictions to opt out of the other ‘pillars’, which generally have a stronger focus on (in English law terms) ‘needs’ and ‘compensation’.50

In any event, the Supreme Court in *Radmacher* effectively has singled out the sharing of property as a separate (and waivable) part of the financial provision upon divorce. In *Z v. Z (no. 2)*, 51 Moor J followed that approach and accepted the exclusion of sharing by a (French) matrimonial property agreement and made a – generous – order based on needs only. Similarly, Charles J in *V v. V (Prenuptial Agreement)* 52 accepted that the pre-marital assets of the husband should not be shared, as had expressly been agreed in a pre-nuptial agreement.53

But when such a separation of the strands apparently is possible when there is a matrimonial property agreement, it certainly should also be possible to make a similar separation with regard to the sharing of matrimonial and non-matrimonial property without such an agreement. This means that the English law of ancillary relief in effect has become ‘pillarised’. 54 Of course the ‘pillars’ on the continent remain different and separate claims whereas the developing English ‘pillars’ appear to be

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48 *Radmacher v. Granatino*, above fn 46, at para [75].
49 At paras [81, 82].
50 See JM Scherpe, above fn. 2, esp p 501 ff.
51 [2011] EWHC 2878 (Fam).
54 This idea was first advanced in Scherpe, above fn 58.
the policy aims of needs, compensation and sharing. But the similarity is nevertheless that sharing – in most jurisdictions on the continent effectively the matrimonial property regime ‘pillar’ – is treated as a distinct and, at least to large extent, waivable part of the financial consequences of divorce. Hence it should also be possible to distinguish between different groups of assets, based on their matrimonial or non-matrimonial origin.

VII. Looking forward: being ‘boffin’ and qualifying the sharing principle

It is not certain which of the approaches outlined, ‘gurus’ or ‘boffins’, will prevail in England and Wales.\textsuperscript{55} But the boffin writing this article unsurprisingly not only prefers the more principled approach but also predicts that it will prevail. There are good reasons for this. As Mostyn J has pointed out in a recent decision on ancillary relief and non-matrimonial property, judicial ‘discretion must be exercised consistently and predictably’,\textsuperscript{56} thus providing greater legal certainty. This, one hopes, will enable the parties and their lawyers to negotiate their own settlements with greater confidence, and consequently lead to less litigation and lower costs. In addition, even the ‘gurus’ concede that where ‘property is acquired before the marriage or when inherited property is acquired during the marriage, thus coming from a source external to the marriage, then it may be said that the spouse to whom it is given should in fairness be allowed to keep it.’\textsuperscript{57} Certainly for most other jurisdictions it is settled law and considered ‘fair’ that property utterly unrelated to the relationship should not be shared,\textsuperscript{58} and it is difficult to see why the perception of fairness England and Wales should be that different.

In addition, the Law Commission in its recent consultation paper after careful consideration appears to take a ‘boffin’ view, too. It provisionally proposed that

\begin{quote}
\textquote{(...) non-matrimonial property, defined as held in the sole name of one party to the marriage or civil partnership and:}
\end{quote}

\textsuperscript{55} Although it should be noted that one of the ‘boffins’ was appointed to the Supreme Court.

\textsuperscript{56} \textit{N v. F}, above fn 40, at [8].

\textsuperscript{57} Ward LJ in \textit{Robson v. Robson}, above fn 41, at [43], although admittedly this statement is immediately is qualified: ‘On the other hand, the more and the longer that wealth has been enjoyed, the less fair it is that it should be ringfenced and excluded from distribution in such a way as to render it unavailable to meet the claimant’s financial needs generated by the relationship.’ Yet it is noteworthy that the qualification expressly only appears to apply to the case where the property would be unavailable to cover relationship-generated needs, which is similar to the ‘boffin’ point of view.

\textsuperscript{58} Cf also Scherpe, above fn 2, 473 ff and JM Scherpe, ‘Towards a Matrimonial Property Regime in England and Wales?’ in R Probert and C Barlow (eds), \textit{Fifty years in Family Law – Essays for Stephen Cretney} (Intersentia 2012), p 129 ff.
(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.\(^{59}\)

The distinction between matrimonial and non-matrimonial property the Law Commission proposes
for England and Wales is very much in line with the rules existing in the other jurisdictions outlined
in this article. In essence the proposition therefore is that the sharing principle should be qualified
with regard to the source of the assets: property that is not, to use the terminology from
*Miller/McFarlane*, ‘fruits of the marriage’ or result of a ‘joint endeavour’ is, as a starting point, not to
be shared whereas all other property (which could be described as the marital acquest) is to be
shared.

Indeed, the consequence of the increasingly important distinction between matrimonial or non-
matrimonial property described earlier (see V. above) logically needs to be that the classification of
the assets must to be undertaken first at the ‘computation stage’\(^{60}\) and that sharing becomes the
starting point for the financial relief exercise – unless of course the available assets or rather the lack
thereof obviously make it a clear ‘needs’ case, which would render the classification largely futile
anyway. Hence one could argue that English law seems to be moving toward the following principled
(and thus ‘boffin’) approach to the division of property upon divorce.\(^{61}\)

— **Matrimonial property** is to be shared upon divorce unless considerations of fairness
demand otherwise.

Such considerations can include the (short) duration of the marriage and ‘stellar’
contributions.

— **Non-matrimonial property** is not to be shared unless considerations of fairness demand
otherwise.

Such considerations can include the duration of the marriage and the contributions made to
the overall welfare of the family, particularly past and future child-care and related
sacrifices, as well as other relationship-generated advantages and disadvantages and, more
generally, the needs of the spouses.

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\(^{59}\) Law Commission, above fn 1, p 97.


\(^{61}\) This was first proposed in Scherpe, above fn 2, p 481 ff and above fn 58, p 137 f.
Under this approach, which essentially is the same as the one proposed by the Law Commission, if and when fairness and particularly the rationales of needs and compensation require it, the court will exercise its discretion, divide the assets differently and also make additional orders for maintenance etc. where appropriate. But the burden of proof for this would lie on the spouse wanting to depart from what could be described as a ‘rule’ for sharing.

A similar approach is taken in some other common law and even some civil law jurisdictions. For example Austria, New Zealand, Scotland, several US jurisdictions and Singapore also have an approach whereby the division of the matrimonial property is, in principle, discretionary. However, this discretion is guided either by express statutory provisions or by case law that has firmly established that the matrimonial property is to be divided equally, absent special circumstances – but the discretion to decide otherwise is retained. Irrespective of whether the rule for the division of property is established by statute or case law, a deviation from equal sharing in these jurisdictions requires specific justification. Similarly, in the Nordic countries equal sharing of (all) assets is the statutory rule, but the courts also retain discretion to order differently and will do so particularly in cases of assets acquired before the marriage or through gift or inheritance during the marriage, and if the marriage was a short one. All these jurisdictions therefore combine rule-based and discretion-based approaches and it could therefore be said that they have a ‘rule-based discretionary’ approach to the financial consequences of divorce, and the jurisdiction of England and Wales appears to be heading in that direction as well. In conclusion, it therefore appears that while the strong remaining discretionary elements will presumably prevent the legal rules governing financial relief upon divorce in England and Wales from being qualified as a ‘real’ matrimonial

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62 See above and Law Commission, above fn 1, p 97.
63 Ferrari, above fn 37, p 53 ff.
64 See above and the statutory rule on equal sharing in New Zealand (s. 11(1) Property (Relationships) Act 1976, cf M Briggs, above fn 22, p 260 ff.
65 See above and K Norrie, above fn 30, p 293 ff.
67 See above and WK Leong, above fn 29, p 316 and WK Leong, Elements of Family Law in Singapore (Singapore, 2007), p 697 ff.
68 Likewise they have rules on when non-matrimonial property can become matrimonial property (through passage of time, usage or intervening events, see above), which cannot be debated here but of course is an important question; on this see Law Commission, above fn 1, p 101 ff.
69 M Jänterå-Jareborg, above fn 15, p 372 ff.; JM Scherpe, above fn. 15; A Agell, above fn. 15.
70 JM Scherpe, above fn 2, p 467 ff.
property regime in the continental European sense, this jurisdiction nevertheless is heading towards a system closely resembling that of a deferred community of acquest.\textsuperscript{71}

\textsuperscript{71} As predicted by S. Cretney, ‘Community of property imposed by judicial decision’ (2003) 119 Law Quarterly Review 349.

Dr Thérèse Callus, University of Reading.

1. The reflections below rely upon three central beliefs: (i) that there is a need to identify why the law should require an ex-spouse¹ to financially support the other; (ii) that such justification should then ground a principled approach to how property should be distributed; and (iii) that there is a pressing need for accessible, clear information for the public (a growing number of whom are unlikely to be able to access legal advice with the reduction in legal aid provision).

2. The discussion is further informed by an awareness of the social context in which orders are being made: (towards) equal opportunities in the work place and capacity for equal participation in the home. No longer is the wife expected to be an appendage to the husband, to have as her sole vocation the wellbeing of the children and her husband. The husband is no longer expected to be remote from child-caring activities. This does not negate the fact that often within a family, one spouse will assume greater child-caring (and therefore, unpaid) work while the other spouse engages in paid employment outside of the home. However, given that divorce is available, the simple fact of the formal partnership alone should not justifiy the imposition of life-long spousal support.

3. One further consideration is relevant in what follows: the SCP indicates that the Law Commission will be recommending the introduction of Qualifying Nuptial Agreements (QNA - subject to certain conditions as stated in para 1.11). This recognition of individual autonomy and ability for ‘private ordering’ will inevitably impact upon potential justification of some of the possibilities mooted in the SCP.

Principled reform

4. I agree that payment of spousal support needs a principled basis. (Para 7.3, 7.4).

5. I would suggest that provision of spousal support relies upon the following expectations (i) that the marriage is intended to be for life, but if it does break down that the court can redistribute assets according to identified principles based upon sharing and redress; (ii) that the partnership means that one party should not suffer financially from choices made for the benefit of the family, and as a corollary, that financial advantages gained by one party in part due to the sacrifices of the other, should be shared; and (iii) no disproportionate burden should be shouldered by either spouse and that the existence of a marriage does not automatically negate the State’s obligation to provide financial support for an individual unable to support him or herself.

¹ All references to spouse/ex-spouse apply equally to civil partners/ex-civil partners unless otherwise indicated: ‘it is common ground that the language of Schedule 5 CPA 2004 is identical to the language of s25 of the MCA 1973’, per Thorpe LJ in Lawrence v Gallagher [2012] EWCA Civ 394. Ref to SCP 2012.
6. As a result, the concept of ‘needs’ in and of itself is neither necessary nor helpful. Needs resulting from the marriage are in reality needs generated due to an unequal disparity in the income earning capacity between the parties because of the division of paid and unpaid roles in the marriage. By focussing on needs, the assumptions that the economically stronger spouse must provide a ‘meal ticket’ for life for the other spouse is entrenched. Further by reconceptualising needs in terms of redress expressly values the importance of child/relative care within the family, by recognising the benefits (moral and financial) accrued by one spouse because the main carer spouse makes economic and career sacrifices. Ultimately, refocusing on the cause of the need would reduces the requirement for the judge to engage in an appreciation of whether the needs should be interpreted ‘generously’ or ‘narrowly’. There would therefore be less uncertainty if needs could be reconceptualised in terms of compensation (redress) for relationship generated inequalities.

7. Nevertheless, the partnership nature of marriage should not be without consequences upon divorce. The sharing rationale, espoused in White v White [2000] UKHL 54 and most recently confirmed in Lawrence v Gallagher [2012] EWCA Civ 394 should be recognised as a principle. Consequently, as a starting point, all ‘matrimonial property’ (I return to the definition below) should be shared equally between the parties. This reflects what would appear to be a common belief that marriage is an equal partnership. (It would be interesting to have some large scale empirical research to identify public opinion on this). However, this does mean that a distinction is drawn between sharing property by virtue of the marriage alone, and the provision of a further financial award in terms of support. Traditionally, English law does not make such a distinction, but there is scope to suggest that the proposal to recognise QNA is strengthening the acceptance of such a distinction.

8. Following the sharing principle, the justification to provide spousal support should lie in ensuring redress (or compensation) for the financial loss caused as a result of how the parties divided roles between them during the marriage. This supports the recognition of the parties’ autonomy to organise their affairs as they see fit, while at the same time recognising effects that flow from the partnership which have important social consequences. The State has an interest in ensuring choice in the creation of families: on the one hand, the choice of returning to paid employment by the provision of appropriate and affordable childcare; and on the other hand, the ability to look after one’s own children at home without undue financial suffering if the relationship breaks down.

9. We would, of course, be naive to think that divorce does not have potentially grave financial consequences for one or other (or both) of the parties. However, there should not be an expectation that because one spouse is financially better off than the other, that the State should impose a disproportionate financial burden on him or her. The financial responsibility should flow from the financial advantage of one spouse over another incurred from how the parties shared their roles and contribution during the marriage for the welfare of the family. It should not result from the benefit of having a particularly wealthy spouse. Consequently, a spouse cannot claim to ‘need’ to be financially kept by another for the sole reason that they have been financially kept during the marriage. The State’s interest in individuals remaining
self-sufficient (or at least provided for by the ex-spouse) while relevant, cannot be
determinative. The concept of ‘redress’ can be adopted to deal with the financial
inequalities which flow from the interdependence that marriage (and in particularly a
marriage with children) supposes.

10. Consequently, I would not support the adoption of any variation of the ‘merger over time’
theory (para 7.3). Imposing a result from the intermingling of lies denies a place for the
parties’ autonomy and implies financial dependence of one spouse upon the other.
Moreover, given the proposal to respect individual autonomy over some property by
recognising QNA, coupled with the fact that marriage by itself does not convey any property
rights, there is less justification to adopt a ‘merger over time’ approach.

11. In response to para 7.4, I would suggest that the length of the marriage and the marital
standard of living (actors present in s25 MCA 1973) are only relevant insofar as both will be
inherent in the amount of matrimonial property available to share, or in calculating the
amount of compensation payable for any relationship generated redress. In this respect, the
joint responsibilities of the parties during the marriage for other family members will be
central.

12. This model could take either the form of a guided discretionary approach, or of a formulaic
approach. One does not necessarily negate the other, as evidence from other jurisdictions
show. Notably, in France, a choice of (informal, practitioner) formulaic models gives an
indication of a range of likely awards. This also appears to be the case in applying the
Spousal Support Advisory Guidelines in Canada.

13. The question of spousal support raises fundamental questions as to societal expectations
and opinions. Despite some small scale studies enquiring into public perception of some of
the issues² there is a clear lack of large scale empirical evidence as to what individuals
perceive to be an acceptable and fair division of assets upon divorce (as identified in the
Family Justice Review 2012). Any principled reform should be based upon such evidence,
which could be carried out by independent academic researchers in conjunction with the
ONS.

**Improving the current law relating to needs**

14. The Consultation Paper refers to the difficulties faced by (i) practitioners and (ii)
self-represented litigants, in predicting with any certainty the likely award that a court will make.
The nebulous concepts of ‘needs’, coupled with variations between courts, lead to much
uncertainty. However, in the absence of principled reform, it is difficult to know the purpose
that ‘need’ is addressing. Case law suggests that one purpose could be said to enable the
recipient spouse to become financially independent. Superficially attractive, it is not always

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J. Smithson, Is modern marriage a bargain? Exploring perceptions of pre-nuptial agreements in England &
Wales, (2012) 24 CFLQ 304
going to be possible especially where the spouse is left looking after young children. Consequently, while awaiting principled reform, the best solution would be to refrain from adopting more nebulous concepts, preferring instead to establish some guidelines as to how courts (in general) deal with the various s25 MCA factors. This would be information targeted at individuals without legal advice.

15. I therefore agree that information, and education, for the public is absolutely necessary (para 7.8(2)). As proposed in the Family Justice Review, there needs to be an information hub which will give accessible, useful and clear information to parties who are more likely than ever to be self-representing where they do not have sufficient assets to be able to afford legal advice and representation. The usefulness of this information, however, is based upon the identification of a clear principled basis. This is also crucial for the provision of relevant legal advice and could be central to encouraging greater use of mediation for financial dispute resolution.

Matrimonial and non matrimonial property

16. I agree with para 7.11 that it would be helpful to have statutory guidance on the distinction between matrimonial and non-matrimonial property. Although not explicitly referred to in the current s25 MCA 1973, the development of the case law and the apparent direction of future principled reform all support such a distinction.

17. In the light of my suggestion above (7) that there should be a principle of sharing of the matrimonial property, a definition is crucial. The definition proposed in para 7.11 (1) (2) is logical and consistent with current case law. However, as identified in the Consultation Paper, it is not without difficulty, particularly with respect to the family home and the nature of property which may change over time. Nevertheless, it is a logical initial distinction to make, which can be further refined.

18. With respect to growth during the marriage of non-matrimonial property, I would argue that the all pre-acquired property is non-matrimonial and therefore could be subject to a qualifying pre-nuptial agreement which could clarify if any of the growth would be shared or not upon divorce. In the absence of any such agreement, the onus should be on the party claiming a share to show that the growth is due to the activities during the marriage and therefore that they each contributed in different ways to the realisation of the growth. I therefore agree with para 7.14 that mere use by the family of non-matrimonial property should not have any consequence. This stance can be supported by the fact that, unlike in a community of property regime, there is no provision for the debts arising from losses on non-matrimonial property to be assumed by the spouse. As a result, it would seem unfair on the owner spouse to be obliged to share the growth, when any debts would not be served upon the other spouse.³

³ In the French Community of acquests regime (the default regime), growth on non-matrimonial property becomes part of the community acquest. However, the community also becomes liable for any debts incurred on this property.
19. On the contrary, as for income earned during the marriage thanks to pre-marital education or training, I would argue that this should fall into the matrimonial property pot. Indeed, marriage represents the partnership of the two people and the acceptance of each at the time of the marriage. Intellectual or professional capacity is a personal attribute and not one that should be financially valued as an element of non-matrimonial property (because acquired pre-marriage). Income earned during the marriage should be shared insofar as it represents the activity of each or either spouse which is negotiated between the spouses as to how they decide to allocate roles within their couple. Consequently, it is possible to distinguish between tangible property or financial assets acquired pre-marriage and personal intellectual skills or knowledge which go on to allow a spouse to earn a high income, for example.

20. One further complication with pre-acquired property is where it is sold or transformed during the marriage. This could be addressed through recognition of post nuptial contracts which could allow for the property acquired during the marriage to be excluded from the matrimonial pot where the parties so agreed. The transformation of pre-acquired property is one obvious example where this would be beneficial. In this way, where a spouse wishes to preserve pre-marital property, but nevertheless transforms it during the marriage, a contract could stipulate that the new property is to remain non-matrimonial. In the absence of such an agreement, the property could become matrimonial property and subject to the sharing presumption. However, in order to provide the relevant protection for either party, a certain level of public education would be required.

**The family home**

21. The status of the family home is a difficult issue. Intuitively, it is matrimonial property insofar as it will have been the shared family home during the marriage and as such bears strong symbolic importance for each member of the family. However, in the light of the fact that marriage has no effect on property rights in itself, it is not so straightforward to claim that irrespective of the legal owner, the value of the property should fall into the pot of matrimonial property. We know from experience with cohabitants that there is the mechanism of trusts to recognise equitable ownership in property legally owned by one’s partner, but the powers of the court in ancillary relief extend to transferring ownership of the family home from the legal owner. Although most couples today will buy (and therefore legally own) a property jointly, the question remains whether the share of one spouse should be available for transfer; or where the home is legally owned by one spouse, whether the other should be given proprietary rights therein, as part of the s25 exercise. In essence, does the character of the property, as the family home, justify the court to exercise its discretion when deciding whether it falls into the matrimonial pot or not? It could be argued that the non-owner spouse has had the advantage of the property during the marriage, but that the partnership itself does not give rise to an expectation of continuing to live in the same (or equivalent) property. This is compatible with what we have suggested above in

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4 *B v S (financial remedy: marital property regime) [2012] EWHC 265 (Fam)*: under the national law, it was acceptable for a contract to stipulate that the purchase of an apartment with the husband’s own money would in fact be in the wife’s name (a gift) and therefore become her property.
relation to needs: there is little justification for marriage to be seen as imposing a life-long responsibility on the economically stronger ex-spouse, in the absence of compensation generated as a result of the marriage and its subsequent breakdown. In the same vein as pre-acquired property discussed above, the matrimonial home if acquired pre-marriage should remain the individual property of the legal owner. However, any increase in value during the lifetime of the marriage could be said to be matrimonial property (irrespective of whether it is directly attributable to the activities of the spouses, in order to avoid the difficulties of trusts as apparent with cohabitants). This would rightly distinguish the home from other pre-marital property by recognising its important symbolic status for each member of the couple, but would not unduly impose a detriment upon the owner, by virtue of the marriage alone.

Overview of main responses

- There is an overwhelming need for principled reform for the law to better reflect the lived reality of 21st Century families and this should be informed by large scale empirical evidence.
- An accessible source of clear, concise information would be very welcome, as the current discretionary system leads to uncertainty for both practitioners and lay individuals.
- Interim reform could include statutory provisions to provide for the principle of sharing equally matrimonial property and for a basic distinction between matrimonial and non-matrimonial property. This could be in the context of a provision regulating the introduction of qualifying nuptial agreements.
- The family home should not automatically become matrimonial property.
- Growth during the marriage on non-matrimonial property should not automatically mean the property becomes matrimonial (after all, debts do not become joint).
- Any reform should be based upon the notion of redress or compensation for relationship generated financial disadvantage and not ‘merger over time’.
- Needs should only be considered in terms of compensation and not be an overriding factor subject to the court’s discretion.
- QNA should not allow contracting out of providing for compensation.
- An ex-spouse should not be disproportionately burdened to provide for the other beyond what is required in terms of compensation for economic disparity resulting from the division of roles during the marriage.
- The development of a formula to assess compensation could be sufficiently flexible to allow a margin of discretion, while at the same time providing a certain range for a possible award. Any formula would need to include disparity of income (this would in part reflect the earning capacity loss), the length of the relationship, and the on-going caring responsibilities (and subsequent financial disadvantage).
I know I missed the deadline, but if it is possible I would like to make to following comments on the consultation 208 document.

This report seem flawed in conception: the changes are not radical enough, and the questions it seeks judgements about in the consultation are not the important ones.

Some slight changes to marriage and divorce laws are proposed but they are so limited that they only further erode the institution of marriage. Above all, there was no strong endorsement of prenups, proper prenups. But Gary Becker, the nobel prizewinning economist, was right that people should be free to draw up their own marriage contracts as they see fit. This is not conceded by the law commission writers.

What the report does not touch at any point, which was highly bizarre, is the effect of laws concerning this subject on people's behaviour when they decide to opt into the marriage contract in the first place. 10s of 1000s of people are opting NOT to enter the marriage contract due to the bad deal it gives (usually to the man). One may believe in niceness and love etc but with the current marriage laws, and this remains the same with this slight tweaking, are an very strong incentive for a woman to marry and divorce with kids. Hardly any profession could enable a woman to earn such huge amounts of money in just a few years, and in some cases to have children too. The writers of this report are not in touch with the behaviour of huge numbers of ordinary people in this country. This is happening on a huge scale it is very often premeditated. Listen to women talk in pubs. Laws change behaviour and society by changing incentives.

Most of the questions were then biased. And flawed.

Asking what we think should be the case in the case studies when no reference is made to their previous agreements is then besides the point.

For example, 7.10 assumes an anti-prenup position. Biased.

Consider 7.11. This is odd question. Yes 1 and 2 should not count, but then this 'save where it is required to meet the others needs'... renders it meaningless in fact. 7.14 was ok. Non-matrimonial property should stay as such even if jointly used, otherwise it is a golddiggers charter.

The disparity of lifestyle argument is outrageous and should be dispensed with. So, someone's standard of living has gone up through marriage. The idea that they have a right to have that sustained afterwards is absurd. Consider the motives for marriage of the weaker party. That this current aspect of the law should be ditched ought to be a no-brainer for the commission.

Para. 109, is just apalling. What conception of 'needs' is this? It allows people (usually women) to use their 'needs' as a weapon and to force support. Deach is right here. So,... a woman can get married and divorced and simply allow her needs to make the guy be her slave for life, near enough.

I may sound annoyed, but do the writes of this report understand that there are hundreds of thousands of angry British men out there who feel the law has been unjust to them. There are also tens of thousands (such as myself) who refused to marry when they realize how spectacularly vulnerable it made them. This report continues to make it irrational, obviously, irrational, for a man to marry.

By not looking at it from the man's point of view, and from the point of view of someone who might or not marry, this report is flawed root and branch (while making the odd reasonable point).

I hope these thought may be taken into account despite missing the deadline by 2 days.
Dear Elizabeth,

CP 208 - MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

I have pleasure in sending this Society’s response to certain of the questions raised in this fascinating Consultation Paper. I must apologise for its lateness but I hope it will still be acceptable.

The author is Sarah Moore, solicitor with Russells Solicitors, Regency House, 1-4 Warwick Street, London W1B 5LJ, 020 7439 8692, assisted by myself. Queries should please in the first instance be addressed to me.

Yours sincerely,

Arthur

ARTHUR WEIR
<table>
<thead>
<tr>
<th>7.2 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?</th>
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<tr>
<td>Yes, it is agreed that reform in this area of law is needed.</td>
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Unfortunately, very few people who marry are aware that they are entering into a legally binding contract, and even fewer are aware as to the economic consequences that flow from marriage. In the unfortunate event that such a relationship breaks down, the current state of the law often serves to breed further confusion, and thereby frustration and disappointment in the legal process generally.

Currently, a family lawyer is rarely able to specifically advise a client who is experiencing the breakdown of a relationship as to the likelihood of how spousal support will be met. The same case facts could be heard by 12 different Judges and there would likely be 12 different answers. Whilst judicial discretion does have its benefits in the fact-specific area of family law, such discretion is currently far too wide and it therefore provides little guidance for those wanting to deal with the legal consequences of their marital breakdown without using the Court process.

Reform of the law in this area, explaining how much has to be paid and for how long, will hopefully provide guidance and less uncertainty for those experiencing marital breakdown and their legal advisors. We would hope that some form of principled rationale would, as a consequence, assist with the emotional recovery following divorce and separation. The majority of people require some form of predictability and the law ought to provide this.

In addition, reliable guidance as to how a Judge would be likely to decide a case should lead to less expense on legal costs.

Reform is particularly needed in light of the legal aid cutbacks. Those individuals without access to specialist legal advice ought to have clearer guidance. More people will have no choice but to represent themselves, placing ever greater strain on the Court system. It is nearly always much better that a divorcing couple resolve differences themselves. An imposed judicial decision is less likely to be
acceptable to both.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

It is submitted that spousal support should seek to unravel the “merger over time”. It should not be restricted to compensation of loss caused by the relationship.

Our reply to 7.2 refers to marriage being a legally binding contract. However for the vast majority marriage is more than that. It is a commitment to share two lives. It is rarely entered into solely for economic reasons, as the compensation of loss approach seems to suggest. Likewise the financial decisions made during the marriage are seldom made solely for economic reasons.. Instead, as time passes, the lives of two spouses become twisted together in an often intricate and complex manner, as an assortment of decisions and compromises are made in the interests of family life. As well as there being conceptual difficulties regarding compensation of loss that arise from how the marital relationship is viewed, this approach also raises a number of fact-specific concerns:

The Compensation of Loss Approach

1. Basing financial relief on the compensation of loss is likely to produce unfair results for one party, particularly in the event of a long marriage. For example:

   a. Take first the example in which the wife had been, say, a receptionist before the marriage and had ‘married into money’. By adopting the compensation of loss approach, this could be financially disastrous for her. Upon divorce, she would receive only what she needs to adapt to a single lifestyle that she is able to financially sustain. Such an approach fails to take account of the reality of the marriage and the marital standard of living. Furthermore, the length of the marriage is an important factor to consider here as the longer the marriage, the more that the two lives will have become intertwined and the more compromises made by both parties. Therefore, in such a scenario, the ex-receptionist could be forced to face unfairly harsh financial consequences.

   b. Next, take the example of the lawyer wife who has sacrificed her career to look after the children whilst her policeman husband went to work. On a compensatory basis, it could be argued that the wife’s needs should be based on her being compensated for the loss of her legal career. She would arguably be entitled to claim a high level of financial support from
her policeman husband. However, this could be unfair on the husband, where the situation derived from joint decisions and compromises.

c. Thirdly, consider the example where the husband and wife have virtually no capital and enjoy a high standard of living due to one party’s particularly high income. During the marriage, both parties would have shared the enjoyment of the high level of wealth. In the event of divorce, if the compensatory approach was adopted then the financially weaker party would suffer deprivation of the standard of shared living to which he or she had become accustomed.

2. The compensation of loss approach would also cause difficulties where the loss incurred is not specifically caused by the marriage, and it would likely invite unnecessary Court battles and analysis based around the cause of the spousal need. During a marriage, decisions are sometimes made as a consequence of an external or unforeseen event or act, for example, if one spouse is made redundant (the unforeseen event) in a difficult job market and as a result takes on a lower paid role or may remain at home. Was the decision to take on a lower paid role caused by the relationship? Or would the spouse have chosen to take a lesser paid role in any event?

3. The compensatory approach is a particularly artificial method. It is a departure from reality and looks at what might have been. Difficulties arise by trying to foresee the totally unknown – for example, a 16 year old potential future Cambridge-graduate married for 25 years who has stayed at home looking after the children. The Court would be faced with an argument about what her career path might have been. Would an established career path need to be proven or must the Court just speculate? There would also be evidential difficulties, with inevitably lengthy and complicated submissions to the Judge. This approach would only serve to hinder the Court process rather than resolve the current problems that the system faces. Particularly where there is a marriage of any significant length, it would be unfair and probably impossible to try to rewrite history.

4. One of the Law Commission’s aims of reform is to make the law clearer and easier for litigants in person. However, arguments between spouses that are based on assumptions and forecasting do not fit in with the objective of clarity. Instead, further arguments would be created between the parties, who will be left to make predictions regarding the totally unknown. Rather than making the law clearer for the individual, by adopting the compensatory approach it could potentially become more confusing.

5. If the compensation approach is adopted, presumably this would be based on the lost income of one party. However, if such party had enjoyed income over the years, then such lost income could have been invested. Therefore, one party could argue that they should also be compensated
for their loss of opportunity to invest or to acquire capital. It is therefore difficult to establish where the financial liability for compensation would end.

6. On the basis that a party would be compensated for lost income, there would be regional discrepancies with regard to salaries which would inevitably create confusion for those spouses unable to use the Court system. Presumably, the Court would take such regional differences into consideration, but this is likely to invite creative submissions from each spouse before a Judge.

Families often move nationally or internationally. If for example a couple agree to move out of the City and take on roles in a regional area, they may have competing compensation claims. Arguably, both parties have made a financial loss due to the decision made to move during the course of the marriage, and so they should both be compensated. However, the reality is that there is only one finite pot of resources.

Indeed, it is quite often that both parties will have made decisions and compromises within a marriage in the best interests of the family unit. It is potentially unfair that only one of the parties are compensated for the decisions that they make, when arguably both parties may have endured some form of financial loss.

7. The compensatory approach may be difficult for the client to rationalise in the event where the marriage has broken down due to one party having committed adultery. In the current legal system, the average person experiencing a marital breakdown often finds it difficult to understand the concept that one party’s behaviour within the marriage, such as an affair, is not considered by the Court when looking at how the marital finances are to be divided. Insofar as they are concerned, that adulterous spouse is in the wrong morally and so should be financially penalised. Of course, this is not how the law currently works. This problem could be further exacerbated if the compensation approach is adopted, as the innocent spouse could be left in a financially precarious position where they did not want the marriage to end. Not only would the innocent party be expecting the adulterer spouse to be financially penalised, but the innocent party would feel like they are being penalised instead.

8. The compensatory approach assumes that people enter marriage as rational economic actors, which is frequently not the case. Furthermore, decisions made within the marriage are also frequently made without much economic rationality. Therefore, the compensatory approach fails to take account of the emotional reality of marriage.

9. It could be argued that if the wife has started the marriage with an ordinary career path and she sacrifices such career path to stay at home, then she has already been compensated financially. She may have chosen not to remain in the workplace but she has arguably already benefited financially from her husband’s salary.
10. The compensation of loss approach potentially creates difficult issues for children of the family. For example, it may not be in the child’s best interests in a case where, say, the day following Decree Absolute, the mother is left struggling to pay the mortgage for her small flat, whereas the father is able to afford to continue to live in the family mansion. Children need a gradual adjustment to their new way of living following the family breakdown, and to see their parents in particularly different financial circumstances could be very difficult for a child, at an already challenging time.

The “merger over time” approach

During the course of a marriage, it is often the case that two separate lives gradually merge. Decisions and compromises are made together in the general interests of the family, with the overall result being that the parties often become financially interdependent. Roles and responsibilities are undertaken and the longer the marriage the more the two separate lives (and their finances) become entwined. As time passes, financial assets become mingled rather than being in the ownership of each separate person. Therefore, following divorce, it is submitted that the two lifestyles should gradually be financially separated taking into account the length of the marriage and also any childcare responsibilities. It is important that such ties are severed gradually because otherwise it could cause unjust results for one party. The longer the marriage between the parties, the longer it is likely to take for their finances to be separated fairly.

This approach achieves a much fairer outcome for spouses experiencing a divorce as compared with the compensation of loss approach. It does not look to establish the cause of any loss, nor does it look at what could have been, unlike the compensatory approach. It instead looks at the reality of the situation. The “merger over time” principle recognises that those who choose to marry tend increasingly over time to share many aspects of their lives, including their finances.

When looking at the merger of the parties’ lives over time, the marital standard of living is an important factor to consider. Both parties will have contributed, in their own manner, to the standard of living during the marriage. For example, whilst the husband may have earned an income, he has been able to do so and has been supported in his career by his wife who has stayed at home and looked after the domestic duties. It is not fair for the wife to financially suffer in the event of divorce. However, there should be no automatic entitlement for the financially weaker party to continue living at the marital standard of living for life. If the relationship has ended then a divorce cannot be ignored. Both parties need to accept that there are consequences following their relationship breakdown. It is not fair for the financially stronger spouse to be financially responsible for the other spouse on a joint lives basis.
Instead, the financially weaker party should assume a level of responsibility. However, there needs to be a gradual transition to independence, with the transition taking longer in the cases where there is a longer marriage.

On principle the merger over time approach is more in accord with most people’s concepts of marriage as an institution. No doubt individual concepts differ widely, but a common thread must be that marriage is intended as a permanent commitment based on sharing. That characteristic remains true despite all the risks of eventual failure. The merger over time approach may be seen as reflecting what most couples have been attempting to do and achieving in varying degrees during their marriage – that is, sharing their resources and commitments.

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

See reply 7.3 which addresses these factors.

Factors (1) to (3) above are usually the most relevant considerations.

(1) Length of the marriage: As the marriage continues over time, the more the two lives usually become entwined together and merged. More adjustments may be needed. Spousal support may be required at a higher amount and for a longer period.

(2) The marital standard of living must remain an important consideration, (though in most divorces the single finite pot of resources will not allow that standard to be maintained).

(3) Furthermore, the manner in which joint responsibilities have been shared during the marriage is also an important factor to consider. It would not be fair for one party to shoulder the burden of such responsibility following the breakdown of the relationship. For example the merger over time approach should in principle include sharing responsibility for a disabled parent or sibling of one party where the
burden had been shared for a long time.

(4) Occupation of the former matrimonial home following divorce may be a relevant factor to be considered, particularly where there are children, in whose interests it is often necessary to keep the home for the use of the parent with whom they will live. Because the home usually represents a large and indivisible proportion of the joint assets it is usually very difficult to know how to treat it when dividing matrimonial property. The problem arises very frequently and no formula, it seems, could ever cope properly with it. That is a strong argument against the formulaic approach.

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

Ideally, it would be clearer and easier for divorcing spouses if there was one formulaic calculation that could be applied in all cases and that provided a fair and reasonable outcome. However, for fairness to be achieved, a more flexible system is needed where judicial discretion must still have a place. Therefore, we do not believe a suitable formulaic calculation is practically achievable and we think that reformed judicial discretion is the better solution.

The existing level of judicial discretion in the current legal system has the advantage of providing a fact-specific solution. This tends to ensure justice and a fair solution in each specific case, as it looks at the individual circumstances of each marriage. Such an approach offers flexibility, which is essential when considering complex family situations. However, judicial discretion currently has far too wide an ambit and, as a result, such discretion is rarely exercised consistently. Different judges could provide different solutions to the same case facts, which is unfair for couples currently experiencing marital breakdown. The broad brush application of a judge’s discretion to specific facts means that there is no certainty and so it can be difficult for divorcing spouses to either predict or rationalise a particular outcome. The legal advisor cannot advise the client what to expect. This invites litigation between parties, which is not only detrimental to the spouses in dispute but is also likely to impact upon the wellbeing of any children of the family. Furthermore, due to the inevitable legal costs in reaching a Court hearing, very few people are able to afford to put their case before a judge. Indeed the majority of cases are settled without setting out their case facts to a judge. Therefore, judicial discretion (whether reformed or not) is only available to the privileged few.

If a formula was introduced, we recognise that this would have the advantage of providing certainty and clarity. If this approach is adopted, the formulae should not be binding, but should be used as
guidance, and provide individuals with an idea as to what would happen if their case reached a Court hearing. It would put the Judge’s decisions into a more rational and understandable framework, ensuring greater consistency and certainty.

However, whilst a formulaic approach might seem attractive, we have concerns as to whether it could be successfully implemented in practice.

Firstly, we fear that a mathematical approach could not, in reality, be introduced in a manner that would consider all relevant factors following a relationship breakdown. For example, it is questionable how a business asset would be taken into account if a formulaic approach was adopted. Similarly, it is unlikely that illness or injury could be factored into any formula, such as in the example of Case Study 3. Secondly, we would expect that a formula would be unable to take account of external factors that would have an effect on spousal support, such as a recession. Of course, such external factors could be considered through a discretion-based approach. Moreover, whilst a formulaic approach might work in certain cases, the reality is that each family structure is unique and quite often complex, and we do not expect that there could be a one-size-fits-all formula. Indeed, in seeking to achieve fairness with a formulaic approach, a formula must not create injustice where it does not fit the case facts. Every case is different, and there is often a difficult balancing exercise where we fear a formula would be unable to help. For example, we set out above at Reply 7.3 that spousal support should be based on a transition to independence, but this transition would need to be balanced with the need to provide the children with a home. Would a formula be able to provide enough flexibility so as to balance the potentially competing interests? It would need to be, but we are not sure that it is practically achievable without further research. It is clear from research carried out in other jurisdictions that reform is difficult, and we would hope that if a formulaic approach was introduced that this is carried out cautiously, and after considerable research and trials.

A Suggested way forward.

We put forward a suggestion, which undeveloped and inadequate as it is at the moment might indicate a possible way forward.

Many years ago there was the ‘one-third rule’, under which the wife (invariably the wife in those days) should have her income made up to one-third of the joint incomes. Though never a rule of law, it was widely relied on as a starting point in negotiations and in judicial decisions. Its value lay in that, whatever its shortcomings and limitations, it was a consistent starting point.
It is worth looking afresh at the words of Lord Denning MR in Wachtel v Wachtel [1973] 1 All ER 829:

“.........In awarding maintenance the Divorce Courts followed the practice of the Ecclesiastical Courts. They awarded an innocent wife a sum equal to one-third of their joint incomes...........

That one-third rule has been much criticised. In Kershaw v. Kershaw (1966) P. at page 17, Sir Jocelyn Simon, President, spoke of it as "the discredited 'one-third rule'". But it has retained its attraction for a very simple reason: those who have to assess maintenance must have some starting point. They cannot operate in a void. No better starting point has yet been suggested that the one-third rule. In Ackerman v. Ackerman (1972) 2 W.L.R. at page 1260, Lord Justice Phillimore said:

‘The proper course is to start again. I would begin with the 'one-third rule' - bearing in mind that it is not a rule.’

There was, we think, much good sense in taking one-third as a starting point…….”

There might be a place for something of the sort, to be introduced by or pursuant to statute into matrimonial property law. For example:-

Where the court considers that the length of the marriage should be a factor in assessing the amount to be ordered, it shall take as a starting point, to be varied as the circumstances may require, that effect be given to that factor as follows:

where the marriage has lasted 25 years or more, full effect;
where the marriage has lasted less than 5 years, no effect;
where the marriage has lasted between 5 and 25 years, partial effect in proportion to the number of years which have elapsed between the 5th and 25th year bears to the number 20.

There is no significance in the numbers chosen for this illustration,. There would always be the danger that ‘starting points’ introduced in this way would be given undue importance, but clear drafting could limit the risk.

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

It is agreed that, if possible, there should be incentives towards financial independence following marital breakdown. Currently, financial support for one spouse is often ordered by the Court on a life-long basis at the marital standard of living, particularly in the event of a long marriage. This can often be unfair on the party who is expected to meet the obligations. Such party could be working long hours in a stressful and demanding job, and yet the other spouse is able to enjoy the financial benefit but without having to work towards self-sufficiency. In such a scenario, the payee has little motivation to achieve dependency. Instead, this can encourage financial reliance between the parties even though they are no longer married. By encouraging independence between the parties, there would also be psychological benefits
as the parties would move away from a position of reliance but instead towards independence.

However, it is recognised that there are risks in placing a limit on the extent of financial support. For example, there may be potential financial hardship on the payee if the limit is too restrictive. There are the uncertainties of prediction of an unknown future and the risks of crystal ball gazing. Furthermore, where a spouse has given up a career to look after children then it is often difficult for them to re-enter the workplace after not having been in the job market for many years. This could leave one spouse, who was encouraged by the other to give up their career to look after the home, to face financial worries and problems. Women could find themselves in a position of returning to work sooner than they would have otherwise chosen so as to maintain their career, but this would come at the expense of family life. Having limits on spousal support could also invite evidential arguments from each party as to when a party could, or should, achieve independence. Furthermore, this approach may be unfair on the payer who could be expected to pay larger sums from their income over a comparatively shorter time period, so as to enable the payee to adjust as quickly as possible.

Nevertheless, it is agreed that there should be more of a balance between the current emphasis on joint lives maintenance, and with placing limits on financial support. It is suggested that one option could be that the Court should be obliged to seek to encourage the parties to achieve a clean break as soon as possible. There need not be a specific time limit imposed, such as in Scotland where there is a 3 year time limit, as this is arguably a more arbitrary approach, and is likely to cause unjust results and undue hardship for one party. However, by having an obligation to encourage independence as soon as possible, this still enables each case to be looked at on an individual basis whilst also removing any expectation that one spouse can simply rely on the other following divorce.
This optional response form is provided for consultees’ convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

[www.lawcom.gov.uk](http://www.lawcom.gov.uk)

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from **11 September 2012 to 11 December 2012**.

Please send your completed form:

**by email to:** propertyandtrust@lawcommission.gsi.gov.uk  or

**by post to:** Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

**Freedom of Information statement**

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

### Your details

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<th><strong>Name:</strong></th>
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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

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As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
**PRINCIPLED REFORM**

7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

YES

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

**Spousal support:**

(1) **SHOULD NOT** be restricted to the compensation of loss caused by the relationship
(2) There should be clarity and consistency with regard to what 'loss' and what 'compensation' means.

**LOSS WHAT IS IT?**
The concept of loss to a party during the course of the marriage means exactly what? And, should it be compensated?
The meaning of ‘compensation’ in the context of matrimonial property has changed over time. It is now accepted that where there are children, the wife will be likely to give up her career for a period whilst the children are being raised and may, when she returns to work take up part-time employment in her chosen career or indeed in another areas of work altogether. The loss is the combined result of i. reduction in years of skills acquired, ii. Reduction experience, iii reduction in qualifications which expressed in monetary or quantum means a reduction in salary and a reduction in the Accrual of State Pension benefits and in occupational pension benefits. This loss is experienced in the post-divorce stage. This loss will translate into an economic value. This economic value is only experienced upon divorce when the party, usually the wife tries to achieve financial independence, and, the courts try to apply the sharing principle and equality to her economic value and his economic value post-divorce.
This economic loss is inevitable where there are children and where the wife gives up work for a period. The world of work remains intransigent in its failure to accommodate working mothers. Experience across all professions demonstrates that it is structurally difficult to maintain a home life of raising children and a full time career. For example, Women at the Bar have found it impossible to combine the demand of work with child care. The Bar Retention Working Group is looking at the public interest in the retention in practice at the Bar of parents after the birth of their children (http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/parental-support-hub/external-assistance/).

WHAT DOES ‘COMPENSATION’ MEAN TODAY?

Gow v Grant Supreme Court, 4 July 2012 uses the term ‘sacrifices’. Gow and Grant identify what is at the heart of the problem:-

“[53] A fourth lesson from Scotland is that the compensation principle, although attractive in theory, can be difficult to apply in practice because of the problems of identifying and valuing those advantages and disadvantages”

Gow v Grant see Para 21:-

“He did however make two observations. First, in contrast to the scheme in ss.8—10 of the 1985 Act as to the rights of a spouse on divorce, the financial provision which the court was permitted to make by s.28 was in the nature of compensation for an imbalance of economic advantage or disadvantage”,

Para 28:- “Our sense of a fair and just outcome when committed relationships come to an end involves setting a framework for compensation where one partner can show that they have suffered net economic disadvantage in the interests of the relationship.”

Para 36:- refers again to compensation “So it may be helpful to refer to cases decided under s.9(1)(b) when the court is considering what might be taken to be an economic advantage, disadvantage or contribution for this purpose or how the economic burden of caring for a child is to be dealt with under s.28(2)(b)

Thus, reflects the fact that any financial award that the courts make to an applicant addresses the 'net economic disadvantage' that the person may experience as a direct result of joint decisions that were made by the couple during the relationship.

(See also Zelent v Savage Sheriff Court (Grampian, Highland and Islands) (Inverness), 14 March 2012, Lilleyman v Lilleyman Chancery Division District Registry (Leeds), 4 April 2012)

Spousal support and ‘merger over time’

(2) Seek to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution?

There is no consensus with regard to the meaning or reality of ‘merger
over time’. Two questions arise here:-

a. What does merger mean?

b. And, how, in any event, can the courts address the disparity in lifestyle occasioned in the post divorce stage?

On the ‘merger over time’

The question is whether a couple does in fact merge over time. The assumption is that the wife or the person with the reduced earning capacity becomes assimilated/ subsumed. The ‘merger over time’ concept might wish to convey a merger in an equality sense of the term but in reality the longer the duration of the relationship the more likely the party with the lesser earning capacity and more of the household responsibilities will become merged. The early feminist analysis saw this as a material inevitability. The very notion of merger construct is an anachronism and is anti - thetical to a Marxist /feminist view of what the position of women should be within the family in 2013. (See the considerable critiques:- New Left Review I/94, November-December 1975 ,Wally Seccombe Domestic Labour: reply to critics, Hilary Wainwright

‘while domestic labour is a necessary condition of reproduction of labour power, it does not contribute to its value or realize its own value when that commodity is sold on the market, because it is not in the Marxist sense socially necessary labour. The consequences of this fact are by no means academic for proletarian women living in a society dominated by the law of value’. New Left Review I/89, January-February 1975

The merger over time does not sufficiently recognise the structural gendered inequalities and uses a language that does not liberate women from this material reality. The language is characteristic of how women’s position within the family might have been described in the last century.

However, the term, whether an appropriate use of language or not ,is intended to set out an approach to sharing whereby income sharing is based on the length of the marriage where a spouse would be given a percentage interest in the other’s earnings in accordance with the length of the marriage.

Disparity In Life Style - Is It Compensatable?

Principles guiding disparity

a. To Put her back into the position she would have been in before the
marriage during the marriage.

b. If there is sufficient capital it should embrace position she was whilst considering her prospects in the future.

c. It is impossible to compensate for a Gendered Labour market and Embedded structural inequality

7.4 In answering the question at paragraph 7.3 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.

Supplementary Consultation Paper, Part 4, paragraph 4.115

(1) THE LENGTH OF THE MARRIAGE
This is an important factor as it affects the extent of what is lost in the past, especially where there are children from future opportunities.

But is should also address what will be lost since the prospective situation is a
function of how the parties planned the future with regard to matrimonial division of labour including child care. So the concept of ‘loss’ should be both retrospective and prospective.

2) THE MARITAL STANDARD OF LIVING
This is important to the prospect of readjustment and how far there should be an expectation of readjustment and to what level.

(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;

a. Childcare, and how this has been shared during the marriage and the respective effects it may have had on career progression during the marriage and its affect on future work opportunities where a. Employment skills etc have been forfeited in marriage.

b. Future childcare
This will impact disproportionately on the parent with care regardless of the arrangements that may be made for shared residence.

c. Future childcare when children become adults
Future childcare in contemporary time of ‘austerity’ means that the parent with care may meet the housing needs for the adult children into their 30’s.

See Figure 1 below
Office for National Statistics said 2.9 million people aged 20-34 were living with their parents.

**Figure 1: Men and women aged 20-34 living with parents, UK, 1997-2011**

![Graph showing living with parents](image)

Notes: Source: Labour Force Survey, Office for National Statistics

d. Elderly parent care

(4) THE OCCUPATION OF THE FORMER MATRIMONIAL HOME FOLLOWING DIVORCE.
In considering ‘Loss Compensation And Disparity’ where there are children the spouse with care will ‘benefit’ from the matrimonial home in accordance with the Mesher/ Martin orders which should be retained until child completes full time education.

7.5 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?

Supplementary Consultation Paper, Part 4, paragraph 4.116

1. A reformed discretionary approach, **YES**
2. A formulaic calculation, **NO**

A formulaic calculation hypothetically would assist where lack of legal aid. And it is easily understood how the collapse of legal aid necessitates some attempt at rationalising a system to bring consistency and certainty but as the Law Commissions own examples show there are too many variables co existing militating against a formula which would need to set length of marriage, against children, elderly relatives, care in the past, care in the future etc etc.an impossible task!

7.6 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?

Supplementary Consultation Paper, Part 4, paragraph 4.117

7.6 A REFORMED DISCRETIONARY BASIS
   Should embody incentives towards independence by placing limits on the extent of support that might be given.
   
   However this must look at current context of **material conditions** at the time
   a. employability of the spouse loss/compensation
   b. provision of affordable child care
   c. equality at work and recognition of material disadvantage of spouse
This is an ever changing reality.

Edwards and Halpern’s research on Financial provision on Divorce published in 1990’s (141 NLJ 1340,04 October 1991) The cost of truth; 140 NLJ 1687 30 November 1990, Making fathers pay, 140 NLJ 821, 08 June 1990, The stark reality? The meal ticket for life; Edwards and Halpern 1990 Journal of Social Welfare Law April; Regional Injustice Financial Provision on Divorce Edwards, Halpern and Gould FL January 1990 Vol 20 pp 31-35) The continuing saga of maintaining the family after divorce, Family Law 20: 31, found that Where continuing maintenance has been granted, the wife or husband generally is given support because of age, infirmity, lack of work skills or prospects, childcare responsibilities or disability (Mrs. Atkinson was herself thought by the court unable to work because of disability |1988^ 2 FLR 353, 355). The important point to remember is that courts make their decisions largely based on two principles, the needs of the applicant (see s 25(2)(b) MCA 1973) and the ability of the other party to pay (s 25(2)(a))

THESE FACTORS ARE STILL RELEVANT.

The courts recognised then the material condition within the labour market for women

"that there are huge difficulties for women with little or no work experience. These difficulties are especially acute for women in and over middle-age and research points to the fact that the reconstituted family often provides the only opportunity to salvage some financial security out of the ruin of a broken marriage. For any feminist this is the uncomfortable paradox whilst at the same time the reality for many a divorced wife where dependency on one man is substituted for dependency on another. The feminist revolution is about making women independent. To achieve this, women need to be eased towards independence rather than being wrenched out of a social situation and context with which they have been accustomed. Some feminists would argue that women should be entitled to half of the capital and assets which have been accrued during the marriage in recognition of their contribution. The provisions of the MCA 1973 (s 25A) recognise this mandate. The courts are required to consider individual circumstances and ask whether a particular woman will be able to adjust without undue hardship to the termination of support'.

Her material disadvantage REMAINS THE CASE.

7.7 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;

(1) What sort of timescale and investment would be required?
(1) Who should do that work?
Two/three Universities should work together on developing the several strands of research that needs to be conducted with the full cooperation of the government departments and the courts. The University of Buckingham Susan Edwards and Judith Bray would be interested in conducting a part of this proposed work.

Research and pilot a new approach
Need to consider whether compensation model/loss is correct

(2) What methodology should be adopted?

Statistical analysis of trends and regional differences and also interviews with judges, solicitors, barristers and with clients.

Regional comparison as Edwards and Halpern's research in the 1980's discovered stark regional disparities, and their work echoed the conclusion of Eekelaar and MacLean's work on "Matrimonial jurisdiction of registrars" (1977).
Interviews with solicitors and counsel

Interviews with judges in PR and in the county courts and in the magistrates courts

Interviews with clients

(2) What sort of timescale and investment would be required?

Duration- two years from start to final report.
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Loss is couched in economic terms since the object is self sufficiency and is about earning potential and capacity in the future. For the party who has given up work or change work or reduced working hours they begin to forfeit the benefits that might have accrued to them in the building up of work skills, qualifications, and years of work experience and pension contributions which all have a capital value. This bundle of work ‘assets’ they then carry with them into the post divorce stage and can exchange for work and capital value. The wife (usually the wife) has not built up any of this exchange value or else her bundle is so much the less in capital value such that this is the ‘loss’ in the context of financial independence.

A. Michael should **not** be entitled to live at the same standard but should be entitled to a graduated transition to independence for a fixed period of time (always subject to exceptions).

B. **Yes** (but dependent on what is available).

C. **No**, if no children.
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. A Formula would not be helpful because of the widely differing range of circumstances and would not be sufficiently flexible.
E. Rules for independence. There should be guidance towards independence.
A limited for Sarah
A limited for Michael both dependent on whether there are children
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah is entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Comments

F. The length of the marriage is a factor for a variety of reasons (a) (but it is the length of the marriage together with (b) the diminution of work 'assets' for one of the parties, added into this (c) how far did the diminution of work for one party enable the other party to build further his work assets. Helping him build up his pot.

Scarmen LJ in Trippas v Trippas:
'I accept that the wife’s contribution (as I have found it to be) made a significant difference to the success of the husband. She was part of the circumstances that persuaded the husband to drop the laddish culture and, as she put it, “grow up” … Thus, in my judgment, the court must seek a way that does justice to the parties and which does not, so far as is possible, impose a glass ceiling on the one hand but which does not hand out capital on the other.'

Children are significant factors. In a childless marriage they may have continued in their careers on equal terms.

H. Continuing responsibilities - these may be for children (until completion of higher education) but provision of a roof is expected for a ‘child’ until they leave home, which figures suggest may happen in reality much later (see my earlier comments on this). This is a factor which cannot be totally ignored since the parent with care may be expected to house the ‘child’ until the ‘child’ is in their thirties. Again, as stated earlier the dependent relative parents are an increasing part of modern family life where the extended family once shattered, today, because of the collapse of ‘Beveridge’s dream’ has foisted care of the elderly back into the private realm and onto the family.

i. Entitlement of a party to live in the matrimonial home is considered by the Mesher and Martin principles and added to that a consideration of the now increasing dependency of elderly relatives is parent is relevant.

Other factors affecting support

South Asian Family Form
In my response I shall refer to South Asian families, however families from a range of other ethnic groups are very similar in family structure and financial arrangements to what I will call the South Asian template. A clear and detailed consideration needs to be given to understanding other family arrangements for care and also as these arrangements impact on the matrimonial division of labour and matrimonial finance during the marriage and in the post-divorce phase. Taking the South Asian family as just one of many other family arrangements in contemporary Britain caring for elderly relatives is regarded as a duty not as an exception. Caring for adult offspring and their families is also part of family life.

The Law Commission needs to ensure that their deliberations include a consideration of these family forms and to include the experiences of the courts and of lawyers with regard to family breakdown and financial matters in these particular family arrangements. (See Rapoport, Fogarty and Rapoport (eds) Families In Britain London, Routledge and Kegan Paul, 1982 “South Asian Families” Roger Ballard, See also for statistical information on ethnic minority families on multi-occupation and home ownership- Edition No: Social Trends 41 Editor: Jen Beaumont Office for National Statistics -Also higher rates of owner occupation http://www.scotland.gov.uk/Resource/Doc/1125/0085999.pdf. These and other factors are all relevant to understanding the variations in family form in considering how arrangements for financial provision impact on them.

See for example Mirza v Mirza [2009] EWHC 3 (Ch) 2009] 2 FLR 115 where: - it was the middle brother, not the husband who had made the capital investments and was the sole beneficial owner of the property.
7.8 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 finishes 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

1. **Yes agree.** But must take into account those who have never worked, those who have worked and have given part of this up working part time in same profession or changing jobs, and those who have worked and have given up work.

2. The considerations in assessment of (a) could be provided in a checklist.

(b) priority to be attached to different levels of need this is a problem in the case law with regard to what weight is to be given to each area of need. The Piglowska problem [1999] still persists as regards ‘weight’.

3 (a) I agree with 5.38

(b) I agree with b
c. financial arrangements after short marriages and short childless marriages (SCM)

Even where things may appear relatively straightforward, there may be a range of circumstances. For example the SCM where both parties continued to work and lived together in mutuality.

Sue and Bill

Sue gives up her job because she is undergoing IVF treatment which requires many hospital appointments. She is very sensitive about their infertility and at times which becomes increasingly difficult to have time off work. She is told that stress may also be contributing to the lack of success of IVF. She decides to hand in her notice and concentrate on getting pregnant. She is off work for two years is still not pregnant. Meanwhile her relationship with Bill is becoming even more strained they separate and then divorce.

Sue is in a very different position to the SCM where both parties were building up their careers.

4. Practice Guidance – YES

5. Yes

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

Other reform measures

Needs so varied that many reform measures would need to be in place. I.e. For IVF example we would require Family Friendly policies and a climate and culture change.
7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

Statute cannot specify level of needs because of wide variation However statute can assert that no pre nup contracting out where needs.

NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

There are some unanswered questions about sharing principles. The protection of an asset already owned by a party before the marriage – or gained as a gift or inheritance during the marriage – is important to the person who owns it. The purpose of the consultation seeks to set out what property is non-matrimonial.

The last opportunity the Law Commission had to examine this question was in 1981. The composition of ethnic groups in the population has radically changed since that time. The courts have for the last decade tackled a wide range of issues with regard to children and welfare which involved a range of ethnic groups. Financial provision again operates frequently in the context of considering the equality sharing and other principles in the context of financial arrangements within family which are of particular complexity. The Mirza situation is by no means uncommon, much of the complexity is unwritten unspoken but implicitly understood. The Law Commission in this Consultation needs urgently to Commission a background paper which will address some of this complexity.
Gift inheritance.

GIFT
In an article I wrote entitled 'Division of Assets and Fairness – ‘Brick Lane’– Gender, Culture and Ancillary Relief on Divorce’ 2004

I explore some of the complexity of financial arrangement in South Asian Families., rehabilitation and the SAF

I would suggest that any discussion on these matters takes account of the very specific situations that arise in some ethnic community families. I would like to be commissioned to write a background paper on the issues arising from gifts and inheritance in the context of the South Asian family and other ethnic minority families drawing on my article in Family Law

Gifting - When is a gift - a gift

This should also take into account gifts within the South Asian context and understand the complexity and specificity of ‘the gift relationship’. I also refer to the specific situation of the dowry. (This also needs detailed consideration).

The court must consider ‘all the circumstances’ and there is a need to understand gifting from a non Anglo-European context.

‘...in a recent directions hearing where there was a short marriage with no children, where both parties were working and where the mother of the husband representing the deceased father’s estate contended that she had a claim on the estate on the basis that the deceased had contributed financially throughout the marriage, the judge in giving directions approached the case by taking into account the fact that Asian families arrange financial affairs in a particular way. This, the judge recognised, was an arrangement that resulted from the particularly close ties of the extended family and the common practice of a parental contribution to the marriage. The judge also recognised that the limited opportunity for remarriage in such cultures was also a pressing consideration on any determination of the future needs of the wife.

In multi-cultural, multi-ethnic Britain, the courts will be increasingly presented with the need to develop a jurisprudence, which acknowledges all aspects of culture and ethnicity as they impact on and shape ‘all the circumstances’. The considerable discussion which ensued in Cowan v Cowan with regard to the principle of fairness and its application, demonstrates the difficulties which lie ahead, and even more so where the specific complexity of the division of assets in Asian marriages is under consideration’. (See ‘Division of Assets and Fairness – Brick Lane– Gender, Culture and Ancillary Relief on Divorce’ 2004).

Inheritance

I would suggest that monetary inheritance, property inheritance received prior to marriage is not subject to the sharing principle.

I would suggest that inheritance which is passed down from generation to generation involving historic homes, manorial estates see the fictional examples known to all of
Private Benjamin are excluded because they have a value of being part of heritage.

**Gift received prior to**

A gift prior to marriage should also be excluded. Forms of gifts include (a) Gifted money to assist a child on the property ladder is something that parents if able work towards. A new culture of childhood dependency and expectation has arisen through education and loans where parents remain morally and financially involved with children beyond majority... Parents see themselves as less of discrete units in continue to provide for children in assisting them towards the purchase of property.

Again, the South Asian family provides one such example where this gifting is considered the default position, and in again in such families the expectations are both ways whereby the once assisted child will later in life assists the elderly parent in providing care for them. The obligation is both ways and continuing and not appreciated from an Anglo- Eurocentric perspective...

The proposal that such gifts or inheritance acquired before the partnership should be available to the other partner on breakdown (in so far as needs require) would also depend on the length of the marriage and other factors. I do not think it should be automatic. As I have already argued, for some families, for example the South Asian family the partner remains if not contractually but morally obligated to support their wider consanguine family, including siblings, in times of crisis and also has a continuing obligation to them who are not the (wife).

7.12 We ask for consultees’ views on whether the family home should be excluded From the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

Yes

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59
No. Subject to all the caveats argued above length of marriage, children, and other claims should be considered. The contract of marriage should not trump and exclude all others.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

I agree with this.

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

7.15 I agree.
7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

No. It seems harsh that just because the NMP has been used for the benefit and enhancement of the family to the marriage that it should now be forfeited and becomes part of matrimonial property. So I do not agree.

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

Guided discretion for growth in value of property.

I agree this should just be a mathematical exercise where the gift or inheritance was x and that value has grown by y percent over time.

Formula

\( (Y \times Z\% \times \text{years} =) \)

June and Terry

June purchases a flat for £310,000 she puts down £60,000 deposit and pays the monthly mortgage. After a year Terry moves in and shares in the contribution to the household expenses. They marry and both work and after five years they divorce. There are no children.
The house has increased in value by 20%. Therefore so too has the original deposit of 60K. This should be subtracted from the capital leaving the remainder to be shared to be shared upon divorce irrespective of needs of either of the parties.
Conclusions: Matrimonial Property, Needs and Agreements: A supplementary Consultation Paper

I have completed the response form in full to the Consultation Paper 208, this is an overview of my conclusions. I have attended three meetings concerning the Law Commission consultation and have heard a variety of views. I am a legal academic but with some experience as a practising Barrister of practice in the family courts.

1. Reasons for change

Parties to a marriage or a civil partnership currently encounter little difficulty in ending the relationship. By comparison, issues relating to the redistribution of assets of the couple, is fraught with difficulty. The shortcomings of the current system stem from the lack of guidance in the Matrimonial Causes Act 1973. Although s.25 of the Act outlines matters that a court must consider it fails to guide the court as to which matters should have priority and how much weight should be placed on matters such as length of the relationship or standard of living enjoyed by the parties. Development of the law on these issues has been left to the courts and so development has been piecemeal and fragmented. Litigants are uncertain how a court will be applied. Where an award is made which is perceived to be too high by one party there is a willingness to appeal which wastes time and costs for both parties.

It is against this background of uncertainty that the Law Commission has embarked on a consultation engaging with a wider number of people including the Judiciary, family law practitioners and legal academics. The uncertainty of the present law makes is necessary for there to be change. Arguments that the present law embodying discretion allowing cases to be decided on individual facts carry little persuasion: The shortcomings in the law must be addressed.

2. The way forward

The Law Commission has explored two alternatives for the reform of the law: a reformed discretionary approach and a formulaic calculation. Both views have merit but the predictability of a formulaic calculation makes this attractive particularly where legal advice may not always be available. Where a formulaic approach is adopted it would be preferable to adopt it as a presumption which can be rebutted by evidence from the claimant. The law should state in what circumstances rebuttal would be allowed. E.g. the party claiming spousal support may wish to retrain so present earnings would be excluded from the calculation and higher spousal support
awarded for a limited period because retraining may lead to a higher level of earnings. Spousal support should be restricted to compensation for loss caused by the relationship rather than unravelling ‘the merger over time’. There would be a far better chance of the parties recognising that a relationship does not give rise to lifelong support. There is merit in setting a limit on the time allowed for spousal support to be given but this should also be a rebuttable presumption allowing a party to argue that the limit should not be applied because of special circumstances.

3. **Non-matrimonial property: the pitfalls**

Since Miller/MacFarlane the courts have distinguished between property that can come into the calculation (matrimonial property) and property that should be excluded (non-matrimonial property). There is little background law on how this distinction should be made and the issue has often taken up an inordinate amount of the court’s time. It is difficult to argue that all assets brought into a marriage can always remain separate assets. Assets used and enjoyed by both parties arguably become matrimonial assets over a period of time. E.g. a holiday home enjoyed by both parties and maintained and improved by both parties. Property lawyers may argue that enjoyment is under licence at all times but rights could easily be acquired informally through property law principles such as proprietary estoppel and a constructive trust. In order to avoid doubt legislation should try as far as possible to adopt definitions as set out in the New Zealand Property (Relationships) Act 1976. The family home should always be excluded from the definition of non-matrimonial property even where acquired by one party before the relationship began. This should be a rebuttable presumption.

4. **Research**

The Law Commission has proposed that research should be undertaken to explore the introduction of new proposals. Research could include the introduction of a voluntary scheme where couples could adopt the formulaic approach but it would be difficult to prevent recourse to the courts in the event of dissatisfaction. Couples could be given the option of self-assessment of means in a way similar to filling in an on-line Inland Revenue self-assessment form. Research must cover wide range of backgrounds and geographic areas.
5. Conclusions

The reform of his area of law is long overdue. The Matrimonial Causes Act 1973 has been shown to have considerable shortcomings. The law has developed in a haphazard and fragmented way in a series of cases leaving a couple uncertain how the law will be applied to their case. The use of a formula has many attractions not least an element of certainty missing in the present law but caution should be applied before removing all discretion from the courts. If a formulaic approach is adopted then it should have a safeguard allowing discretion to be used where the claimant can show that he/she falls within certain circumstances.

Judith Bray
Reader in Law
University of Buckingham

December 2012
This optional response form is provided for consultees' convenience in responding to our Supplementary Consultation Paper on Matrimonial Property, Needs and Agreements.

You can view or download the Supplementary Consultation Paper free of charge on our website at:

www.lawcom.gov.uk

(see A-Z of projects > Matrimonial Property, Needs and Agreements)

The response form includes the text of the consultation questions in the Supplementary Consultation Paper (numbered in accordance with Part 7 of the paper), with space for answers. You do not have to answer all of the questions. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question is followed by a reference to the Part of the Supplementary Consultation Paper in which that question is discussed, and the paragraph at which the question can be found. Please consider the discussion before answering the question.

We invite responses from 11 September 2012 to 11 December 2012.

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk  or
by post to: Law Commission
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.
An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Law Commission.

The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Your details

<table>
<thead>
<tr>
<th>Name:</th>
<th>Judith Bray</th>
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Are you responding on behalf of a firm, association or other organisation?
If so, please give its name (and address, if not the same as above):

I am responding in my own personal capacity as a legal academic at the University of Buckingham

If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.
7.2 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?

Supplementary Consultation Paper, Part 4, paragraph 4.113

The current law does require reform. Development through the common law has led to uncertainty as to outcomes. The discretion reserved within the Matrimonial Causes Act 1973 has merit but the issues described do not guide the courts as to which matters should have priority in the event of a case coming before the courts.

7.3 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?

Supplementary Consultation Paper, Part 4, paragraph 4.114

Ideally financial provision should be restricted to compensation for loss caused by the relationship allowing the parties to make a fresh start and to prevent a culture of dependency. This is the ideal solution which can only be put into effect where neither party has suffered financial loss through the relationship.

Acceptance of an idea of merger over time has merit because it addresses that issue but it suggests that a right to financial provision is gradually earned over a period of and the longer the parties are together the more that can be claimed.

I suggest that a better way to address the issue is that there has been disparity in lifestyle caused by the marriage rather than disparity caused by the divorce or dissolution.
7.4 In answering the question at paragraph 7.3 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.

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Supplementary Consultation Paper, Part 4, paragraph 4.115

I would suggest that it is wrong to take individual matters into account in this way.

Better to focus on central issue how has the marriage affected the parties?

(i) Although the MCA 1973 refers to the length of the marriage as being a matter relevant to the court (s.25(2)(d) there is a danger of allowing too great focus on the length of the marriage. The law has always worked with a minimum length of marriage before rights accrue. I suggest that this remains relevant;

(ii) The marital standard of living. This matter should be relevant to the decision. It is relevant whether the court works from the point of view of compensation or from the point of view of addressing needs. But I suggest that it should not form part of a checklist;

(iii) Joint responsibilities will be relevant but as part of the central issue discussed above rather than as part of a checklist;

(iv) Views on this issue same as above.

---

7.5 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?

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Supplementary Consultation Paper, Part 4, paragraph 4.116

Both (1) and (2) have merit but I suggest that there is merit in moving towards a formulaic calculation on a similar basis as that in Canada but ideally this
should be based on a presumption which is rebuttable. There should be cases that can be decided on a discretionary basis rather than using the agreed formula. In spite of continued enthusiasm for retention of discretion it has been proved to fail to deal with financial provision on divorce satisfactorily.

7.6 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?

Any reform of the provision of financial support should embody incentives towards independence. However it would be salutary to consider why the ‘clean-break’ provisions embodied in MCA s.25A have not worked in practice and what safeguards could be embodied into new legislation.

7.7 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?

I suggest that this is a question for practitioners. I note that lessons can be learnt from previous research projects such as the Bristol project on HIPs and research undertaken before introduction of the Family Law Act 1996 divorce provision reform. Both subsequently failed. I suggest that any research should cover a sufficiently wide range of relationships and should not centre in any particular area. Meaningful research would require considerable investment.
Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
   - to live at the same standard as he would have lived during the marriage, and if so for how long?
   - to as much as he needs to relocate and to start again as a single person?
   - to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Comments

Case Studies
A The standard of living of the marriage should be relevant where resources can support this. As discussed above the new system should move towards limiting dependency; aim towards independence;
B The Canadian system as described by Professor Rogerson has merit where issues of capital are discussed separately and there is an assumption of sharing capital assets equally however where assets are limited then it is difficult to avoid the issues becoming entwined. It is not clear whether the Canadian system can always keep issues of capital separate from matters regarding income.
C The logic of arguing that Chris should continue to have responsibility to support Pat stems from the continued responsibility in both the other cases but I suggest that this should not be open ended.
Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Comments

D. There is real merit in creating a formula which could be used by parties who cannot afford or prefer not to take legal advice. However the problem with a formula is that it rarely caters for the range of variations which arise within relationships. E.g. Suppose Michael had inherited property from a relative. Should that come within the formula? E.g. Suppose Sarah had one or two items of valuable jewellery should she be forced to sell that in order to raise money in order to live. In both cases such property may be outside the calculation but it would be relevant.

E. The difference lies in the need to compensate for losses that arise from the marriage and in particular childcare. If there are no children then such losses do not arise. However that does not mean that the obligation to support does not arise.

Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?
I believe that length of marriage unnecessarily complicates the issue. It does appear to suggest that each year of marriage raises a higher level of entitlement. That is inappropriate.

The marital standard of living could be relevant. If financial provision is awarded on the basis of loss arising from the marriage it should be seen as losses from THAT particular marriage and so the standard of living would be relevant. It would not be general losses arising from marriage in general.

On going care is relevant in looking at the losses arising from the relationship through inability to work because of care of children and this remains a relevant issue. However it would be easier to look at this as one general issue of losses arising through the relationship.

There is a difference between having a right to live in the family home and having the right to seek the court’s agreement that one of the parties should be able to live in the family home.

**IMPROVING THE CURRENT LAW RELATING TO NEEDS**

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

   (b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

   (b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

   (c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).
(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.

Supplementary Consultation Paper, Part 5, paragraph 5.62

There is a need to have information available to parties on the possible alternatives after divorce. Para 5.40-5.48 suggests a checklist. This could be similar to the information that is given in the national conditions of sale.

Where marriages are short and childless the presumption should be for no order but such a presumption could be rebutted by evidence of loss arising from the relationship.

7.9 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.

Supplementary Consultation Paper, Part 5, paragraph 5.63

7.10 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.

Supplementary Consultation Paper, Part 5, paragraph 5.70

The view of the Law Commission preventing a party from contracting out of provision for needs has merit but it undermines the status of the pre-nuptial agreement. It appears to tie the hands of the parties. If the agreement has been drawn up without adhering to certain safeguards such as
### NON-MATRIMONIAL PROPERTY

7.11 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?

Supplementary Consultation Paper, Part 6, paragraph 6.41

(1) There is considerable merit in holding that property received as a gift or inheritance should be dealt with separately.

(2) It is much harder to argue that gifts purchased by one party before marriage or civil partnership should be dealt with separately. It is possible to envisage that disputes concerning such property will lead to expensive litigation. Should the piano which was purchased by one party before the relationship but has been played by both parties (both musicians) and the children be dealt with as separate property? It seems absurd to regard that as separate. Should the valuable French clock bought on a joint holiday by one party two years before the marriage be regarded as separate property?

Property purchased for and used within the family home should be presumed to be jointly owned.

The same principle should be applied to intangible assets. It is difficult to see why shares purchased a year before marriage should be regarded as separate
property whereas shares purchased the year after should come within the assets of the couple. Surely during marriage where assets have been acquired prior to marriage in the absence of a specific provision in a will such assets will automatically pass to the survivor on death?

In the example described above the widow of a husband will be able to claim the piano which has been played by both parties during the marriage on his death indeed can be claimed even if it has not been played?

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Supplementary Consultation Paper, Part 6, paragraph 6.50

A major reform of financial provision in relationships would be to regard every family home as jointly owned at law and in equity. This should be a presumption rebuttable in exceptional cases. It would address one of the most contentious issues in land law.

A consequence of this would be that it would be presumed that the family home would be excluded from the definition of non-matrimonial property.

7.13 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.

Supplementary Consultation Paper, Part 6, paragraph 6.59

There should be a presumption that property acquired by one party during cohabitation with the other party should not be brought within the definition but this presumption should be rebuttable. This issue was raised in Miller v Miller. The period of cohabitation became relevant during the hearing.

7.14 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?

Supplementary Consultation Paper, Part 6, paragraph 6.77

This issue depends on the type of property and the context. It is impossible for all property to remain separate. Consider the piano mentioned above which is
played by both parties inherited by one party remain property of one party for
the duration of the relationship? Can the holiday home used by both parties
and maintained by both parties remain the property of one party only?

7.15 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?

Supplementary Consultation Paper, Part 6, paragraph 6.87

Where property has retained the status of non-matrimonial property and is
then sold then the status of non-matrimonial property should be presumed to
cease. I suggest in all these cases it is a rebuttable presumption.

7.16 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?

Supplementary Consultation Paper, Part 6, paragraph 6.88

I agree with this proposal.

7.17 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?

Supplementary Consultation Paper, Part 6, paragraph 6.100

This question relies on a clear definition of what constitutes non-matrimonial
property. If it can be defined as non-matrimonial property then it will remain
outside the calculation.
LAW COMMISSION
CONSULTATION PAPER No 208
MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

Response to the Law Commission Consultation Paper

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Introduction

This paper is my response to the Law Commission paper on matrimonial property, needs and agreements. I have previously responded to the consultation paper in respect of agreements.

I set out my details in Appendix 1. In summary, I am a solicitor, mediator, arbitrator, deputy district judge at the PRFD and also Australian qualified solicitor. I have practised as a specialist family law solicitor for over 25 years, almost entirely in central London. The primary area of my work has been financial aspects of marriage breakdown, often with an international element. I worked for two years in Sydney, Australia, about 10 years ago and I bring my experience to bear in this paper. Through my private practice work I have considerable dealings with other countries and I bring this experience also to bear.

I endeavour to follow the questions put in the consultation paper, in the order they are put and structured in a way which I hope will assist in compiling responses. I make a few preliminary remarks.

I am absolutely delighted and pleased, personally and professionally, at this work being undertaken, with the portents of primary legislation. I have been critical for some time of our ancillary relief law, as it was described until recently, and especially the unfettered discretion leading to uncertainty, lack of clarity, unpredictability and encouragement to litigation. Of course I admire its flexibility, its opportunity for tailor-made justice, its adaptability to trends in society, culture and expectations and the freedom for creativity. They are hallmarks of all that is best about the English family law system in particular and the common law system in general, of which we are entitled to be very proud and should be entirely supportive. Nothing in this response is intended to detract from those key elements. If I felt that the consequence of this consultation was to lose the benefits of our English common law financial arrangements for divorce and gain a number of the worst elements of the civil law system then I would be opposed immediately. My hope and desire is that through this consultation process we can create a system which has more certainty, predictability of outcome and clarity yet with the very best of the historic English family law approach. This is a gigantic task. I happen to think the task is already underway with the consultation paper and, hopefully not naively, I would like to think the task will be refined within this final process of response to the consultation.

I have attended one of the consultation sessions and a couple of my professional colleagues have attended others and reported back. I have spoken about the topic on a number of occasions when lecturing on financial matters on divorce to other lawyers. My sense is that opposition to reform is relatively limited, and primarily from the more senior bar and some judiciary whom I would suggest have a narrow perspective on the issues across the board. Very many solicitors of my personal and professional acquaintance are supportive, and all acknowledge how difficult is the task of finding a better alternative.

One of the frustrations is that although there has been keenness for reform over many years, there has been very little active debate within the profession about what should be that reform. About six years ago, fairly soon after my return from Australia, I was
invited by the Yorkshire family lawyers group to speak about possible reform. I was delighted but it was a real challenge. I read the academic literature but frankly some was wholly unrealistic and had no prospect of practical implementation. More concerning, there was very little indeed from the professions. There was nothing or almost nothing from Resolution, the law society or FLBA. It has seemed to me that whilst the professions have been active on the micro issues, there has been very little in the past decade on the big macro issue facing us.

Accordingly when about five years or so ago the Centre for Social Justice undertook a major examination of family law to recommend family law reforms to help family life and especially overcome family poverty, of which I was the final chair and oversaw the recommendations regarding reforms of financial provision law, it was a major task to think through what could be the reforms. Although we looked at jurisdictions abroad and looked at some comparisons in this country in other areas of law, we were broadly starting with a plain piece of paper as far as previous domestic recommendations of reform were concerned. Our recommendations in respect of financial matters on divorce are set out at Appendix 2.

I have looked again at our recommendations both during this consultation process and in preparing this response. We were going first, with no previous overall reform proposals. I don’t think I would now necessarily make some of those recommendations. I think some recommendations started a debate and discussion which has occurred. I happen to think some of the recommendations were very good and not too far away from what is now being discussed in the consultation paper, and I feel humbly pleased at this.

This paper is entirely personal to me and does not necessarily represent the views or opinions of any organisation with which I’m associated. I set out below some particular principles which I consider invaluable and have guided me in my thinking.

In the CSJ discussions and in my thinking for this response, the position abroad has been informative but not compelling. I think there is a lot we can learn from where other jurisdictions have already gone. I think New Zealand has certain attractions although I understand from speaking with New Zealand specialist lawyers that they are keenly aware of some of the shortcomings of the legislation, particularly perhaps it is too prescriptive element. Here again is a difficult balance for us. I was fascinated by the Canadian experience as explained at a recent consultation meeting. I think we have much to learn and could borrow. The Norgrove report referred to certain Scandinavian models, although I am less convinced. Chiefly, whatever our opinion about elements from Europe such as applicable law and lis pendens both of which I thoroughly oppose, we cannot and should not ignore that continental civil law Europe represents a massive population of the westernised world which is conducting its affairs according to particular patterns of outcomes on divorce. Moreover through the sheer clout of the EU, these patterns are being imposed on many other jurisdictions both directly through legislation and indirectly through normative influence.

I and my colleagues in my law practice undertake very many international family law cases with Europe. We see very real injustice and unfairness in the operation of the civil law marital community regimes, particularly for women either as mothers or
who have made material sacrifices for the relationship. I would want to turn my back entirely on that sort of approach. We must not allow it to be imported into England. Equally it is right to record we hear from our clients from European civil law countries about the considerable benefits of knowing the likely outcome and the discouragement of unnecessary disputes.

This for me is a most difficult balance in this process, certainty against perceived gender and other fairness, and yet the one which I think is the most vital.

I have been of the opinion for more than a decade, perhaps from the uncertainties and bad outcomes arising in the mid-and late 1990s, that as a society and community we can no longer afford the costs, the disruptions, the delays and the other disadvantages of our present unfettered discretionary system, with the uncertainty of contradictory or layered case law moreover case law, deriving from a narrow area of divorce experience namely the big money work. The direct cost of our financial dispute system for divorce is colossal, through the courts, private and publicly funded lawyers, ancillary professionals and more. However the indirect cost of the system is incredibly high, in financial terms and in personal terms as the litigation goes on, affecting family members, employers and fellow employees, and others within the community.

If our inability to afford this was the case in the late 1990s, it is dramatically more so 15 years later in our present economic climate. Whilst at one level it is wrong that the law should follow the financial difficulties of the Justice system, it is also realistic to realise that in the foreseeable future, there will be no greater facilities and funding for the family justice system in our country. We have a duty within this system to find both law and processes which can operate fairly and justly within the financial constraints imposed upon us all. This is less than satisfactory but has to be entirely pragmatic.

It is not only the inability of our country to afford our present system, it is an unwillingness from many people to take part in our present system. Certainly there is an unwillingness to engage with the lawyers, beyond the simple cost of doing so. There is a greater expectation now in society that there should be simple and understandable processes which affect ordinary people in ordinary relationships and which should be able to be conducted and resolved by those people. Whilst there is still a real need for lawyers to protect the vulnerable party through the financial resolution, there are many instances where one or both parties feel frustrated that they are almost compelled to use lawyers. We must surely be able to devise a system which is less dependent upon high involvement of lawyers throughout the process. Legal advice and representation will still be needed but should not be needed so much, so often and by so many.

So I have been convinced over the past 15 years, with various degrees of keenness in part dependent upon the fluctuations of the clarity and certainty coming from the Court of Appeal, about the importance of new primary legislation to fetter discretion but still retain some discretion, to give greater clarity, guidance and predictability, to encourage more couples to be able to get towards a final settlement more quickly and easily themselves and use all modern IT opportunities to develop awareness of that law and working out the appropriate outcomes.
I am fully aware of course that more certain law can produce more hard cases. I have thought much about this. I am of the conclusion that the huge cost, direct and indirect, of our present arrangements is so unjustifiable and unsustainable that the hard outcome in some cases is warranted if overall we have a clearer and more predictable outcome in most cases.

Thus far, none of this has related to the content of the law! It is simply the process especially the common law unfettered discretionary system. But the law itself has at times, and perhaps now, been out of step. I’m very conscious that as a middle-class male in his late 50s, my own thinking about matters of marital property and dependency are quite different to my colleagues 30 years younger. I know that whereas I have a more traditional approach to bringing into account so called non-marital property, there are now very many in our society who will be quite content with this sort of property being set apart and treated differently in some way. Moreover whereas I have come from a position of expecting lifelong support after divorce, perhaps arising from a position of marriage as a lifelong commitment, there is a strong view amongst the younger in our society that there should not be this expectation of very long term dependency. This is why the consultation process has been important and I will be interested in how there have been differences between age groups and wealth groups. In my response here I am naturally setting forth my perceptions however I hope I can embrace what I believe to be perceptions of others from younger age categories and backgrounds.

Guiding principles

I refer to guiding principles. I suggest there are at least three. The third is already referred to namely the importance of certainty, clarity, predictability and every opportunity for ordinary people to resolve ordinary disputes themselves with only some input from legal professionals.

The first two are interlinked.

The first is the support for the institution of marriage. In my opinion this is the primary principle. (I am conscious of course this includes civil partnership, which would have a similar law reform.) I have been critical of both the content of the law and separately of the long and expensive process of sorting out financial matters on relationship breakdown which together have caused some to hold marriage in a less high regard. I took a full part in the 1996 legislative reforms where one aspect of the debate was that we should not have such a divorce process whereby extracting oneself from marriage was so “easy” that it led to a lower regard for the marriage. I have the opposite worry now. It is not good for marriage where either the process of sorting financial matters out on divorce is so hard, long and expensive or the law being applied to sorting out those financial matters seems to a good amount of the population to be out of step with some perceptions of fairness and justice that in each case it prompts people to say they will not enter into the marriage relationship (again). We must protect certain safeguards within our law for those who have made commitments to marriage. We must protect the vulnerable. But we must not have a law or a process of resolutions under that law which will cause a general feeling to
turn against the relationship of marriage or recommend others against committing to it.

How we treat the process of resolving matters on divorce is an indication of how we treat and respect marriage. I don’t think we’ve been doing a very good job of the former. Perhaps it is little surprise that marriage has lesser respect, and certainly lesser numbers entering into it, than previously.

My second principle follows my first in certain ways. Marriage is an institution which in this country and across many cultures is perceived as a relationship to which one or both spouses are prepared to make commitments to the other spouse, to children and other dependents which they reasonably believe are worthwhile and reliable commitments for a long, possibly lifelong, relationship. These commitments can be huge. Travelling from one country to live in another country and another culture. Giving up successful careers for parenthood. Giving up financial resources to live with the other spouse. There are many examples. These are commitments which would not be made to any other form of relationship without some rock solid contract and other binding written commitment for compensation or recompense if the contract ended. Yet these commitments occur even in anticipation of the wedding and certainly after the wedding.

Failure to acknowledge and respond to those commitments will cause dreadful deterioration in the respect given to the institution of marriage, coupled with an inevitable reluctance subsequently for others to make such a commitment. Yet marriage including parenthood within marriage is strong because of the level of personal commitment. The sacrifices made for the lifelong loving spouse is a feature of happy married life. This experience enriches and rewards all others who come into contact with it. It is wonderful to see. It is a wonderful example for others. I am absolutely adamant that any new law must ensure that these sacrifices and commitments are respected, honoured and acknowledged in outcomes. Curiously, although I was in two minds about cohabitation law reform in itself, I was certain that the reform model for relationship generated benefits and disadvantages was a very good one, including for marriage, as I said at the time.

So my second guiding principle is that these sacrifices and commitments made to marriage including parenthood and within marriage should be honoured, respected and acknowledged in the financial outcomes.

I also endorse and support those principles set out at 4.23

With these opening remarks I turn now to the specific questions posed
REFORM PROPOSALS

7.2 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?

It follows from the above that I agree entirely. I have not set out above my own position to the matters set out at Part 3 of the consultation paper in part because I have set them out elsewhere including the CSJ report and in part because I simply and unequivocally agree.

7.3 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?

It follows from my remarks above that I endorse entirely 7.3.1 namely compensation of loss caused by the relationship, however this may want to be described. The reference at 4.31 and following to “relationship generated needs” is not necessarily in my opinion very helpful and indeed I think the Court of Appeal in Charman felt themselves obliged to unpack some of the remarks made in the House of Lords in Miller.

But “compensation caused by the relationship” is too narrow. I suggest this is not human experience. Certainly in many cases it will be sufficient. Nevertheless a number of examples could be given where it is insufficient including as set out in the consultation paper. Compensation itself has real limitations as has been shown by successive High Court and Court of Appeal analyses of the House of Lords in McFarlane. Secondly, the concept of being “caused by the relationship” is either too narrow or potentially too legalistic. The commitment and sacrifice and corresponding loss and damage may not be caused by the relationship but for example have arisen from reliance on the relationship of marriage as reasonably expected of the other spouse by way of interdependent support. So I’m satisfied that 7.3.1 is good but not sufficient. Specifically it does not go far enough for my second principle as above.

I have examined carefully the comments at 4.52 onwards. I’ve seen reference to the French compensatory award system. I record that I have had a number of cases involving French financial settlements. I have always found this to be a highly inadequate and insufficient provision. It could be argued that this is only the consequence of a rather parsimonious French system: remarks at 4.56 bear this out.

Moreover within our global community, and any new law must acknowledge global family law trends, we need to know whether particular outcomes would be within the category of maintenance. The French system of compensation is outside maintenance. My belief of the acknowledgement of the sacrifices and commitments made to marriage are that these are indeed “maintenance” in the truest sense. They are one component feature of looking at needs fairly on divorce financial outcome.
As indicated, I do not regard this as essentially compensation, although this is one way in which it could sometimes be categorised. What I do consider has been a very unhelpful development in English law is decisions such as VP v JP 2008 EWCA 112 from the then President which made it clear that spousal maintenance was only needs and really should not include any compensatory element. It was blatant policy making with serious gender implications without any public debate or public consensus. In the broad range of finances on relationship breakdown, some families are capital rich and income poor and some are income rich and capital poor. To deny appropriate provision for compensation or relationship generated commitments and contributions in some of these cases e.g. out of income, seems unfair.

I have elsewhere criticised what seems at times an almost Luddite approach from the judiciary. Where opportunity exists to take a serious calculation of the consequences of marriage breakdown, then this should be used. I’m conscious that in one particular post McFarlane case, P v P [2006] EWHC 3409 at 61-64, expert evidence was produced from HR consultants to show what a spouse would have been earning if it had not been for the sacrifices and commitments made to the marriage relationship. In the reported decision, this approach was thoroughly condemned, in favour of the more discretionary broad brush approach to analysing outcome. In my opinion this was unnecessarily backward looking.

Yet my commitment to my second principle under 7.3.1 must also be informed by my commitment to my third principle i.e. creating a more certain, clear and predictable outcome.

It was in this regard that I was attracted to the Canadian model. It is certainly not the complete answer. However I would like to examine how far we can introduce this sort of thing into our jurisdiction.

My vision is for a family law system of financial outcomes on marriage which is far more certain and predictable for the vast majority of cases. These vast majority will be needs-based with often no real prospect of any other equitable distribution for the sacrifices and commitments of the marriage. Yet there will be some, perhaps increasingly more, cases where there is the opportunity for such an equitable distribution to reflect commitments and sacrifices. I believe this is one of the areas where fettered discretion should still be alive and available with clear guidance and guidelines on the importance of these sacrifices and commitments being reflected in the outcome and the general manner of that reflection. I cover also in the context of non-matrimonial property. I consider this will meet a general expectation within society that sacrifices to marriage will be respected and honoured and are therefore worthwhile being made and continued to be made for those married and for future generations of those getting married. In turn it will honour and uphold the status and institution of marriage and commitment to marriage.

As to 7.3.2, redressing the disparity in lifestyle caused by the divorce, as practitioners we are completely imbued with this concept in English law of the period, often quite a long period relative to the length of the marriage, of provision to overcome the disparity. I suggest it is a real distinctive compared to most other countries around the world. I consider there are several features.
First, there must be a greater emphasis on the clean break provisions and working towards self-sufficiency, and see 7.6 and 7.8.

Secondly, absent children, I do not think public opinion is any longer sympathetic to material provision for disparity in lifestyle in short marriage cases unless there has been clear sacrifices and commitments made to real prejudice e.g. moving country, giving up a job, giving up accommodation etc. However in this connection, the sacrifices and commitments may be made before the marriage in anticipation of the marriage or at the very beginning of the marriage and are less an issue of so-called unravelling over time. Where this element is not present and it is a short marriage, perhaps three years or less without children, I would like to see a return to the pre Miller position of putting the parties in the position as if they had not been married unless this would cause significant injustice taking account of some of the section 25 factors. As I refer below under 7.16 where advocating a conversion of non-marital assets into marital assets over the length of the relationship, I could quite understand if this conversion process did not start until perhaps five years of marriage.

Thirdly, I refer to my remarks below under 7.4.2.

Fourthly, I am attracted to the formulaic guidelines and calculations at 4.62 and following and 4.69 and following.

Fifthly, as set out elsewhere in my response, there are many countries where provision post-divorce is meagre, parsimonious, disproportionate to the other spouse and overall finances and wholly inadequate for any semblance of similarity of the marital lifestyle. So whilst I’m sure we should be pulling back on the very generous provision, as to quantum or period or both, we must not go anywhere close to the harsh, gender discriminatory outcomes in many countries.

Sixth, spousal support should acknowledge not only needs but also where appropriate elements of contribution, commitment and sacrifice where these are appropriately met out of income rather than capital.

Finally, spousal support should address the disparity in lifestyle on the end of the relationship but English case law has gone too far, been too generous to some applicants, been unduly cautious and unrealistic as to actual ability to work towards some independence and in so doing has unintentionally caused lesser respect and regard for the institution of marriage and willingness to commit to it

7.4 In answering the question at paragraph 7.3 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.

I deal with each in turn.

Length of marriage, 7.4.1, may go directly to the issue of absorption of premarital assets into marital as I refer below. However in the context of needs and fairness
outcome, needs can be greatest at the beginning of the long marriage, at the end of a short marriage or in between. Length of marriage is not of crucial relevance to needs.

The marital standard of living, 7.4.2, is a distinctive feature of English law and a couple of other jurisdictions and has led to very large outcomes. Whilst I agree with the perception that it has probably gone too far, especially in relatively short relationships or non-dependent relationships, it is significantly more just and fair than a number of countries, predominately civil law jurisdictions, where this feature almost seems ignored. It is classically the merger over time feature. After a modest length relationship, a particular standard should not be expected to last for life. After a long relationship, it is harsh and unfair where finances permit to require a significantly lower standard of the applicant.

Yet we must find a way of avoiding the continued analysis of overinflated budgets, of which all family lawyers have been guilty and to which ends we create ever more sophisticated incomes requirement documentation. My first such document was in about 1988 and ran to about three or four pages. I think I’m now up to about 16 pages and include very many varieties of luxurious lifestyles. There has been judicial condemnation of parties and lawyers who artificially create and/or inflate such budgets. It is a problem. Yet equally the lifestyle created by and chosen for the parties over a period of time should be maintained (for a period of years) wherever reasonably possible after significant commitment. Our problem is that in case law it has been extended into short relationships and at artificially high levels.

I’m sad to report that we have, unintentionally, created lifestyle career ambitions of marriage to moderately or very wealthy spouses with the realistic expectation that the marriage will not last and a large divorce payout will follow. Whether described as gold diggers or worse, these have become for some in our society an easy way forward to good prosperity at a relatively young age, without any relevance or bearing whatsoever on contribution, commitment or especially on what would otherwise have been achieved through employment. These series of cases, some in the public profile, have been very bad for our family justice system. They are a scourge to which any reform of the law must be directed. This is not the intention of a fair and just divorce financial resolution system reflecting commitment and sacrifice to marriage.

The sharing of past and future responsibilities, 7.4.3, is a crucial element in needs going forward and the commitments already made.

The occupation of the family home post-divorce, 7.4.4, features later in respect of non-marital property. In this context I am presuming that it is needed for the primary residential parent with the children. The status quo for the children is very important, although not paramount. One of the beneficial outcomes post White is the acknowledgement that husband fathers had been kept out of capital for too long e.g. in the Martin type situations. Of course the less long-term Mesher orders have their problems. When I started my career they were in their primacy. They seemed to solve so many problems. Continuity for the children. Continuity for the primary residential parent. The husband subsequently receiving his share. We later realised the problems when the chickens came home to roost. Nevertheless I remain of the opinion that they have benefit. One chief disadvantage is the CGT which arises when the share is realised. By now the husband will invariably have purchased another
property. The CSJ tried to find figures for how much CGT arose to the Treasury in the circumstances. We could not obtain reliable figures and suspect they do not exist. We recommended that CGT in the circumstances should be abolished. I commend this recommendation because this form of occupation of the family home post-divorce has still much to commend it as a form of resolution, balancing needs of the parties and beneficial for children yet should not have this unintended adverse fiscal consequence

7.5 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?

It is probably unhelpful in this response to say that I favour both! (It is unreformed, unfettered discretion which I strongly oppose.) My support for a formula has been acknowledged, criticised and ridiculed and I remain unrepentant! But I have advocated a formula which is not a binding outcome but a better and more reliable creation of a starting point for a resolution nearer the finishing mark than the present system. As I have written elsewhere, in so many other areas of life we have formula assisting our decisions. These may be lifestyle choices such as holidays or mortgages. They guide on fiscal calculations. Unfortunately they have also had such an appalling profile because of the CSA. Yet these CSA calculations were badly and hastily put together without any real foundation of public acceptance and with minimal opportunity for discretionary review. Any who oppose the use of a formula merely has to wave the CSA wand and pro formulaic proposals scatter as fairy dust. It should not be this way.

One problem in our family justice system is that we do not have extensive reporting of family law cases. We have decided cases in the High Court and Court of Appeal which are mostly one end of the range, being of relatively narrow application. I suspect strongly that if we had information about all of the decided cases in the past two years across the DJ level, taking out perhaps 5% at each extreme end, we would be able to put together a formula based on how these cases were generally decided. This exercise has been undertaken on capitalisation figures, duration of maintenance orders in decided cases and other elements. On removing the extremes at each end, there is often a broad centre. This broad centre can be put into a formula for a starting point for resolution.

In any event it would in reality be more in the way of a flowchart, albeit perhaps hidden within a computer model. I suspect most good family lawyers have an internal flowchart mindset when approaching a case, even if they’re not aware of it.

I really do remain committed to a formula type approach which is more flowchart than exact precision of a binding outcome in accordance with the CSA.

So how does this marry fettered discretion? How do both 7.5.1 and 7.5.2 work together successfully?

As I do not think we should be introducing a binding formula but I do think we should be working out a calculation model which is somewhere between a flowchart and a
formula, the end result is the starting point for the resolution. This could be described in many ways. At one end it could be the show cause why an order should not be made in its terms. At the other end it could be the place from which the fettered discretion then takes over. In the former the fettered discretion would only arise if a particular hurdle could be overcome e.g. showing that the formula/flowchart outcome either had ignored particular features in the individual case or was an unjust outcome.

Discretion has so many benefits as has been seen in our system over several decades. It is the unfettered and uncertain element of the discretion which has been unhelpful. If it is fettered in particular ways and especially in my opinion if it follows some sort of formulaic/flowchart approach then I think we have the best of both worlds and is the one which we advocated in the CSJ report and to which I remain committed notwithstanding the flak I have received for even suggesting it!

7.6 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?

One of the disappointments of our system is that the 1984 legislation has not brought about as many clean breaks as it anticipated and encouraged. Certainly there are clean breaks where there is ample capital. But not in the way of many fixed term maintenance orders and s28 seems mostly lost in space and time. There has been handed down perceived wisdom from some courts that there should be no dismissal of spousal maintenance until the youngest child has attained majority, notwithstanding that the primary residential parent may be the higher earner. The family courts paternalistic approach has caused many hesitations in granting fixed term orders.

The consequence is that joint lives orders are made without any expectation that they will last joint lives but only on the basis that it gives the burden of showing the termination on the paying party. (If it is a fixed term order, the burden of showing the continuation is on the receiving party.) Yet the message that a joint lives order gives is that it is, as it says on the order, for joint lives. So I have seen as a solicitor and in my part-time judicial capacity many cases in which the recipient of spousal maintenance has post-divorce gone through their late 30s including parenthood, their 40s and then into their 50s without any real attempt at self-sufficiency. There might have been a few variations. There might have been some part-time work. Yet in their 50s, the opportunity for self-sufficiency because of the difficult job market disappears fast. The paying party who may not previously have been in too much difficulty in paying the spousal maintenance and now approaches retirement years finds that the joint lives order actually means what it says. This causes much grief and litigation.

Given that case law and practice has developed so that the differential between a term order and a joint lives order is really which party has the burden of seeking a variation and change i.e. the recipient in the former for it to be continued and the paying party in the latter to bring it to an end or convert into a term order, I have wondered whether there is any purpose in maintaining the distinction. This is even more the case now with pension sharing with the expectation in many cases that spousal maintenance will not extend beyond retirement when pensions have been shared as part of the overall financial settlement. I invite the Law Commission to consider scrapping the differential which, as I say, is now primarily directed to the burden of showing any
change. Is it too controversial always to have a term order, with the burden on the judge or in the settlement to show the term? Where there is a pension sharing, it would be the date of retirement. Where a pension sharing outcome will clearly not on retirement produce for the recipient a fair, financially proportionate or a reasonable level of income, then it might be appropriate for it to be a term of joint lives, but as a term order in itself and not as a norm. Where it is a mother with young children, it would be mid-teens or end of education. Where it is the classic need to retrain to become self-sufficient, a judgement should be taken as part of the final settlement on the likely period for the retraining and adjustment etc. I hasten to say that none of these would be with a section 28 bar: they are for particular cases and situations, including sometimes at the end of any further extension of a term. It would always be possible to come back to seek an extension of the term and this happens not infrequently in practice. But at this time of major review and reform, I put this forward for consideration.

The 1984 legislation is fine. Its application is not. I’m not sure there is much more that needs to be done or said in primary legislation, possibly apart from the above. What is needed is a strong endorsement of the expectation of increased attempts towards independence.

Nevertheless and as a major caution, I believe there is a trend around the world for this to go much too far. One looks at Scotland where the stay at home wives were completely abandoned in the legislation in the 1990s and now have very short term alimony, with dramatic differences in standards of living after a long relationship. Looking in the other direction, France provides very meagre and parsimonious maintenance provision. The Scandinavian countries have had this for many years, deriving from their high welfare benefit culture. Working towards self-sufficiency and independence is a good thing. Cutting off spousal maintenance after only a couple of years is unfair, unjust and a failure to recognise the sacrifices and hardships created through marriage from which the other spouse benefits.

7.7 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?

As a practising lawyer, I don’t feel competent reliably to answer this question as I am not familiar with the worlds of methodology of social science research

IMPROVING THE CURRENT LAW RELATING TO NEEDS

7.8 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.

I support this and see comments on 7.6 above. Moreover I don’t think there should be the expectation that independence is unlikely to be practicable until the children finish their education. This has been part of the problems in creating clean breaks. Our welfare benefits system expects mothers to be working when the children are eight years or so. I happen to think this is too early but finishing secondary education is too late in most cases.

(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

I support this. The CSJ recommended family relationship hubs, which was taken up in a similar way by Norgrove. We felt that if there was much more and better information available, there would be less recourse to disputes. There is much more information now available on the Internet. But quite a lot can be unreliable and agenda driven. The government is already producing some good information on websites and apps. I am certain that a fundamental key for the future is good, reliable, clear, transparent information on resolving family finance disputes, perhaps coupled with the formula/spreadsheet approach as above, with good indications of the expectation of working to self-sufficiency, as in 7.6 and 7.8.

At the moment our law is found almost exclusively in judicial case law. This is hard for many lawyers to understand and systematise into a way of working out appropriate outcomes. It is one of the criticisms of our present law.

My vision is for a greater burden to be placed upon the family law judiciary as far as law creation is concerned. I consider that it should go hand-in-hand with some government organisation which explains what is the law through government information websites and similar. The CSJ proposed that the President of the Family Division should have an obligation in relation to each decided case to say what was a development of the law and what was only an exposition of the existing law on the facts of the individual case. We described the former as red letter law cases or judgements. These would go directly to the information on the websites to further, refine, advance or in other ways make better and more sophisticated the existing law. All other cases, of which there will be increasing number reported in the Internet era, will have no bearing on the law itself and simply the manifestation and application of the law on the particular case. I believe this will help hugely to make it more clear and transparent what is the law. It would mean less conflicting decisions and thereby less potential for conflict and litigation

Some of us write for legal periodicals and give lectures to other lawyers. When new cases are reported, the biggest challenge is often to find out where they fit in to previously reported decisions. Occasionally they do fit in somehow into the overall structure and add an additional piece to the judicial jigsaw of what is the law. Sadly too often we find it is yet another layer of judicial commentary on an existing law which thereby allows more opportunity for litigation and dispute. This present
exercise of reform is so important. But we cannot allow a careful reform of the law following this consultation then to be placed in exactly the same vehicle which, using the Patrick Parkinson’s example of the bus driver, leads us still to an uncertain destination. I commend this burden upon the President of the Family Division in the analysis of all reported decisions. To make his burden lighter, there could be a presumption that all decisions are simply a working out of the law on a particular set of circumstances, and only specified cases actually change the law.

I appreciate there will be much opposition to this, especially from the judiciary. It places incredible power in the hands of the President. If this generally finds favour, I’m sure way could be found to moderate the power

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

As to 7.8.3.1, time for expected independence, this is very hard. As is clear from this response, I am committed to a more certain law including use of formula. But I balk at provisions I have seen in some countries such as a proportion of the length of the marriage. I see the certainty and predictability. I see the real injustice. As stated under 7.6, I believe we should go back to the real expectations and intentions of the 1984 legislation. We have been far too liberal in respect of clean breaks, with some courts and judges almost ignoring that legislation. But I think to prescribe or presume a time period is harsh on the more vulnerable party, the applicant for spousal support. It must not be in statute. It is not yet clear what form any authoritative guidance may take. Elsewhere in the consultation paper there is reference to practice directions, information on government websites, other information provision. I am more sympathetic to timeframes being set out in that context, without any strong statutory or case law expectations.

As to 7.8.3.2, normal form of periodical payments orders, I refer to my remarks under 7.6. I put forward for consideration the possibility of moving entirely to term orders, given that they have moved towards the emphasis being on which party, recipient or paying party, has to seek any change.

As to 7.8.3.3, financial arrangements after a short childless marriage, see remarks under 7.3.2. As the CSJ recommended, where there is a short marriage without children, the parties should be put in the position as if they had not been married unless this would cause significant injustice taking account of a number of relevant factors. There has been much bad profile for divorce financial provision from very generous settlements in short childless marriage cases and is a primary driver for this reform

(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?
Yes although in some elements e.g. time period for self-sufficiency as 7.8.3.1 above, a practice guidance could be too authoritative and more general information and guidance would be preferred from other sources. I hope that in parallel with these reform proposals there will be progress in respect of information hubs, which is already underway post Norgrove and which the CSJ strongly recommended. Accordingly I would rather not be so prescriptive to say it should be from the FJC at this stage

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

Yes and see above

7.9 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.

This is a very helpful sweeping up question. There are several aspects.

First, the appeal courts have got into a complete mess in respect of impact of cohabitation on the recipient of spousal maintenance. Paul Coleridge in K v K (2006) 2 FLR 486 produced good common sense, meeting the general public expectation that on cohabitation, perhaps after a period of months, it was wrong that spousal maintenance should continue. He referred, as also set out under my response to 7.13, about the prevalence of cohabitation including those who cohabited in order to retain their spousal maintenance rather than remarrying when it would automatically end. It should be at best a nominal order, capable of being revived in appropriate circumstances. The Court of Appeal responded with what many regard as a highly politicised judgement, in effect throwing down the gauntlet to government saying that if government will not introduce cohabitation law reform then MPs should continue to expect their postbag to be filled with letters from husbands asking why they are having to pay maintenance to the former wives in medium and long term cohabitation relationships. In Grey (2009) EWCA 1424 the wife continued to receive £125,000 per annum spousal maintenance despite giving birth to a child to another man, which pregnancy she had sought to conceal from the court at first instance. Going back to Atkinson in 1995 and Fleming in 2004, the Court of Appeal said that in the absence of parliamentary legislation, it was wrong to fetter the entitlement to spousal maintenance in circumstances where cohabitation did not give rise to a similar entitlement to maintenance on its termination.

Whilst many are sympathetic to cohabitation law reform, this will not happen in any medium term in our present political landscape. The reforms anticipated in this consultation will hopefully happen in the short and medium term. Opportunity therefore lies for Parliamentary legislation, to which the Court of Appeal refers. Its decision is so far out of kilter with public expectation and belief in what is fair. Even many recipient wives choose not to continue to receive spousal maintenance during cohabitation, despite entitlement in law, because of the feeling that it is not right or fair. The Court of Appeal should not have engaged in the political arena to the cost of many paying parties. In this reform, it should be clear that cohabitation, perhaps after six months or so, produces a downward automatic variation to a nominal order. It
would then be rare for that nominal order to be revived if the cohabitation was any length of time. This seems very fair and just. In the context of the principle of supporting the institution of marriage, it is also crucially a major step to overcome the incentive of cohabitation rather than remarriage with the former allowing maintenance to continue and the latter producing automatic termination in law.

Secondly, it is quite normal to have some form of indexation provision in maintenance orders, both for children and spouses. This is normally the retail prices index or similar. In more complicated arrangements, it can follow the movement up or down of the overall income of the paying party. The intention is to avoid the need for regular reviews, disclosure and similar. There have been calls in the past for indexation to be incorporated automatically as a matter of law. I recommend this provision in the context of these reforms.

Thirdly, I suspect the Law Commission will understandably want to shy away from any involvement with child support. There are present on-going changes and we will need to see how these work out in practice. Nevertheless in these reform consultations, I would seek that the family courts should have power to make child maintenance orders where both parties are not in receipt of or claiming welfare benefits and the court is making other orders between the parties concerning income or capital and in any event where there are arrears of more than six months. Moreover written agreements after legal advice by parents regarding child support when neither is in receipt of welfare benefits should count as child support assessments, and I believe this is contemplated in the present proposed changes.

Fourthly and more generally on reform of both aspects of this consultation but primarily needs, an essence of the CSJ recommendations in the context of the fairness exercise for both needs and invasion into non-marital property was what we described as overriding calls on assets. This is set out more fully in Appendix 2. It gave first priority call to residential homes for the children with both parents, recognising the significant changes in post separation parenting patterns over the past decade. The second priority call was quantified recognition of the prejudice caused to either party by commitments, sacrifices or other steps one spouse has taken for the benefit of the children or other spouse during the marriage and on-going i.e. future primary child care. I have dealt with this elsewhere in this response. The third priority call was provision for the reasonable needs of each spouse with justification being required by either spouse to show why their needs should be greater than the other in the immediate post separation period. As I indicated at the beginning, these recommendations have caused a very constructive debate and I think have found their way in some part into the consultation paper. In this response to that paper, I commend again this element of overriding calls on assets for consideration.

Fifth, and again more general to cover both needs and non-matrimonial property, I refer to the lack of a statutory objective. We had one in 1969 and 1973 but it proved to be impossible in the vast majority of cases and was quietly repealed in 1984 and not replaced. Since then, case law has filled the gap and stated the objective should be fairness, even if classically per White it is in the eye of the beholder. At this time of proposed parliamentary reform, I believe we should again have an objective in legislation, even if it is very general such is fairness. This was our CSJ recommendation, Appendix 2. I still think this should be within statute, despite its
vagueness. Whether the Law Commission wants to proceed further as we did in the CSJ recommendations is a further issue I raise also with you. By analogy on divorce of showing irretrievable breakdown of marriage can only be evidenced by 5 facts, the CSJ recommended that the statutory object of fairness was found in certain ways. We said it was found in the agreement of the parties, referring of course to agreements with qualifying conditions as this consultation seems likely to recommend, secondly in the overriding calls on the overall resources of the parties, my fourth point above and which is found in this consultation paper in needs and in my response with the additional elements of contribution, commitment and sacrifice etc, then thirdly in equal sharing of marital assets. This third element is already the White position which is outside this consultation and which will not be changed. The CSJ then included the first consideration to the children following the existing section 25.1 MCA, coupled with taking account of s25 MCA, and it will be essential to know where this fits in to the anticipated reform. Finally the recommendations referred again to the 1984 legislation which I think should be included afresh in the proposed reform legislation rather than cross referred back. Give it a new lease of life in new legislation! We had an overall subheading of “objectives”, starting with fairness and moving on to the exposition of fairness. I commend this in the proposed legislation.

7.10 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.

I am attracted to the formulaic approach of the Canadian model. Nevertheless in England we are still a long way from acceptance of this approach. Rather like Canada, I would like to see this moving quickly and firmly towards acceptance and adoption but I’m realistic to appreciate reluctantly that it may well be in the first instance through information, guidance and other strongly endorsed channels. I have little doubt that sooner or later this is where we will end up. I’m not yet convinced we are ready to go there immediately from where we are presently. This is a pity but better that we get there through good progress than it is rejected through undue haste and inadequate testing

**NON-MATRIMONIAL PROPERTY**

I start with some preliminary remarks before going on to the specific consultation questions.

I am absolutely certain that we should be moving to the categorisation of assets is anticipated in your report. As the consultation paper is of a similar opinion, I need not set out arguments here. I agree with 6.23.

The greater difficulty is ascertaining the principles and values which should inform how the non-matrimonial property should be treated, before we turn to that treatment. I have several elements in play here

1. On marriage, conventionally spouses commit to share all that they are and all that they will be and all that they have with the other: “*With my body I honour you, all that I am I give to you, and all that I have I share with you, within the love of God,*
Father, Son and Holy Spirit’. How does this play with these present proposals? I find several aspects: others may disagree and I suspect this will be a material debate once this consultation reaches the public arena of Parliament. First, this sharing of all that one has, at the date of marriage, is looking to marriage and marriage commitment, not outcome on divorce. Secondly, presuming needs overrides non-marital property, as proposed and as I support, I’m satisfied this is sufficient for the marital vow commitment to share, even if this is not equality sharing. Thirdly, I worry that the proposals will lead to behavioural changes within marriage which will detract from the full commitment to the wedding vows, and I refer to this further below.

2 Much weight is given in the consultation paper to the present case law in respect of non-division sharing of non-matrim onial assets apart from needs. Even apart from the fact that this is relatively recent case law, with the specifics only from the Court of Appeal in the last two or three years, this has not been subject to the prior scrutiny of and debate in the public arena. It has been judge made law, primarily in big money cases. One of the important and valuable elements of this present Law Commission consultation is that for the first time for several decades the public beyond the senior judiciary are having a real opportunity to discuss and inform what will be the law. We have had 40 years with almost entirely judge made law. The fact that in many respects it has been fair and just cannot detract from the democratic unfairness of this process. I ask in my introduction to this part of the consultation paper whether indeed it is public opinion that non-marital assets apart from needs should be entirely excluded from the sharing process? If it should not be wholly excluded, are the proposals in the report whereby non-marital assets become marital sufficient to satisfy public concern? I suspect this will be a fundamental discussion through the journey in Parliament. I myself do not consider needs as the only criteria for “invading” non-marital property: sacrifices, contributions and commitments to the relationship, 7.3.1 as extended, should also be included, either shoehorned into the category of needs or otherwise

3 We cannot ignore the demographics of our society since the legislation of 40 years ago. Couples are marrying later and therefore have more premarital wealth in their own right. Some couples are marrying much later including second marriages in later middle life when they then have either substantial premarital wealth from their career or may have limited wealth e.g. arising from paying a previous divorce. So the demographics of the wealth at the time of marriage demand this consultation and public consideration. In addition, these 40 years have seen the older generation both living longer and becoming significantly wealthier yet passing on their wealth during the lifetime, in older age, as well as on death. So the further demographics are a huge increase in significant inheritances coming during the period of marriage in a couple’s 30s and 40s and 50s. Again, the law cannot ignore this. Indeed, I feel more strongly towards the exclusion of inherited assets during the marriage than premarital assets. Although the divorce court only looks at the spouses, the law must have regard to the position of parents, perhaps even now deceased, who have made inherited provision and who would not have intended that it would be shared on a subsequent divorce perhaps other than needs of children. This consultation is urgently needed because of the demographics of our present society and acquisition and transfer of wealth between generations affecting the finances on divorce
4 I worry significantly about the behavioural impact of these proposals on married couples. I have seen it already in small part when giving advice on the making of pre-marriage agreements whereby in order to be effective, the parties have to create structures and manner of holding assets in order to keep certain finances apart and separate. This goes more to the process in which non-marital assets might become marital rather than the exclusion altogether of the non-marital. I foresee many more assets being held in the sole name of one party, being the party with the assets premarital or inherited, rather than put into joint names including even the family home. This might be the choice of the spouse or more likely is on the recommendation of professional advisers. It will extend to how non-marital funds are held and used: again advice will be to use the marital first and keep the non-marital out of the picture as much as possible to avoid it being converted into marital in whole or part. This sort of behaviour has always existed in the dynastic monied classes, including use of trusts. I forecast that the likely proposals from this consultation, once entering into general knowledge including professional advice, will cause potentially significant changes in the way assets and resources are held during the marriage. It might be of course that this is no bad thing especially if it is acknowledged and open. Nevertheless I think that for some spouses it will be a source of disappointment and some real insecurity. I worry that it will create marital tensions.

5 A driving feature should be the lack of any artificiality created by these proposals. I refer here for example to the distinction between putting property into joint names and being held in the sole name of one party, the originator of the assets either premarital or inherited. I suggest that this has absolutely nothing to do with marriage commitment or intentions of separate holdings and should have no distinction in outcomes. Some spouses feel keenly that all assets should be in joint names and put significant pressure, emotional and in other ways, on their (financial contributor) spouse to do so. Other spouses are much less worried, perhaps less insecure or perhaps less conventionally traditional, and are content for an asset to remain in sole name of the other spouse knowing that it has been or might be shared as and when needed. I would be very unhappy with legislation which treated these situations quite differently, given the relatively artificial distinction.

6 I am intrinsically unhappy at a position in law whereby premarital financial wealth is excluded from any division, presuming needs are satisfied, but contribution in the non-financial but widest sense has relatively little influence in the section 25 process and/or outcome, whatever that process may now be if the consultation becomes law. It seems to me that it is giving far too much weight to the tangible financial contribution rather than the intangible non-financial contribution. One spouse brings premarital wealth. The other spouse brings significant personal, relationship, societal and other contributions to the other spouse, perhaps transforming that spouse, developing him, maturing him and enabling him in the true reciprocal sharing sense of the marriage relationship. Yet one spouse takes out on divorce everything financially they brought in. The other spouse is left with (only) their needs. Of course if the contribution has manifested itself in financial growth of the non-marital asset there would be an argument of a claim. But this would be a very contentious and expensive argument. More often it will be hard tangibly to demonstrate and evidence. It has seemed to me that post White, the section 25 contribution factor has been rarely raised to a material extent. This is not a problem when marital assets and growth in assets are treated equally and shared equally. But
if our society is not going to have significant increases in marital wealth in the medium term e.g. house price increases, then the premarital wealth aspect will be fundamental in many more cases. Marriage is a partnership but contributions can be different and sometimes can be significantly separate in type. I am at the moment unhappy that the contribution, including commitment and sacrifices, to a marriage in non-financial terms, although valuable in personal and in other ways to the recipient spouse, has no reflection in the outcome apart from needs.

7 I reiterate my support for certainty, clarity and predictability. I came quickly to the conclusion at 16.13.3. For me the biggest issue is 16.13.5 which includes some discretionary elements as well as any formulaic or other definitions. So it is these which are the central elements in my opinion to deliver law reform which is fair and just with fettered discretion yet also delivers certainty, clarity and predictability as much as reasonably possible

7.11 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?

I agree with a couple of provisos.

First, it is important to delete reference to being “held in the sole name of one party”. As stated above, this is often entirely arbitrary and will be the subject of considerable marital tensions, emotions and stresses. One party, perhaps emotionally weak or perhaps exceedingly loving, gives way and puts the inherited asset into joint names. Suddenly it becomes matrimonial property. This is not a principled value-based position in law. Another financial contributor party may be emotionally strong, perhaps even less committed to the marriage, perhaps with stronger dominating features from other family members and refuses to put into joint names, even with the marital distress it will cause, and so their asset is not subject to any sharing. This 7.11 provision does not need reference to the name in which it is held. It can stand on its own, with only a slight amendment by deleting the relevant words as to how it is held on the basis that this is always a relatively arbitrary criteria within relationships

Secondly, needs must be a departure, the trump card to the otherwise strong non-matrimonial property hand. However I would also want to include other section 25 criteria in a narrow sense for departure. Most section 25 factors are attributable to or included in needs in one way or another e.g. health, age, loss of benefits etc. A couple are not. I am no lover of conduct. But it continually raises its head. Those of us who remember the 1996 Parliamentary experience record the countless occasions on which conduct was attempted to be introduced, sometimes successfully, in the legislation as it entered Parliament. I’m sure the same will happen again. Might it not be wise to head this particular attack off by allowing section 25 conduct in the very narrow sense here? Conduct in the needs exercise is always a difficult one: should a spouse with clear needs be refused those needs because of her conduct? In the non-matrimonial property exercise it is arguably an easier issue.
Next, more important on departure, I believe contribution including commitment and sacrifices as a section 25 factor should be relevant here, as described above. I’m not introducing stellar contribution and also I note 6.6 of the consultation paper. I also do not want unfettered discretion, and fettering the discretion is a driving feature for me in these reforms. Nevertheless I think we would be losing a lot if we were to abandon any reference to narrow elements of some of the existing section 25 criteria, especially contribution including commitments and sacrifices, in addition to needs.

It might be said that this is provided for in any event in your clause because you simply exclude the sharing principle. If so, then I think it needs to be clear in what way the section 25 factors have any continuing existence and if so how and where.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

No, it should not. I’m aware of the arguments including those deriving from what I think was a stray remark by Lord Nicholls, 6.42. I have come across in practice a number of quite harsh outcomes where, sometimes after a relatively short marriage, the family home has been placed into joint names because this is the cultural norm, only for the contributing party to find after a short marriage that they have lost their entire contribution because it is in joint names.

In my opinion this is only a matter of needs. If the family home is “needed” in the context as discussed above under needs, then it should be divided up on the needs basis. The standard of accommodation will be one feature of the needs basis, 7.4.2, however may be mitigated by length of marriage, age of the applicant and similar. But the family home should not automatically become marital property simply through being used as the family home in itself. I no longer support the New Zealand model in that regard, given the other proposals in the consultation paper.

The consultation paper refers in footnote 58, following the quotation from Lord Nicholls, that it does not mean that a sale of the matrimonial home will invariably be ordered or that sale proceeds will be shared equally. That might have been the case under the law when the relevant judicial comment was made. It would not be the position under the law as now proposed. If the family home becomes automatically marital property, and presuming one half meet the needs, then either it will be sold and divided equally or one will purchase the half interest of the other. So the footnote, with respect, would no longer be accurate.

I can foresee marital agreements expressly stating that a marital home will be jointly shared. However this is very different from the position in law absent a marital agreement.

I appreciate what is said at 6.48. We must remind ourselves that in the vast majority of cases, this issue will not arise because needs will dominate. The family home will be needed to produce two family homes. It was Lord Justice Thorpe many years ago in a case, from memory, called M v B where he referred to the need “to stretch and strain” the resources as much as possible and as creatively as possible to provide for the needs of both parties in modest (I suggest even middle) asset cases. So it will be a
relatively rare case where the family home is surplus to the need to provide for both parties. Moreover in a good number of cases, the family home will be derived from joint marital enterprise, perhaps with different levels of actual contribution but still in the category of marital asset. As said at 6.48, this may be an issue of conversion of non-marital into marital but not an automatic conversion simply because it is the family home. I observe what is said at 6.49 although not attracted to some of these solutions

In conclusion, and after reflection and considering the totality of the consultation and proposals, I do not believe that the family home should automatically become marital property and therefore automatic sharing subject to needs. I believe the needs criteria should be broad, flexible and sufficient to deal with the family home deriving from non-marital origins. I’m consoled that in the vast majority of cases, this will either be academic because needs will dominate or irrelevant because the family home has been created in whole or part from marital endeavours

7.13 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.

It should not be excluded from the definition of marital property. I am very clear on this element. As a strong supporter of the institution of marriage, I do not agree with the proposition put forward at 6.58 that to do so detracts from the status of marriage.

This is yet another area where the demographics of our society cannot be ignored. Whatever may be personal opinions about cohabitation, it is now, and especially for the younger, below the mid/late-30s, and for a number amongst the poorest in our society, the predominant form of relationship both as an alternative to marriage altogether or leading to marriage. In respect of the latter, it seems very artificial and arbitrary that an asset purchased a few months before the marriage or engagement should be treated completely differently to one purchased a few months after the marriage.

I would want strongly for cohabitation in this context to be as if living together as man and wife with the financial commitments and interdependency which goes with it. I would want to follow strongly the approach of Sir Hugh Bennett in the McCartney case, 2008 EWHC 401, where he found that for most of the period of the relationship before marriage they were not cohabiting as if man and wife. There were deeds of loans and similar. It is not simply a living together, a sexual relationship with some sharing of board and lodging. He said (para 55): Cohabitation, moving seamlessly into and beyond marriage, normally involves in my judgment, a mutual commitment by two parties to make their lives together both in emotional and practical terms. Cohabitation is normally but not necessarily in one location. There is often a pooling of resources, both in money and property terms. Loans between cohabitants may be forgiven. I support also the comment of Nick Mostyn at 6.53. I appreciate his concept of fledgeling has been demolished by the Court of Appeal in the context of premarital contribution. Nevertheless to borrow it for the purposes of premarital cohabitation, if the relationship were fully fledged then assets should be marital. If the cohabitation was a fledgeling or indeed still in the nest, then the acquisitions should be separate and sole.
Moreover in this context, I rejoice that this consultation paper tends to a holistic set of reforms. This was one of the criticisms of the CSJ, namely that reforms previously discussed had been micro-only. This reform regarding treatment of assets acquired during cohabitation before marriage runs alongside the reform in respect of marital agreements. If a party in the context of getting married feels strongly that an asset purchased during the cohabitation was in circumstances which were clearly not a joint enterprise then the opportunity lies for a marital agreement to deal with this asset e.g. to declare it is non-marital.

Of course this proposal gives rise to the many difficulties experienced by the Law Commission in its cohabitation law reform consultation, of which the chief here is when does cohabitation begin. Unlike marriage which has a fixed point, cohabitation tends to be what I understand the social scientists describe as a “sliding” relationship. Invariably it starts as the occasional sleepover, becomes a more frequent sleepover, becomes some movement in of clothes and toiletries, becomes having one primary home with a secondary home, having one home together, possibly having a child together and then eventually deciding to get married. Some when during that process, simple cohabitation ends and premarital cohabitation begins. It may be perceived differently by the parties, perhaps differently by gender, differently by those with prior marital experience and for other reasons. There is some judicial guidance. More will be needed. For these purposes of 7.13 it is not just any cohabitation but cohabitation as if married and man and wife.

There is also the very good justification given in respect of civil partnership in 6.57.

7.14 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?

I agree subject to my comments in respect of 7.15 and following. This will not detract from needs. It will not or should not detract from contribution in the non-financial sense. But as a general principle, I agree. I can see this as another area which could be covered by marital agreements.

I also agree that this is a very difficult area with no right and wrong answers in the overall scheme of things. I support what is said at 6.68. I do worry about any disincentive of either marriage or contribution during marriage and I find consolation in retaining section 25 “contribution” to recognise this feature. I find this is in practice a very difficult area for a marital agreement to cover. If I may say, I think the consultation paper is putting too great a burden on solicitors drafting these documents by expecting it will fill the gap. We tend to take the easier, black-and-white approach, invariably favouring the financially contributing party being often the party demanding the marital agreement. It is rare for contribution or other features leading to a sharing approach to be a material aspect in marital agreements. This might change. I doubt it. Certainly I have not seen it in the Australian marital agreements which are now about 10 years old in professional experience. Of course marital agreements can exclude from sharing those assets which would otherwise be shared by any proposed law. But including assets which would not otherwise be shared e.g. because of possible future contribution during a marriage, is much less likely. I think
it is a shaky foundation to introduce a law which gives necessary benefits for the non-financially contributing spouse to derive not from legal provisions but from anticipation to be covered in a marital agreement. Brenda Hale was absolutely right in Radmacher to highlight the gender issue in the formation and content of marital agreements.

So as a general rule, “being used by the family” will not immediately convert automatically into marital property. However it should make it susceptible to some form of non-equal sharing, because of contribution in the widest sense. This seems to me to be the right balance.

7.15 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?

I will not conceal that I find these questions very difficult in balancing the various criteria that I have set out above in my thinking and the principles the consultation paper has identified to inform the proper approach. It is also an area where I think this reform in the law will significantly create behavioural changes in marriage.

We must also reflect to ensure there is a logical consistency. I have said above that a family home purchased from a non-matrimonial source should not automatically become marital property. If so, then why in the illustration in 6.82 does the holiday property, a second home, become marital property? If the contributor spouse has put non-marital funds into buying a family home, a primary situation, and it does not then become marital then it is illogical to argue the position at 7.15. I am not referring here to the mixing and mingling issue which is separate, as below. It is only the black-and-white proposition of an asset being used for the family, whether family home, second property, painting on the wall in the marital living room, bank account as a holiday fund or similar. If all of those resources were previously in some other form, do they become marital property through their present usage in the family, with the consequence that they are now automatically divided equally?

I accept I am surprised at this conclusion I have reached. Nevertheless in order to create logical non-arbitrary, non-artificial distinctions, I feel there must be a boundary line placed a little further back than the consultation paper suggests. I certainly support ingress over the boundary for mixing and mingling, contribution over time and general contribution and of course needs. But I would rather place my reliance on those features rather than the relatively arbitrary behavioural distinctions being put forward.

None of this affects gifts given either solely or jointly. The problem is extent and this is potentially where it becomes particularly harsh. In gender terminology, the purchase of jewellery etc for the non-financially contributing spouse would be a gift and clearly become marital. The purchase of a car for the family would clearly become marital when for joint use, and we must avoid any artificial distinction that it is marital if both drive and non-marital if only the financially contributing spouse drives it! But it does not become marital if substantial such as the second home. Can
7.16 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?

I presume this is in the context of investment in existing matrimonial property. If so, yes and clearly a very important element. Covering 7.15 and 7.16, I would want strongly to deal with two features. One is at 6.85 and the other returns to the contribution over time element, which I know has some controversy

Whereas I am taking a fairly strict approach to the retention of non-marital assets as separate even if used within the family, I take a very liberal approach when they have been mixed and mingled, in circumstances in 6.85 and similar. I endorse the wish in the consultation paper to avoid difficult tracing exercises. I support the view expressed by Nick Wilson as quoted at 6.85 and 6.64. In these circumstances it becomes marital. Not because it is used by the family, 7.15, but because it has been mixed and mingled as part of the marital finances.

I draw attention to what is again a relatively unfair and arbitrary outcome which must be taken into account. A couple purchase a property for £750,000, of which one third is capital they have created and the balance on mortgage. A spouse, say the husband, later receives an inheritance of £1 million and keeps half separate and uses the other half to pay off the mortgage on the family home e.g. to free up income etc. Of course the half which is separate will remain in non-matrimonial category and not shared unless “needed” etc. However in mixing and mingling, the £500,000 which went into the family home is now a marital asset. The relationship breaks down a couple of years later and the wife is entitled to one half of the £750,000. This will cause unhappiness for the husband and his wider family which sees the inheritance going in part to the other spouse. If instead at the time of the inheritance they had been renting, and he used the inheritance to purchase a family home, with no mixing or mingling, then on the proposals above, it would stay entirely his. By virtue of mixing and mingling with already existing marital assets, it loses its non-marital element. As I say, this is unfair and arbitrary. What is the answer? It is relatively simple and as referred to in various places in the consultation paper. There must be much greater awareness on those receiving inheritances and family gifts about how it is used. I anticipate there will be much greater relationship between family lawyers and probate lawyers. In the above example, when receiving the inheritance and considering putting it into the family home to pay off the mortgage, there could be some declaration about consequences on the ownership of matrimonial property. This would overrule the sharing element

There can be no doubt that even if some of these proposals are made into law, there will be some quite significant changes in marital behaviour as a consequence, as above. Nevertheless I’m satisfied that the mixing and mingling element is justified and is fair

The second aspect is the element of time, duration of the marriage. In this regard it is necessary to look again at the comments by Nick Wilson quoted at 6.64 in the light of
the possible reforms set out in the consultation paper. His first situation will stand unaffected. The premarital may have been significant on marriage but much less significant many years later with the other wealth acquired. The second situation is covered in your 7.16. It is the third situation which seems to me not to be covered in the consultation paper, especially in my response to 7.15. Nevertheless I consider that it is an element of marriage that there is sharing of what one has at the beginning of and during marriage. I am deeply unhappy that these reforms may well lead to a more secretive, self-possessive behaviour of the financially contributing spouse towards their distinctive non-marital assets. I understood the decision in K v L but it was not very attractive. It was also relatively arbitrary e.g. in contrast to AR (2011) EWHC 2717. If the non-financially contributing spouse had been very insistent on a certain lifestyle e.g. handbags and shoes, and the financially contributing spouse had been willing to loosen the purse strings, then the acquisitions for the other spouse would have clearly become marital. If the family lived a frugal lifestyle, living off the income alone, then it all remained non-marital.

I don’t think this will be acceptable to the public. I believe there is an expectation that over time, the non-marital diminishes, and not just relatively in the first situation anticipated by Nick Wilson as above. I believe there is a feeling within society that the non-marital should over time become increasingly marital. This is not (so much or only) earning a share because of the length of the relationship, although I appreciate this is found in the number of marital agreements in a number of jurisdictions including England. It goes to the essential nature of marriage.

I saw that the consultation paper quoted at 6.75 and footnote 85 the SC proposal for a percentage acquisition on an annual basis. We said 5% per annum up to 20 years but this was for discussion purposes. I have been interested to see how many marital agreements adopt a similar approach including a number I saw in Australia when working there about 10 years ago. The percentages and the years could be varied. There might even be a provision of no acquisition in the first five years or so, to prevent such claims after a short marriages.

The consultation paper answers this at 6.76 that it negatives the protection given to the source of the property. In fact, as I note, many premarital agreements already make such provision. Indeed, the benefit of annual increases is significant compared to the bigger increases every five years or so where anecdotally the marriage breaks down just after the five-year or 10 year period as applicable! The consultation paper also says that it penalises generosity and practical sharing. I do not see this is inconsistent. Either there could be a form of credit, however unattractive that seems in a marital relationship, or it would be taken into account so that there was not a duplication. The consultation paper says that it is unnecessary if there is a rule that non-marital property must be accessible to meet needs. Perhaps unnecessary but important nevertheless for the fairness and sense of commitment to the marriage relationship. I endorse entirely that needs still dominates and trumps non-matrimonial. This element is over and above the needs and any other relevant criteria.

The consultation paper says in the same 6.76 that it is not appropriate that mere use of non-matrimonial property by the family makes it matrimonial. Yet this is the position at 7.15. I happen to agree now that use as matrimonial property should not lose the non-matrimonial status. In this regard and having looked again at the New Zealand
legislation in the context of this consultation, I would not be wanting to adopt elements of their section 8 of their legislation. But I consider that as part of the commitment to marriage there is a commitment to sharing and I find this most satisfactorily in some sort of acquisition over time as part of the joint contribution. I’m encouraged in this regard by the fact this is found in a number of marital agreements in England, the US and Australia including in fairly large money cases (including, no possible greater authority, in celebrity marital agreements!)

7.17 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?

I have no doubt it is possible not only to create such rules, although I prefer fettered discretion, but we should do so. As stated in the consultation paper including the conclusion at 6.101, these are difficult questions, a dramatic understatement. I understand the various conflicting dilemmas set out at 6.95. Moreover converting what may be a series of caselaw decisions into logical and consistent criteria is very hard indeed, footnote 90.

It is with no element of ducking the issue that I say after this very long consultation report, with its huge complexities of principles and competing values and priorities, I feel this is an issue which should follow the decisions taken on the previous elements, 7.14 and following. I have said above about the importance of a logical and consistent approach. I have a degree of confidence that once this approach is obtained and acknowledged, the 7.17 issue will follow.

I am pretty clear that passive growth should be shared. A non-marital asset which is used by the family but, as above, does not become automatically marital property e.g. the family home or a second property, increases in value through market forces, as we have seen for very many years until quite recently with the economic downturn. I think that passive growth should be shared, in part as the lost opportunity of the non-contributory spouse in being able to take part herself in property growth. It is also part of the sharing experience of marriage. I would limit this to assets being used by the family, thereby for example taking out of account investments which are simply rolled up and not used directly by the family.

As to the issue in 6.97, I believe that is answered by either the mixing and mingling element or by the contribution element, both of which I want strongly to retain and which would make the growth of the assets into a marital property for sharing. In this regard I am attracted to the New Zealand statute at section 9, 6.98.

As I say, I suspect this may well follow from the other elements

Conclusion

I have responded previously to other Law Commission reports, along with reform proposals of other organisations e.g. Family Justice Council and its predecessors. I have taken part in the Parliamentary process e.g. 1996. I am committed to law reform
to produce a fair and just law and thereby improve life for those in our society and community. Hence my involvement and contribution.

Accordingly with this past experience of previous responses, I am able confidently to say this is far and away the most complicated and difficult consultation paper I have known. I am certain that reform is needed, having been of this opinion from the 1990s onwards and increasingly so as I have seen the contradictory and confusing decisions coming from the higher courts and their impact on day-to-day practice and at first instance court level. Although initially surprised that it was not the whole area of what used to be known as ancillary relief, I fully understand and now support the two dimensions of needs and non-marital property. But these are really difficult areas.

Converting consultation discussions into legislation will be hard. The consultation paper has rightly raised many difficult questions. Within a scheme of caselaw, I am relatively confident in giving an answer to what is fair and just including consistent with support for marriage commitments and marriage itself. It is in converting into policy, simpler than broad explanations of case law, and in a logical fashion which will not have an adverse behavioural implications that the difficulties arise.

I come back to my guiding principles as set out above. We must have clear, certain and predictable law even though there may be a few hard unjust outcomes; with the benefit of the doubt given to the more vulnerable party invariably the applicant and invariably the woman. We must retain respect for the institution of marriage and for myself, I do not think these proposals are any major issue in that regard. However I am satisfied that they will bring about behavioural changes within marriage which I’m not sure are necessarily going to be good especially for women in as far as they are the party who are not financially contributing from sources outside the marriage and are the party who will be invariably making the needs claims. We must support, in needs or non-marital property or both, commitments, sacrifices and contributions made to the marriage, whether as described broadly as relationship generated disadvantage or otherwise.

Clearly this is an on-going debate even though I’m aware the Law Commission must now produce some firm draft proposals. I hope this response assists in the task. I congratulate again hugely on an excellent paper on very complex issues.

David Hodson
December 2012
Appendix 1

Details of the author

David Hodson is a family law dispute resolution specialist. He is a English solicitor (1978 and accredited 1996), mediator (1997), family arbitrator (2002), Deputy District Judge at the Principal Registry of the Family Division, High Court, London (1995) and an Australian (NSW) solicitor (2003) and mediator. He deals with complex family law cases, often with an international element.

He is practising in London and Surrey, England and Sydney, Australia. He is a partner and co-founder of The International Family Law Group, www.iflg.uk.com.

He was joint founder in 1995 of probably the world’s first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the resolution/Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and founder member of its International Committee. He is a member of The President’s International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of “Divorce Reform: a Guide for Lawyers and Mediators”, “The Business of Family Law” “Guide to International Family Law” and consulting editor of “Family Law in Europe”. He is an Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia and a member of the Lawyers Christian Fellowship. He is chair of the Family Law Reform Group of the Centre for Social Justice

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below.

He is the author of “The International Family Law Practice”, (Jordans Feb 2012), probably the leading textbook on international family law, of which part of this is an extract. He was Family Law Commentator of the Year 2011 and was nominated International Family Lawyer of the Year 2012

The International Family Law Group LLP is a specialist law firm providing services to the international community as well as for purely national clients. iFLG has a special contract with the Legal Services Commission for child abduction work and is regularly instructed by the UK Government (Central Authority). It acts for international families, ex pats and others in respect of financial implications of relationship breakdown including forum shopping and international enforcement of orders. It receives instructions from foreign lawyers and, as accredited specialists, acts for clients of other law firms seeking their specialist experience.

iFLG is situated in Covent Garden near the Law Courts. Its mobile telephone accessible website includes valuable information, podcasts, a government approved child abduction questionnaire and formulae as a starting point for calculating fair financial settlements. It has emergency 24 hour contact arrangements. Contact at www.iflg.uk.com
Appendix 2

Report of Centre for Social Justice
“Every Family Matters” (July 2009)

Summary of Recommendations for Ancillary Relief Reform

Objectives
1. There should be a statutory objective of fairness.
2. Fairness is found in the agreements of the parties, in the overriding calls on the overall resources of the parties and in the equal sharing of the marital assets; with first consideration given to the financial needs of dependent children and taking account of the section 25 Matrimonial Causes Act 1973 criteria where required
3. There shall be an incorporation of the 1984 legislation of attempting a clean break in all cases

Marital agreements
4. The court must follow as binding any marital agreements provided they comply with certain conditions as follows
   i. after legal advice, certified on the marital agreement as having been received, and
   ii. after financial and other relevant disclosure, and
   iii. without misrepresentation, duress, mistake, fraud and similar contractual elements, and
   iv. in the case of pre-marriage agreements, at least 28 days before the wedding ceremony, and
   v. there is no significant injustice
5. Significant injustice shall be in the discretion of the court. Significant injustice will include failure to make reasonable provision for any children of the relationship during their minority in which circumstances the court has power to depart from the agreement to the extent of making such provision. Significant injustice may include failure to have reasonable provision in exceptional unexpected circumstances e.g. health, in which circumstances the court has power to depart from the agreement to the extent of making reasonable provision. Significant injustice may relate to provision as to income or capital or both.
6. If any of the conditions above are not complied with or there is significant injustice, the court shall follow financial provision as set out herein but may nevertheless take into account the existence of the agreement in any discretionary elements
7. Marital agreements may provide by way of example
   i. for the entire outcome if there were a separation or divorce,
   ii. for the entire outcome if there were a separation or divorce,
   iii. a schedule of what are the non-marital assets at the date of the marriage, an issue of considerable importance under our proposed new ancillary relief laws, below
   iv. overriding provisions regarding the couple’s own preferred definitions of marital and non-marital assets,
   v. specific intentions regarding provision for any children
vi. specific intentions regarding provision of major ill health, mental or physical
vii. specific intentions regarding provision for existing children or grandchildren
viii. specific intentions regarding specific assets e.g. family businesses
ix. agreements about preferred jurisdiction

Definitions of property
8. All resources of the parties at the date of the final settlement are to be categorised as marital assets and non-marital assets
9. Marital assets are all assets acquired by the parties solely or jointly during the marriage and any premarital cohabitation whether through passive growth or active acquisition. It includes non-marital assets which by the definition below become marital assets.
10. Non-marital assets are
   i. premarital, pre cohabitation assets,
   ii. inheritances,
   iii. sole gifts
   iv. post separation assets if as a consequence of new enterprises and new initiatives by one spouse post separation
11. Non-marital assets become marital assets in the following manner
   i. they are used for the purchase or acquisition of the primary residential property for the family
   ii. they are used for the purchase or acquisition of the contents of the family home, motor vehicles, chattels, household expenditure and all other elements of family life
   iii. they are used for the purchase, acquisition, investment or other involvement in family and/or jointly run businesses or enterprises or run by the other spouse
   iv. they are used for the common benefit of the family
   v. in other circumstances where it is clear from the actions of the spouses that the assets were intended to be marital (following New Zealand’s provisions in which separate property becomes relationship property)
   vi. in any event premarital assets become marital assets as to 5% per annum up to becoming 100% marital asset after 20 years

Overriding calls on assets
12. In conducting its fairness exercise on distribution of marital assets and non-marital assets, the court shall follow as binding any marital agreement of the parties as set out above.
13. If there is no marital agreement, the following applies
   1. The first priority call is a residential home for the children during their minority with the primary carer and the secondary carer, with a presumption of equal basic housing needs of each parent with the children taking account of their ages, gender and similar, and then, if needs so require, providing an uplift, perhaps between 10% to 30% dependent on circumstances, for the primary residential parent. Reasonable accommodation needs of the child with each parent would take account of the standard of the marriage, available resources and
section 25. The first priority call would include other reasonable capital needs of the children.

2. The second priority call is quantified recognition of the prejudice created to either party by commitments, sacrifices or other steps that one spouse has taken for the benefit of the children or the other spouse during the marriage and on-going, including retained benefit or relationship generated disadvantage. It will be similar to section 18 New Zealand Property (Relationships) Act 1976 as amended.

3. The third priority call would be provision for the reasonable needs of each spouse, with justification being required by either spouse to show why their needs should be greater than the other post separation.

**Division of assets**

14. The marital assets, including illiquid assets, shall be divided equally between the spouses unless there is a good reason not to do so which is the 3 priority calls set out above. If there is a disparity in the provision between the spouses in the liquid marital assets, this should be compensated by appropriate disparity in the division of the illiquid assets, with appropriate provision taken of the element of illiquidity and risk.

15. The non-marital assets should be used to provide for the priority calls set out above only in so far as they cannot be utilised by the marital assets. Thereafter in respect of the (remaining) non-marital assets, there should be good reasons shown to justify any redistribution, taking account of the section 25 factors.

16. The first priority call, primarily the housing needs of each spouse as carers, should first be met out of their one half share of marital assets together with their own non-marital assets. If however it is necessary to use any of the one half share of the marital assets or the non-marital assets of the other party, this should be in the form of a Mesher (charge-back) for the child's minority. The second priority call, "compensation", should be payment of an outright lump sum including from one half of the marital assets or non-marital assets of the paying spouse if necessary, otherwise on-going maintenance. The third priority call, reasonable needs, should be an outright payment or Mesher dependent upon the nature of the provision of the needs.

17. Where there is a short marriage of less than three years without any children the parties should be put in the position as if they had not been married unless this will cause significant injustice taking account of features such as age, health and section 25 factors. There should nevertheless be equal sharing of the marital assets. However conversion of non-marital assets into marital assets, as above, would not then apply.

18. The court shall retain a narrow discretion to review the overall final division of overall assets to make sure that there was no significant injustice, taking account of the section 25 principles. This discretion will specifically include where one party’s parental/family inheritances have become marital assets in accordance with the above and the other party has yet to receive any parental/family inheritance.

**Child support**

19. The family courts shall have power to make Child maintenance orders where both parties are not in receipt of or claiming welfare benefits and the court is
making other orders between them concerning income or capital and in any
event where are arrears of more than 6 months
20. Written agreements after legal advice by parents regarding child support,
when neither is in receipt of welfare benefits, shall count as child-support
assessments

Spousal maintenance
21. Spousal maintenance shall continue to end automatically on remarriage but
should be reduced to a nominal maintenance order after periods of six months
cohabitation
22. Maintenance should be varied in accordance with the retail price indexation on
an automatic basis unless otherwise agreed or ordered

Case reporting
23. The President of the Family Division shall be charged with the responsibility
of overseeing judicial reported decisions, making clear those judgements or
parts of judgements which are specifically intended to define, change or vary
the law or give guidance to practitioners and the public about the law, “red
letter cases”, and those decisions which are intended merely to be illustrative
of an application of the law in a particular case

Application of the law
24. This financial provision law is very susceptible to being converted into a web
based electronic, computer programme. This should be piloted so that it is
available at the time of the introduction of the new law. Legal assistance may
be needed, for example on quantification of the priority calls, before data is
inputted. Further legal assistance may be needed on the outcome. There will
be a number of cases which will be unsuitable. Nevertheless many ancillary
relief disputes will have considerable assistance from a web based computer
model based on this there are law.

Applicable law
25. England should only ever apply English law in financial provision disputes
appearing before the English family courts

Miscellaneous
26. Capital gains tax on Mesher payments shall be abolished
27. The court shall have the power to grant interim lump sums for costs, which
will assist many more parties to have better opportunities for funding their
cases and so more just outcomes
28. To assist the disclosure process, there shall be much more and easier access to
tax returns and other official records
29. In the case of clear failure to give disclosure, the court shall not only have
power to make costs orders including at an interim stage with forthright
payment from existing assets, but to adjust the percentage in favour of the
other party by up to 10% of the overall marital and non-marital assets known
to the court.
Dear Sirs,

Re Matrimonial Property, Needs and Agreements consultation

Thank you for granting an extension of time to the Bar Council to enable us to respond to your consultation Matrimonial Property, Needs and Agreements.

The Bar Council has given careful consideration to the consultation paper and to the response provided by the FLBA. The Bar Council has concluded that it will not lodge a separate response but will endorse that of the FLBA.

Yours faithfully,

Charlotte

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1. The Family Justice Council is a Non Departmental Public Body sponsored by the Judicial Office. Its main function is to provide independent expert advice to the Family Justice Board on proposed reforms to the family justice system from an interdisciplinary perspective. The Council is chaired by the President of the Family Division. Its members, and those of its working groups, are drawn from the professions involved in the family justice system and include judges, lawyers, social workers, medical professionals and officials. The members of the Council are volunteers and unremunerated.

PRINCIPLED REFORM

7.2 Do Consultees agree with our essential 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?

Response

2. The Family Justice Council agrees that the current law requires reform to ensure that the payment of spousal support is founded on a principled basis which explains what has to be paid by way of spousal support, and for how long. The current uncertainty about outcomes can make it difficult for lawyers to advise clients, because two different judges may impose different solutions for the same set of facts. The situation is even more difficult for people who are not legally represented, who cannot rely on the experience and knowledge of case law which a lawyer would have. With the coming into force of the reforms to public funding in
April 2013, taking financial remedies applications out of scope for legal aid, the number of litigants acting for themselves will inevitably increase, making the problem more acute.

7.3 Should spousal support:

(I) Be restricted to the compensation of loss caused by the relationship; or

(II) Seek to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution?

Response

3. The Family Justice Council considers that restricting spousal support to the compensation of loss caused by the relationship could cause undue hardship and unfairness in the case of long marriages, or marriages where there are children or other dependent relatives. Conversely, in short childless marriages, it may well be appropriate to restrict spousal support to the compensation for loss caused by the relationship where that loss is quantifiable, for example loss of widow’s pension on remarriage: or, to address housing needs where a home has been relinquished upon remarriage.

4. The Family Justice Council recommends that the computation of the appropriate level of spousal support should recognise the “merger over time” by redressing the disparity in lifestyle which will potentially be caused by the divorce or dissolution, to a greater or lesser extent depending on i) the duration of the marriage, ii) whether or not there are children, iii) the marital standard of living, iv) the way
that joint responsibilities (for example, provision of child care or care for an elderly parent) have been shared during the marriage and will be shared after its ending and v) the occupation of the former matrimonial home following divorce.

7.4 In answering the question at paragraph 7.3 above, it would be helpful to hear Consultees’ views on the relevance or otherwise of:

(I) The length of the marriage;
(II) The marital standard of living;
(III) The way that joint responsibilities (for example, provision of child care or care for an elderly parent) have been shared during the marriage and will be shared after its ending; and
(IV) The occupation of the former matrimonial home following divorce.

Response

5. The Family Justice Council considers that all of these factors are of relevance if one is seeking to unravel the “merger over time”. A transitional approach whereby spousal support is provided to even out any potential disparity between the lifestyles of the couple post divorce for a period of time proportionate to the length of the marriage, or in the case of a shorter marriage where there are children, to even out potential disparity during the children’s minority, would be the fairest way to approach spousal maintenance.

6. If one party continues to occupy the former matrimonial home in the expectation that she will be able to “downsize” and release capital in due course, that should be taken into account.
7.5 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?

Response

7. Reform of spousal support should take the form of a reformed discretionary approach with the objective of achieving a greater measure of certainty while at the same time retaining the flexibility to address unfairness.

8. The Canadian approach of a formula is very interesting: we understand that the Law Commission will want to look closely at this option.

9. It is important to point out, however, that

(i) England and Wales, as opposed to Canada, treats income and capital as interlinked: a formulaic approach may simply not be suitable for our system. As Baroness Hale pointed out at the meeting last year it is important to remember that to change one part of the system may render the rest inoperable or unfair.

(ii) the decision maker must be a judge, as unhappy experience with the Child Support regime shows, and any formula must be subject to an element of judicial discretion on defined principles, as in Canada.

10. The FJC would be happy to commission one of its academic members to provide a model of how a formula might work in this jurisdiction.
7.6 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?

Response

11. Reform should embody incentives towards independence by placing limits on both the quantum and the time for spousal support. The limits should allow a reasonable period for the recipient to re-establish earning capacity or to acquire new skills. Full account should be taken of childcare and retraining costs as well as limits on the recipient’s ability to work full-time.

7.7 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?

Response

12. Piloting a new approach to financial proceedings would not be a straightforward task and, in the Council’s view, would require the commissioning of an appropriately qualified and experienced team of socio-legal academic researchers. It would be important to consider how cases were to be selected for the pilot and whether this
would have to be voluntary on the part of the parties. Pilots relating to court proceedings with an element of compulsion can run into problems with Article 6 rights.

13. In the Council’s view, it is hard to see how a pilot could be run for less than one year if sufficiently robust data is to be gathered. The Council doubts that a pilot of this nature could be run for less than £100k and a sum approaching £200k may be nearer the mark. If it would assist the Commission, the Council would be happy to ask one of its academic members to draft up a project specification document for a pilot in order to give a clearer idea of the issues involved and the likely costs.

**Our case studies: the basis of support**

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or “unravelling the merger over time”, as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:
- to live at the same standard as he would have lived during the marriage, and if so for how long?

- to as much as he needs to relocate and to start again as a single person?

- to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple’s home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat’s care after the ending of the civil partnership?

Response

14. We favour the neutral approach which offers support to facilitate adjustment to independence.

A. There should be a graduated transition to independence with some income contributions from Sophia for a period of 2 years.

B. Michael’s entitlement should be calculated after the capital value of the home is shared.
C. Chris should have responsibility for contributing to Pat’s care after the ending of the civil partnership depending on his/her ability to do so.

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah’s claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Response

15. The Council responds as follows:

D. We consider that Sarah and Ian would find a calculation inflexible and frustrating.

E. It would be appropriate in this case to make a term order without a bar on extension of the term. This would put the onus of moving towards independence on Sarah. In Michael’s case, there should be a term order which is capitalised.
Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

Response

16. The Council responds as follows:

F. If all other factors are the same for Sarah and Ian, the term should stay the same. It takes childcare and lower earnings into account. For Sophia and Michael, there should be an increase from 2 to 3 years for capitalised
maintenance. For Pat and Chris, there should be a reduced and limited responsibility over a term of no more than 2 years.

G. There should be no entitlement to carry on living at the marital standard of living for Sarah, Michael or Pat.

H. Continuing responsibilities are very important and should make a difference to the level of support in case study 1.

I. Sarah should be entitled to carry on living in the family home after divorce. Neither Ian nor Michael should live in the family home.

7.8 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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);
(b) the priority to be afforded to different elements of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.49 to 5.50).

(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 (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

(b) the normal form of orders for periodical payments (term orders or joint lives) (see Supplementary Consultation Paper, Part 5, paragraph 5.33); and

(c) the financial arrangements to be made after short childless marriages (see Supplementary Consultation Paper, Part 5, paragraphs 5.38 to 5.39).

(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.

Response

17. The Council responds as follows:

(1) There should be statutory provision to make it clear that the aim of spousal maintenance is to enable a payee spouse to become independent within a reasonable period of time. This statutory provision should take account of childcare responsibilities to the conclusion of full-time secondary
education, but on the basis that there should be substantial reduction in the level of spousal support once the children complete primary education, to encourage the recipient spouse to resume employment as soon as possible. It should also take account of other limits on the recipient’s ability to work full time.

(2) There should be an authoritative source of guidance, in plain English, for the courts and for members of the public about the considerations involved in an assessment of needs and the priority to be afforded to different elements of need. There is a particular need for myths, or misconceptions, to be dispelled: for instance that all assets are divided 50/50, or that the matrimonial home will have to be sold, or that needs are not sometimes determinative of outcome.

(3) There should be provision by way of statutory amendment as to the time within which independence is to be expected and about the normal form of orders for periodical payments and the financial arrangements to be made after longer marriages, marriages with children and short childless marriages. Term orders should be the norm but with no Section 28 bar where there are children or it has been a very long marriage. It should be possible to invoke section 31 of the MCA even if circumstances have not changed.

Unless there has been a significant period of pre-marital cohabitation and/or one party has lost benefits such as widow’s pension as a result of remarriage, the parties to a short childless marriage should share the
marital capital and thereafter be returned to their pre-marital financial position via (if required) a short-term order of no more than a year.

Statutory amendment would be appropriate rather than “authoritative guidance” since such matters of principle should be decided by Parliament.

(4) Guidance about the considerations involved in an assessment of need and the priority to be afforded to different elements of need could usefully be provided: by the Family Division Judges assisted by the Family Justice Council’s Money and Property Committee, or by another group.

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

7.9 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.

Response

18. Non-statutory means of improving the law in relation to needs could take the form of provision of greater information for litigants about the extent of needs and what is included within needs. It would be helpful to have an explanation of the relative importance of different types of need, to include differentiation of basic needs and discretionary items such as holidays, private schooling and health
insurance which will depend on the standard of living during the marriage and the continuing affordability of such items.

7.10 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.

Response

19. Statute should specify some general principles in respect of the needs provision for which it shall not be possible to contract out:-

(i) need for appropriate housing;

(ii) need for sufficient maintenance to meet the reasonable expenditure of himself/herself and any children of the family, at a level commensurate with (not exceeding) the standard of living enjoyed during the marriage for a period of time to enable the transition to independence for the payee save in the case of a short, childless marriage where it should be possible to contract out of all maintenance provision.

7.11 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?

Response

20. The Family Justice Council agrees that non-matrimonial property, defined as property held in the sole name of one party to the marriage or civil partnership and (i) received as a gift or inheritance; or (ii) 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. This will provide increased certainty and may give couples an incentive to marry, particularly in circumstances where they have been married previously, knowing that they can safeguard assets acquired prior to the marriage.

7.12 We ask for consultees’ views on whether the family home should be excluded from the definition of non-matrimonial property proposed above.

Response

21. The family home should be excluded from the definition of non-matrimonial property.
7.13 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.

Response

22. Property acquired by one party during cohabitation should be covered by the definition of non-matrimonial property.

7.14 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?

Response

23. The Family Justice Council agrees that non-matrimonial property should not lose its status as such merely by virtue of having been used by the family.

7.15 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?
Response

24. The Family Justice Council agrees that where non-matrimonial property has been sold and a 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, e.g. a work of art or antique furniture.

7.16 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?

Response

25. The Family Justice Council agrees that where non-matrimonial property has been sold and the proceeds invested in matrimonial property, the new property should be matrimonial. It should, however, be subject to the court retaining discretion to adjust the parties’ shares in the property to reflect unequal contributions or derivation from non-matrimonial property.

7.17 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?
Response

26. The owner of the non-matrimonial property should benefit from the increase in value unless specific agreement has been made for the non-owner’s contributions to be reflected as a share of the asset or of the enhanced value of the asset.