



**Law
Commission**
Reforming the law

Matrimonial Property, Needs and Agreements



Law Commission

Matrimonial Property, Needs and Agreements

Law Com No 343

ISBN 978-1-4741-0016-8



9 781474 100168

Law Com No 343

The Law Commission

(LAW COM No 343)

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on
26 February 2014

HC 1089



© Crown copyright 2014

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence v.2. To view this licence visit www.nationalarchives.gov.uk/doc/open-government-licence/version/2/ or email PSI@nationalarchives.gsi.gov.uk

This publication is available at www.gov.uk/government/publications

Print ISBN 9781474100168

Web ISBN 9781474100175

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

ID 2625255 02/14 37356 19585

Printed on paper containing 75% recycled fibre content minimum

THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Lloyd Jones, *Chairman*
Professor Elizabeth Cooke
David Hertzell
Professor David Ormerod QC
Nicholas Paines QC

The Chief Executive of the Law Commission is Elaine Lorimer.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

The terms of this report were agreed on 5 February 2014.

The text of this report is available on the Law Commission's website at <http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm>.

THE LAW COMMISSION

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
GLOSSARY		ix
CHAPTER 1: INTRODUCTION		1
Matrimonial property, needs and agreements	1.1	1
The development of our project	1.9	2
Our conclusions	1.15	4
Financial needs	1.16	4
Marital property agreements	1.32	7
Non-matrimonial property	1.39	9
The structure of this report	1.41	9
Acknowledgements	1.44	10
CHAPTER 2: OVERVIEW OF THE CURRENT LAW		12
Introduction	2.1	12
The long road from 1969: the statutory foundation and evolved discretion	2.2	12
Matrimonial Causes Act 1973	2.2	12
Discretion pre- <i>White v White</i>	2.6	13
The <i>White v White</i> decision and its aftermath	2.10	14
The limits of sharing	2.19	16
The limits of financial needs	2.32	20
Our consultation and conclusions	2.56	27
CHAPTER 3: FINANCIAL NEEDS		28
Introduction	3.1	28
Consultation on needs in the 2012 Supplementary Consultation Paper	3.9	30

	<i>Paragraph</i>	<i>Page</i>
Principled reform (Part 4 of the 2012 SCP): the options explained	3.9	30
Our consultation questions on principled reform	3.24	33
Consultees' responses to our questions on principled reform	3.27	34
Compensation or merger over time?	3.27	34
Enforcing independence	3.46	38
Our conclusions following consultation	3.59	40
Our policy conclusion	3.60	40
Implementing our policy	3.69	42
Our recommendation	3.86	45
Content of the guidance	3.92	46
What are needs?	3.94	46
At what level should needs be met?	3.96	47
The duration of provision for needs and the transition to independence	3.105	48
The place of compensation alongside provision for needs	3.116	51
In conclusion	3.120	52
Looking to the future: could a formula be feasible?	3.121	52
The use of formulae in other jurisdictions	3.121	52
Formulae in family law in England and Wales	3.128	54
Consultation responses	3.132	55
The consultation events held in December 2012	3.148	59
Conclusions about formulae	3.151	60
CHAPTER 4: MARITAL PROPERTY AGREEMENTS AND THE PUBLIC POLICY RULES		63
Introduction	4.1	63
The development of the current law	4.3	63
Contracts between spouses	4.3	63
Pre-nuptial and post-nuptial agreements and the common law rule of invalidity	4.5	64

	<i>Paragraph</i>	<i>Page</i>
Separation agreements and section 34 of the Matrimonial Causes Act 1973	4.7	64
The public policy rules and the modern law	4.16	66
Our consultation question	4.21	68
Our recommendations	4.28	69
Abolition of public policy rule 1	4.28	69
Statutory provisions about maintenance agreements	4.36	70
CHAPTER 5: QUALIFYING NUPTIAL AGREEMENTS		73
Introduction	5.1	73
Qualifying nuptial agreements: in principle	5.8	74
Our consultation question and the responses	5.8	74
The empirical research	5.21	78
Discussion	5.25	79
The scope of qualifying nuptial agreements	5.42	83
The consultation responses	5.44	83
Our recommendation	5.68	90
Why a limitation on scope is necessary at all	5.69	90
The limit on scope: a prohibition on contracting out of needs	5.77	92
The draft Nuptial Agreements Bill	5.85	94
Qualifying nuptial agreements and the Inheritance (Provision for Family and Dependants) Act 1975	5.93	95
Claims by a former spouse	5.96	96
Claims by a surviving spouse	5.100	97
CHAPTER 6: REQUIREMENTS FOR QUALIFYING NUPTIAL AGREEMENTS		104
Introduction	6.1	104
The requirements for qualifying nuptial agreements	6.6	105
(1) Contractual validity	6.6	105
(2) Execution	6.32	109

	<i>Paragraph</i>	<i>Page</i>
(3) Timing	6.42	111
(4) Disclosure	6.69	116
(5) Legal advice	6.105	123
Further requirements for the formation and content of qualifying nuptial agreements?	6.160	134
A requirement of fair process	6.161	134
The content of the agreement	6.166	135
Conclusions on the form and content of the agreement	6.177	137
Variation of qualifying nuptial agreements	6.181	137
Revocation of qualifying nuptial agreements	6.188	138
Identifying property over time	6.192	139
Consultation questions and views expressed by consultees	6.197	140
Conclusion	6.210	143
CHAPTER 7: QUALIFYING NUPTIAL AGREEMENTS IN PRACTICE		144
Introduction	7.1	144
The uses of qualifying nuptial agreements	7.8	145
Jurisdiction and applicable law clauses	7.34	149
Review clauses	7.37	150
Qualifying nuptial agreements, ADR and family law arbitration	7.38	150
Arbitration agreements	7.38	150
What is family law arbitration?	7.39	150
Qualifying nuptial agreements as arbitration agreements	7.41	151
Inclusion of ADR provisions in a qualifying nuptial agreement	7.44	152
How is a qualifying nuptial agreement made?	7.45	152
The requirements for qualifying nuptial agreements	7.45	152
Contractual validity and execution	7.46	152
Timing	7.48	153
Disclosure	7.50	153

	<i>Paragraph</i>	<i>Page</i>
Legal advice	7.59	155
What happens at the end of the marriage?	7.64	156
Tax considerations	7.66	156
CHAPTER 8: NON-MATRIMONIAL PROPERTY		157
Introduction	8.1	157
The case for reform relating to non-matrimonial property	8.11	159
The definition of non-matrimonial property	8.15	160
Consultation responses to our proposed definition	8.16	160
The family home as an exception?	8.27	162
Property acquired during cohabitation	8.37	164
Non-matrimonial property that changes over time	8.47	166
Can non-matrimonial property become matrimonial?	8.47	166
Property that changes	8.57	168
Moving forward	8.73	172
CHAPTER 9: SUMMARY OF RECOMMENDATIONS		175
APPENDIX A: DRAFT NUPTIAL AGREEMENTS BILL AND EXPLANATORY NOTES		180
APPENDIX B: RESPONSES TO CONSULTATION QUESTIONS NOT DEALT WITH IN THE REPORT		207
APPENDIX C: CASE STUDY QUESTIONS FROM THE 2012 SCP		214
APPENDIX D: SECTION 25, MATRIMONIAL CAUSES ACT 1973		217
APPENDIX E: RESPONDENTS TO THE 2011 CP AND 2012 SCP		219

GLOSSARY

“Acquest”: property gained in a way other than by inheritance or gift, for example, by purchase.

“ADR”: this stands for “alternative dispute resolution”, which is an umbrella term for methods of resolving disputes without taking the case to court.

“Ancillary relief”: the term formerly used to describe financial orders made on divorce and dissolution, and excluding financial orders made under schedule 1 of the Children Act 1989.

“Clean break”: an order which imposes no ongoing financial liability on either party for the other.

“Duxbury fund”: a *Duxbury*¹ calculation produces, using certain economic and fiscal assumptions, a lump sum (the Duxbury fund) which would, if suitably invested, provide sufficient income to meet the recipient spouse’s requirements for the rest of his or her life.

“Family Justice Review (also referred to as the Norgrove Review)”: the wide-ranging examination of the family justice system in England and Wales chaired by Sir David Norgrove. The final report was published on 3 November 2011.

“Financial Dispute Resolution (FDR) hearing”: the (usually) second hearing that occurs following the making of an application for a financial order, the first hearing (“First Directions Appointment”) being for the court to make directions as to the provision of evidence and the conduct of the case. Its purpose is to facilitate the parties agreeing a financial settlement through the assistance of the judge, whose role is to provide a neutral evaluation of the case, and to mediate between the parties. This may include providing an indication to the parties of what he or she believes to be the range of possible outcomes, were the matter to proceed to a final hearing. The FDR hearing is “without prejudice” so that anything said or any admission made in an FDR will not generally be admissible as evidence, in order to encourage open discussion and settlement.

“Financial orders”: we use this term to refer to financial orders made on divorce and dissolution, excluding orders made under schedule 1 of the Children Act 1989; it is thus used here as the exact equivalent of “ancillary relief”.

“Marital property agreements”: agreements made before or during marriage or civil partnership which seek to regulate the couple’s financial affairs during the relationship or to determine the division of their property in the event of divorce, dissolution or separation. Often referred to colloquially as “pre-nups” and “post-nups” (depending on whether they are made

¹ From the case *Duxbury v Duxbury* [1987] 1 FLR 7.

before or after marriage), and sometimes in legal writing collectively as “nuptial agreements”.

“Needs”: a very broad concept with no single definition in family law, discussed fully in Chapters 2 and 3.

“Non-matrimonial property”: a term used by practitioners and by the courts (but not found in the statutes) to describe property received as a gift or inheritance by one party to the marriage or civil partnership, or acquired before the marriage or civil partnership took place.

“Periodical payments”: a series of payments made for a definite or indefinite period of time, typically paid on a monthly basis.

“Qualifying nuptial agreement”: a term used to refer to a marital property agreement which is enforceable, providing certain conditions are met, without the need for the agreement to be scrutinised by the court in its discretionary jurisdiction. Such agreements are not available under the current law.

“Section 25 factors”: under section 25 of the Matrimonial Causes Act 1973 the court must have regard to all the circumstances of the case, with first consideration to be given to the welfare of minor children, when deciding whether and how to exercise its powers to make financial orders. The section sets out a “checklist” of specific factors to which the court must have regard.²

“Spouse”: we use this term to refer to one of the parties to a marriage or a civil partnership.

² See Appendix D where we set out section 25 of the Matrimonial Causes Act in full.

THE LAW COMMISSION

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

To the Right Honourable Chris Grayling, MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1 INTRODUCTION

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

- 1.1 Divorce and the dissolution of civil partnership almost always have financial consequences. Typically, two people have been to some extent financially interdependent and the divorce or dissolution means that they are now embarking on separate lives. It is not always practicable to bring their interdependence to an immediate end, because the financial effects of having shared their lives may be long-lasting and shared responsibilities may continue well beyond the point of divorce or dissolution.
- 1.2 The law relating to the financial consequences of divorce and dissolution has developed over some decades. Its statutory framework dates back to 1969, and the courts have been largely responsible for the extensive development in this area of law since then. Some of those developments have been driven by social change; the position of women in society and in the labour market is very different from how it stood in 1969. Other developments have been a response to new financial practices; conspicuous among those are marital property agreements, whose use has become more widespread – partly as a result of influence from other countries where they are commonplace.
- 1.3 Yet for most couples, the financial imperative following divorce or dissolution is what it has always been: to make ends meet. The resources that used to support one household will not easily stretch to two.
- 1.4 This Report is the final step in a project that has examined both ends of the financial spectrum: the majority who need clear and accessible law and who may have to manage without professional advice, and the minority for whom sophisticated financial arrangements may be appropriate. These two groups have different practical needs and they prompt different law reform initiatives. Our recommendations are for relatively simple statutory reform which will provide non-statutory guidance to make the law more transparent and accessible for all and a new and efficient contractual tool for those with more complex resources.
- 1.5 We have not consulted on, nor challenged, the fundamental principles of financial provision: in particular equality, gender neutrality, and the requirement of fairness. In 2000, in its decision in *White v White*,¹ the House of Lords laid the

¹ [2000] UKHL 54, [2001] 1 AC 596.

foundation for what came to be known as the “sharing principle”: the view that a couple’s assets should be shared on divorce or dissolution, absent special factors relating to the source of the assets, or a very short relationship. That principle underpins our work. But fairness is a difficult and complex concept, inevitably subjective, and very dependent upon individual circumstances. An outcome agreed by the parties might be considered fair where the same outcome imposed by the court would be viewed as unfair, because the fairness inherent in upholding agreements may, to some extent, override other conceptions of fairness. The current statutory framework for financial orders assumes that a bespoke package will be devised by a judge for each couple; but in an environment where legal advice is not easy to access, and the court system cannot provide tailor-made justice for all. New approaches are required to enable and empower people to devise fair solutions for themselves or to use other methods of dispute resolution.

- 1.6 Our Report therefore recommends some new approaches, which we introduce and summarise in this Chapter.
- 1.7 There are no legal differences between marriage and civil partnership in any matters covered in this project. Nor will the introduction of same-sex marriage² make any difference to what we say here.
- 1.8 We are aware of the imminent introduction of the single family court, but this is a structural and procedural change and will not affect the recommendations made within this Report.

THE DEVELOPMENT OF OUR PROJECT

- 1.9 This Report is the culmination of an extended project. In 2009, the Law Commission for England and Wales started work on a project designed to review the law relating to marital property agreements. We use this term to refer to agreements made between spouses³ about the financial consequences of a future divorce, or dissolution of civil partnership. In some legal writing these are known collectively as “nuptial agreements”.
- 1.10 Marital property agreements can be divided into three types. First, there are pre-nuptial agreements, made before marriage or civil partnership. They contemplate relationship breakdown at a time when attention is focused on the celebration of its continuance and intended permanence. Then there are post-nuptial agreements made between spouses, but again contemplating a separation that is not currently happening, and may never happen. Finally there are separation agreements, made at the ending of a relationship when separation is a reality.
- 1.11 The practical and emotional implications of these three types of agreement differ, and the development of the law that relates to each has diverged. The most important divide is between pre- and post-nuptial agreements on the one hand, and separation agreements on the other. The former involve an element of prediction; the parties are setting out what they will need, and what they will be

² Brought about by the Marriage (Same Sex Couples) Act 2013, which will come into force in March 2014.

³ We use the term “spouse” to refer to one of the parties to a marriage or a civil partnership.

content with, in circumstances whose reality they may be unable to foresee. Separation agreements on the other hand deal with a known reality or at least one that is immediately anticipated; and for that reason the courts have historically been far more willing to enforce them.

- 1.12 Significant events took place during the course of our work. One was the decision of the Supreme Court in *Radmacher v Granatino* in 2010.⁴ The case concerned an application for financial provision, made by a husband who had signed a pre-nuptial agreement in Germany. The agreement stated that the husband would not receive any financial provision from the wife; the Supreme Court held that the agreement should be given decisive weight and that the award to Mr Granatino should “be provided for his role as a father rather than his role as a husband”.⁵ Another was the publication in 2011 of the Family Justice Review,⁶ in which it was recommended that the whole of the law relating to the financial consequences of divorce and dissolution should be examined.⁷ Following discussion with us, Government’s response to that Review stated that the Law Commission’s terms of reference for this project should be expanded to include two further significant areas of financial provision, namely the law relating to “financial needs” (to use the term employed in the statutes)⁸ and the law relating to “non-matrimonial property”. Non-matrimonial property is a term used by practitioners and by the courts (but not found in the statutes) to describe property received as a gift or inheritance by one party to the marriage or civil partnership, or acquired before the marriage or civil partnership took place.
- 1.13 We recognise that there are significant disadvantages to examining discrete elements of the law relating to financial orders rather than the whole. Some of the difficulties that we have encountered in the course of the project stem from the fact that we have not been able to consider the system in the round. We undertook the extended project nevertheless, on the basis that it was important not to miss the opportunity to examine whether it was possible to improve these elements of the law, and we think that it has been valuable to conduct that examination.
- 1.14 Accordingly, as well as consulting about the law relating to marital property agreements in January 2011,⁹ we published a Supplementary Consultation Paper in September 2012 in which we sought views from the public and from family law

⁴ [2010] UKSC 42, [2011] 1 AC 534.

⁵ *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 at [112], which reiterates the Court of Appeal judgment in the case.

⁶ The Family Justice Review, also referred to as the Norgrove Review, was a wide-ranging examination of the family justice system in England and Wales chaired by Sir David Norgrove. The final report was published on 3 November 2011.

⁷ Family Justice Review Panel, *Family Justice Review: Final Report* (2011) p 178, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf (last visited 7 February 2014).

⁸ Matrimonial Causes Act 1973, s 25(2)(b); and Civil Partnership Act 2004, Sch 5, part 5, para 21(2)(b).

⁹ Marital Property Agreements (2011) Law Commission Consultation Paper No 198, referred to in this Report as the “2011 CP”, available at http://lawcommission.justice.gov.uk/docs/cp198_Marital_Property_Agreements_Consultation.pdf.

professionals about those two additional areas.¹⁰

OUR CONCLUSIONS

- 1.15 The most important recommendations in this Report relate to financial needs and marital property agreements. We have decided to make no recommendation for reform relating to non-matrimonial property.

Financial needs

- 1.16 For the majority of couples going through divorce and dissolution, meeting what are referred to by statute and the courts as “financial needs” is, after providing for their children, the only financial issue. The ending of their partnership will inevitably mean that they will cease to share a home and – in many cases – an income and pension arrangements. A new start has to be made. The resources that supported one household will not easily stretch to two, or at least not in the short term (and in some cases not even in the long term, depending upon whether either party can increase their own resources after divorce). Both parties need a home and an income. If they have children, both parties will generally need the financial means to maintain contact with them and share in their care. And it will not be appropriate for the ending of the marriage or civil partnership to entail a sudden and dramatic disparity in the parties’ lifestyles; the courts have consistently taken the view that the lifestyle the couple had together should be reflected, so far as possible, in the sort of level of income and housing that they have as single people afterwards.
- 1.17 Traditionally, arrangements for financial needs have been negotiated – in all but the simplest of cases – with the help of lawyers. In the very small proportion of cases that have been resolved in court,¹¹ judges have been able to craft solutions that fit the circumstances of the individuals before them. The available evidence about the way the law works points us to three important facts.
- 1.18 First, for the most part, the solutions negotiated or adjudicated lead eventually to the parties becoming independent of each other. Divorce and, so far as we can tell so soon after its introduction, dissolution of civil partnerships do not mean life-long dependence. The incidence of joint lives periodical payments is very small indeed, and the economic evidence points to the fact that people do recover from the financial crisis that divorce so often is and become able, financially, to move

¹⁰ Matrimonial Property, Needs and Agreements (2012) Law Commission Consultation Paper No 208, referred to in this Report as the “2012 SCP”, available at http://lawcommission.justice.gov.uk/docs/cp208_matrimonial_property.pdf.

¹¹ In 2012, 125,116 petitions for divorce, nullity or judicial separation were filed. 47,986 applications for one or more ancillary relief orders were made and 44,744 disposals were made. Of these disposals only 3,596 were contested. Of the disposals made in 2012, some will relate to a petition or an application made in previous years. However, by no means all separating spouses and civil partners apply for a financial order, and only a very small fraction of applications made (8%, using the statistics quoted) will be resolved by an order made after trial. Using the same statistics only 3% of petitions will lead to a financial order being made after trial. The majority will be resolved by agreement between the parties. For petition and disposal statistics see Ministry of Justice, *Court Statistics (quarterly) Main Tables* (2013) tables 2.1 and 2.6, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264142/cs-q2-2013-main-tables.xls (last visited 7 February 2014).

on.¹²

- 1.19 Second, there are some regional disparities in the type of solutions that tend to be negotiated or ordered. It is not possible to be precise about this but many lawyers we have spoken to agree that the law is being applied inconsistently.¹³
- 1.20 Third, the lack of a definition of financial needs in the law, in combination with regional variations in the way that lawyers and judges conceive of them, means that it is very difficult for members of the public to understand their responsibilities and to agree to meet them following divorce or dissolution.
- 1.21 These factors together mean that where people who are going through divorce or dissolution have legal advice, their lawyers will be able to help them negotiate “in the shadow of the law”, predicting the sort of solution that the local courts would impose, and assisting them to reach settlements¹⁴ that can be embodied in draft consent orders which the courts will endorse. The law is not transparent, but solutions are reached and independence is achieved, after some time – sometimes after some years – and in a way that reflects the circumstances of the marriage or civil partnership.
- 1.22 But where lawyers are not involved, individuals struggle to know what the law requires of them. The meaning of “financial needs” is not defined in the statute, and yet it is an issue of central importance in most divorces. The statute gives judges a wide discretion to make financial orders in the light of all the circumstances, but does not say what is to be achieved. Nowhere in the law itself – only in the practice of the courts – can we find any indication that financial needs do have to be met after the ending of marriage or civil partnership, but not generally for ever. The eventual end result is usually independence; but the law gives its users no guidance about this.
- 1.23 The withdrawal of legal aid from many family cases including those relating to financial provision means that access to legal advice is now more difficult. Bargaining “in the shadow of the law”, seeking to produce the sort of outcome that the courts would have ordered, is very difficult if the law is not known and not accessible. The removal of legal aid means that there will be more litigants in person, either approaching the courts without the help of lawyers to manage their expectations or to assist them in reaching settlement, or seeking to negotiate entirely outside the court system.
- 1.24 We have not recommended any change in the law relating to financial needs. The courts have operated the law in a way that generally yields the most practicable outcomes in the circumstances and we have no quarrel with this. Nor had the majority of our consultees. Our consultation revealed no consensus supporting a change in the law here, whether for a change in levels of support to be provided between former spouses or for the introduction of any arbitrary time-limits to the availability of that support.

¹² Chapter 2, para 2.42.

¹³ Chapter 2, paras 2.45 to 2.53.

¹⁴ See, for example, S Beinhart, J Eekelaar and M Maclean, *Family Lawyers: The Divorce Work of Solicitors* (2000) pp 185 to 187.

- 1.25 However, more is needed to make the law, and the courts' practice, transparent. We recommend that the meaning of "financial needs" be clarified in guidance to be published by the Family Justice Council,¹⁵ in order not only to ensure that it is applied consistently by the courts across the country but also that people without legal representation have access to a clear statement of their responsibilities and of the objective that their financial settlement should be achieving. That guidance will be addressed primarily to the courts and legal advisers, but it should also be published in a version suitable for the assistance of litigants in person.¹⁶
- 1.26 Transparency in the law is a necessity, not a luxury. It is not realistic to insist that lack of clarity about financial needs is acceptable because the term is well-understood by lawyers, as many lawyers have told us. So we take the view that accessible guidance is an important step forward.
- 1.27 In recommending guidance produced by the Family Justice Council, and therefore with the authority and respect that that body commands, we do not ignore the many online tools that have been developed recently to help couples going through divorce and dissolution, including the "Sorting Out Separation" app.¹⁷ But while these tools are helpful in explaining in basic terms how to budget and pointing out matters that need to be resolved (debt, housing, childcare needs and so on), they do not point the reader towards a solution. Neither they, nor the statutes, state the objective to be achieved. Our recommendation is that the Family Justice Council guidance should not only make clear the elements involved in assessing financial needs but also make explicit and endorse the courts' practice of making orders that lead to independence, to the extent that that is possible in the light of choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and their continued shared responsibilities in the future, particularly for children. Couples making their own settlements, in the light of the courts' practice, can be informed by that guidance and will have an indication of the outcome that they should be aiming for.
- 1.28 It would be a mistake to suppose that this Report represents an end to reform in this area of the law. It will be clear from our account of developments from 1969 onwards that this is a dynamic area, constantly evolving, constantly under pressure from social change, public opinion, economic pressures and legal influence from abroad.¹⁸ Our Report, and the implementation of our recommendations, can only be staging posts in an ongoing journey.
- 1.29 A further and important step on the journey may be the development, in the future, of more specific guidelines. Guidance as described above can provide only words, not figures. Some jurisdictions – notably Canada – have introduced

¹⁵ The Family Justice Council is an advisory, non-statutory, non-departmental public body which was established in 2004 and is sponsored by the Judicial Office. Its primary role is to "promote an inter-disciplinary approach to family justice and to monitor the system". In August 2012, it became part of the office of the President of the Family Division. See <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/fjc> (last visited 7 February 2014).

¹⁶ Chapter 3, paras 3.88 to 3.90.

¹⁷ <http://www.sortingoutseparation.org.uk/en/hub.aspx> (last visited 7 February 2014).

¹⁸ See Chapter 2 for an overview of the current law and its history.

calculations to generate a financial range within which a court order might fall.¹⁹ Such calculations need not generate a single answer to the question “how much do I have to pay?”. They might generate a range, indicating a maximum and minimum level of support within which parties can negotiate, knowing at least that they are “on the right lines”. They can be subject to specified exceptions or additional criteria for certain types of situation. They might be statutory or non-statutory. Non-statutory guidance may attain an enhanced status if it is approved by the courts.²⁰

- 1.30 The comparison with other jurisdictions has to be treated with caution, because of the different legal frameworks in which such calculations operate.²¹ In particular, the development of calculations for income provision in jurisdictions where the law clearly separates income and capital matters may be a very different matter from any attempt to develop a formula to reflect orders made in a legal context where income and capital are not distinguished. “Financial needs” in this country encompass not only income but also the provision of a home.²² That aspect of financial needs introduces a complexity that other jurisdictions do not suffer. But it is significant that formulaic guidelines have been found helpful in other jurisdictions, and have met with approval from the courts.
- 1.31 Accordingly, we have made a further recommendation, that work be done with a view to assessing whether such an aid to calculation could be devised here.²³ It is very easy to dismiss such a development on the basis that no formula can capture individual circumstances, and we agree that that is true. But for individuals without access to legal advice who need to know whether, for example, one should be supporting the other for five years or ten years (or at all), or whether the proceeds of sale of their house should be split 50:50 or 40:60 (or in some other shares), guidance in the form of figures as well as words could be invaluable in supporting couples to reach settlement. We think that the endeavour to devise such guidelines would be well worth the effort and the relatively low public expenditure that it would require.

Marital property agreements

- 1.32 We recommend statutory confirmation of the contractual validity of marital property agreements.
- 1.33 This in itself will make a practical difference in only a small proportion of cases,²⁴ because despite their contractual validity marital property agreements cannot take a couple’s arrangements outside the scrutiny of the family courts; they will be upheld only if they are “not unfair”, in accordance with the decision of the

¹⁹ Whether it takes the form of regular income provision or a single payment so as to achieve a clean break.

²⁰ Chapter 3, para 3.125.

²¹ Chapter 3, para 3.121.

²² For a long time (at least where the former matrimonial home was owner-occupied) spouses have been regarded as “needing” provision to help them purchase a home where that is possible.

²³ Chapter 3, para 3.159.

²⁴ See Chapter 4, paras 4.28 to 4.35.

Supreme Court in *Radmacher v Granatino*.²⁵ But the provision we recommend would resolve some uncertainty about contractual status and ensure consistency with the rest of the statutory background.²⁶

- 1.34 The Supreme Court, in *Radmacher v Granatino*,²⁷ has gone as far as it is possible for the courts to go in endorsing the validity of marital property agreements without an amendment of the statutory framework; only legislation can enable parties to enforce agreements without involving the courts' discretionary jurisdiction under the Matrimonial Causes Act 1973. We recommend that legislation be enacted to introduce "qualifying nuptial agreements".²⁸ These would be a new form of contract, subject to requirements as to their formation including the provision of legal advice and financial disclosure. They would enable couples to make contractual, and truly enforceable, arrangements about the financial consequences of divorce or dissolution.²⁹ Qualifying agreements could not, however, be used to enable one or both parties to contract out of any responsibility to meet each other's financial needs.
- 1.35 Accordingly, the introduction of qualifying nuptial agreements would enable couples to have confidence that carefully negotiated agreements about the future sharing of assets would be upheld and enforced – much as they are, uncontroversially, throughout continental Europe and beyond – without compromising either their responsibilities to their children or, importantly, their own need for financial support following divorce. If circumstances changed and any arrangements made in the agreement for either party's living arrangements (whether income, housing, or otherwise) proved to be inadequate, the door to the court would remain open; but only to enable orders to be made ensuring that financial needs were met. The other elements of the contract would remain inviolable, including any agreement not to share property beyond that required to meet needs.
- 1.36 Qualifying nuptial agreements are likely to be particularly useful in two situations. First, they will be an important source of legal certainty for high net worth couples who want to make clear and reliable arrangements for their wealth – sometimes generated by the business activities of the individuals themselves, sometimes derived from their families. Qualifying nuptial agreements will be the best way to protect an inheritance from being shared on divorce or dissolution, and thus to avoid the uncertainty inherent in the case law relating to non-matrimonial property.³⁰

²⁵ [2010] UKSC 42, [2011] 1 AC 534.

²⁶ In Chapter 4, at paras 4.18 to 4.20, we explain the significance of the Supreme Court's statement about this in *Radmacher v Granatino* and at paras 4.7 to 4.10 and 4.36 to 4.46, we explain the relationship of contractual validity with section 34 of the Matrimonial Causes Act 1973, which is an issue that could not be addressed in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534.

²⁷ [2010] UKSC 42, [2011] 1 AC 534.

²⁸ Chapter 5, para 5.40.

²⁹ And, indeed, judicial separation or nullity; these decrees are rarely sought.

³⁰ See Chapter 8, para 8.9.

- 1.37 Second, qualifying nuptial agreements will be helpful in circumstances where the parties to a marriage or civil partnership have been in a relationship before and wish to safeguard a house or other assets for their children from that previous relationship. This might be particularly relevant for older couples. Again, the current law is uncertain and does not give such couples the reassurance they need. Qualifying nuptial agreements will fill that gap in the law.
- 1.38 One of the most serious misgivings that many people have about marital property agreements is their potential to cause unforeseen hardship. Agreements made at a time of happiness and security may turn out to have unexpected and unacceptable effects when they come into effect. We share that concern. That is why we have recommended that qualifying nuptial agreements should not be used to contract out of the couple's responsibility to meet each others' financial needs. Accordingly, for the majority of couples, whose resources will be entirely taken up in meeting that responsibility, qualifying nuptial agreements will not be appropriate.

Non-matrimonial property

- 1.39 We have not made any recommendations about reform relating to non-matrimonial property. The courts' approach at present is generally not to make orders requiring former spouses to share property acquired by gift or inheritance, or acquired before marriage or civil partnership, unless that property is required to meet financial needs. The courts have not yet devised rules to meet all the possible situations that can arise in connection with such property (for example, what happens if inherited property is sold and the proceeds used to buy something that the whole family uses). Although we would have liked to recommend statutory provisions to address those situations, consultation responses have demonstrated that it is not possible to achieve sufficient consensus for us to recommend reform. Given that this is an issue that affects only a minority – those whose assets exceed their financial needs – we have taken the view that it is better to enable couples who have non-matrimonial property to make their own arrangements by making qualifying nuptial agreements.
- 1.40 As we said above in the context of financial needs, we do not think that this is likely to be the end of the story. We think that once more cases have reached the courts and the implications of non-matrimonial property have been further explored there may be an opportunity for statutory provision. Without that, the courts can address only the individualised issues presented to them and it will continue to be difficult to ensure a consistent and fair approach across the board.

THE STRUCTURE OF THIS REPORT

- 1.41 Chapter 2 of this Report sets out in more detail the legal background to these recommendations. Chapter 3 explains our policy conclusions on financial needs. Chapters 4, 5 and 6 explain the recommendations we make about marital property agreements and the provisions of the draft Bill (to be found at Appendix A). In Chapter 7 we discuss the practical uses of qualifying nuptial agreements. In Chapter 8 we say more about non-matrimonial property.
- 1.42 We have included the following appendices:

- (1) Appendix A: Draft Nuptial Agreements Bill and Explanatory Notes;
 - (2) Appendix B: Responses to consultation questions not dealt with in the main body of the Report;
 - (3) Appendix C: Case study questions from the 2012 SCP;
 - (4) Appendix D: Section 25 of the Matrimonial Causes Act 1973; and
 - (5) Appendix E: Respondents to the 2011 CP and the 2012 SCP.
- 1.43 We have also published on our website an Impact Assessment and copies of the consultation responses we received to both the 2011 CP and the 2012 SCP.

ACKNOWLEDGEMENTS

- 1.44 Our hearty thanks go to all who responded to our two consultations. Law reform is a collective effort and we are truly grateful to all who have put work, time and careful thought into answering and commenting on the questions that we have posed. Inevitably, on a subject that engages emotions as well as minds, consensus did not emerge. Not everyone was in favour of reform at all, and those who wanted change expressed divergent views about how to achieve it. All these views are valuable and have influenced our conclusions. A list of consultees can be found at Appendix E.
- 1.45 We offer our warm thanks to the members of our advisory group, who met on a number of occasions before the publication of each of our two consultation papers; we benefited from their expertise and their forthright views. The members of the group are: Sarah Anticoni, Charles Russell LLP; Dr Thérèse Callus, University of Reading; James Carroll, Russell-Cooke LLP; Nicholas Francis QC, 29 Bedford Row; Mark Harper, Withers LLP; Dr Emma Hitchings, University of Bristol; David Hodson, the International Family Law Group; His Honour Judge Million, South Eastern Circuit; Jeffrey Nedas, Jeffrey Nedas & Co; Tony Roe, Tony Roe Solicitors; His Honour Judge Mark Rogers, Midland Circuit; Marilyn Stowe, Stowe Family Law LLP; and Richard Todd QC, 1 Hare Court.
- 1.46 We are extremely grateful to the following individuals and organisations:
- (1) Resolution for hosting a survey on financial needs on their website and the Resolution practitioners whose responses made a valuable contribution to our work.
 - (2) The Money and Property Committee of the Family Justice Council for their useful discussions with us and in particular its Chair, and President of the Family Division, Lord Justice Munby.
 - (3) All those academics who attended the seminar on 16 April 2012 to share their specialist knowledge of these areas of the law.
 - (4) Professor Carol Rogerson for our useful discussions with her; in particular her presentations at the seminars in December 2012 at the Inner Temple and Nuffield Foundation, regarding the Canadian Spousal Support Guidelines, and for her help with sections of the Report describing those guidelines, their development and their effects.

- (5) Professor Anne Barlow for her organisation of the seminar at the Nuffield Foundation and her research into the public's view of pre-nuptial agreements, funded by the Nuffield Foundation.
- (6) Deepak Nagpal of 1 King's Bench Walk for his advice and expertise.
- (7) Professor J T Oldham at the University of Houston Law Center for his assistance with sections of the Report summarising the American Law Institute's Principles of the Law of Family Dissolution and their effects.
- (8) Joanna Miles at the University of Cambridge, who acted as a consultant on this project, for her invaluable insight and unstinting support.

1.47 Finally, we thank those organisations that so generously hosted events at which we were able to present the consultation issues. We would like to express our gratitude to the Institute of Advanced Legal Studies, Leeds University, Kings College London, St Philips Chambers, Durham University, the University of Bristol, the University of Birmingham, Reading University, Cardiff Law School, Stowe Family Law LLP, the National Museum of Wales, Thirty Park Place Chambers, the Honourable Society of the Inner Temple, and the Nuffield Foundation.

CHAPTER 2

OVERVIEW OF THE CURRENT LAW

INTRODUCTION

- 2.1 In this Chapter we explain the legal background to our recommendations. In doing so we have not tried to provide a detailed text on the current law. Our 2011 CP provided a much fuller account of the law relating to marital property agreements in this and other jurisdictions, and the 2012 SCP¹ did the same so far as financial needs and non-matrimonial property were concerned. The reader is referred to both documents for a more comprehensive account than we have provided here. In this Chapter we have endeavoured instead to draw together the essentials so as to demonstrate how the three elements in our project – financial needs, marital property agreements and non-matrimonial property – have emerged from the development of the law relating to financial orders during the legally eventful period from 1969 to the present. That development is an ongoing process; the issue for our project is to what extent law reform would improve the law, against the background of that continual development. Should the courts be left to continue the process, or is there a case for law reform to adjust or improve the process?

THE LONG ROAD FROM 1969: STATUTORY FOUNDATION AND EVOLVED DISCRETION

The Matrimonial Causes Act 1973

- 2.2 Statutory provision for the financial consequences of divorce began with the Matrimonial Causes Act 1857 but the starting point for the modern law is the Matrimonial Causes Act 1973, which consolidated the law following the major overhaul of the law of divorce (the most recent we have had) in 1969. The relevant provisions of the 1973 Act are duplicated for civil partnerships in the Civil Partnership Act 2004.
- 2.3 The statutes do two things. First, they set out the financial orders that can be made on divorce or dissolution.² These range from orders for periodical payments to orders for pension sharing.³ Secondly, they set out the considerations that the court must have in mind when making orders. First consideration is to be given to the welfare of the parties' minor children. Beyond that, a set of factors – known to family lawyers as the "section 25 factors" – are to be borne in mind. They are, in a sense, obvious: the judge is to have in mind the length of the parties' marriage, for example, and the needs and resources of the parties. But the statutes do not say what effect the consideration of these factors is to have upon the orders made.

¹ Chapter 1, footnotes 9 and 10.

² Matrimonial Causes Act 1973, s 23; and Civil Partnership Act 2004, Sch 5, parts 1 to 4A. See para 2.5 of the 2011 CP and paras 2.3 to 2.4 of the 2012 SCP.

³ The addition, over the past two decades, of numerous provisions relating to pensions has made the list very much longer than it originally was.

- 2.4 Nor does the statute say what the orders are to achieve. Clearly the court may make an order that H must make periodical payments to W or vice versa, or it may make no such order at all. But in what circumstances might it do so, and for how long should those payments continue? Again, the court may make an order that determines who is to live in the family home, when it is to be sold and in what proportions the sale proceeds are to be divided, but no indication is given as to why such an order should be made.
- 2.5 As originally drafted the statute was not so silent; it imposed an overall duty on the court to exercise its powers in such a way “as to place the parties ... in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other”.⁴ This was known as the “minimal loss principle”; it was both impractical, and incompatible with a divorce law that no longer depended upon proof of fault,⁵ and it was repealed in 1984 on the recommendation of the Law Commission.⁶ Nothing took its place. The task of the family judge has been likened to that of:

... a bus driver who is given a large number of instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the bus. All he or she is told is that the driver is required to drive to a reasonable destination.⁷

Discretion pre-*White v White*

- 2.6 In the absence of any indication in the statutes as to their objective, the courts evolved their own. In the years before the decision in *White v White*,⁸ an applicant for financial provision would be awarded – insofar as the other party’s assets and income made it possible – her “reasonable requirements”. That meant the applicant’s financial needs generously assessed by reference to the marital standard of living, for housing, income, entertainment, holidays, and other luxuries where possible.⁹ For most applicants, of course, the extent of the

⁴ Matrimonial Proceedings and Property Act 1970, s 5.

⁵ In a fault-based divorce law there is a rationale for saying that the “innocent” party should suffer no financial loss as a result of the divorce, and therefore might get life-long support. Divorce law no longer depends upon proof of fault (divorce can be obtained by consent) and therefore if there is to be life-long support in any cases, a different justification has to be found.

⁶ See the recommendations in Family Law: The Financial Consequences of Divorce: The Response to the Law Commission’s Discussion Paper, and Recommendations on the Policy of the Law (1981) Law Com No 112, para 46(5)(ii)(b). The Commission’s recommendations in that paper led to the enactment of the Matrimonial Proceedings and Property Act 1984. See further paras 3.13 to 3.19 of the 2012 Supplementary Consultation.

⁷ P Parkinson, “The Diminishing Significance of Initial Contributions to Property” (1999) 13 *Australian Journal of Family Law* 52, 53, explaining Justice Chisholm’s extra-judicial writing on the equivalent Australian statute.

⁸ [2000] UKHL 54, [2001] 1 AC 596.

⁹ The “financial needs, obligations and responsibilities” of the parties is one of the section 25 factors: Matrimonial Causes Act 1973, s 25 (2)(b). These factors are replicated at paragraph 21 of Schedule 5 of the Civil Partnerships Act 2004.

couple's resources meant that full provision for either party's reasonable requirements was impossible. But in the very wealthy cases it represented both a generous measure of lifestyle, and a ceiling upon awards.

- 2.7 As to lifestyle, the "reasonable requirements" standard meant that the wife of a wealthy man, who had not been in employment and had either no wish for or no prospect of employment after divorce, could be maintained at the marital standard of living for her lifetime. In effect, the "minimal loss" principle lived on – despite the fact that it is hard to justify that standard of provision in an era where divorce no longer has to be fault-based.
- 2.8 But reasonable requirements was also a ceiling. So the millionaire's wife might be awarded lifelong support, capitalised using the *Duxbury* calculation;¹⁰ but however wealthy her husband was, she would almost never receive more than £10 million to £12 million. A little extra might be awarded for special contributions, especially of the domestic or social variety; £15 million was pretty much a ceiling.
- 2.9 Thus the idea that the family wealth should be shared on divorce, no matter which party had earned it – a basic principle of the continental European community of property regimes¹¹ – was unknown in this jurisdiction. That made no practical difference in the majority of cases where in fact there was no prospect of anyone's reasonable requirements being met on a lifelong basis; but in the "big money" cases the inappropriateness of the position became obvious. There is perhaps an air of understatement about Lord Justice Peter Gibson's remark in *Dart v Dart*:

I would have to say that I regard an award of £9m to a good wife in a marriage of 14 years and a good mother to the respondent's children out of the respondent's resources of £400m as on the low side.¹²

The *White v White* decision and its aftermath

- 2.10 The "reasonable requirements" approach was brought to an end by the House of Lords' decision in *White v White*.¹³ Mr and Mrs White were farmers, working together in a business partnership; their two farms were held in Mr White's name. One farm was purchased with the help of £14,000 from Mr White's family and the other farm was acquired by Mr White on advantageous terms as his separated share of a family owned estate. On divorce, Mrs White wanted a half share of the family assets. The court awarded her £800,000 (17% of the total assets) on the basis that her reasonable requirements would be met by a sum of money which would provide her with an income for the remainder of her life, a home and enough land for her horses.

¹⁰ A *Duxbury* calculation produces a lump sum which would, if suitably invested, provide sufficient income to meet the recipient spouse's reasonable requirements for the rest of his or her life: *Duxbury v Duxbury* [1987] 1 FLR 7. For further discussion, see N Lowe and G Douglas, *Bromley's Family Law* (10th Ed, 2007) pp 1038 to 1039.

¹¹ See Part 4 of the 2011 CP.

¹² [1996] EWCA Civ 1343, [1996] 2 FLR 286 at [36].

¹³ [2000] UKHL 54, [2001] 1 AC 596.

2.11 Mrs White appealed, first to the Court of Appeal which increased her award to £1.5 million (32% of the total assets), and then to the House of Lords. And although their Lordships decided that the Court of Appeal's award to Mrs White should stand,¹⁴ the case marked a revolution in financial provision, outlawing the reasonable requirements approach. Lord Nicholls said, "The present case is a good illustration of the unsatisfactory results which can flow from the reasonable requirements approach".¹⁵

2.12 He stressed that:

... there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party.¹⁶

2.13 Their Lordships saw no reason why, when the assets exceeded the financial needs of the parties, the surplus should belong solely to the husband. Lord Nicholls said:

Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion ... a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from if, and only to the extent that, there is good reason for doing so.¹⁷

2.14 Lord Nicholls later said that "the glass ceiling ... was shattered by the decision ... in the *White* case".¹⁸

¹⁴ Misgivings were expressed about the value attributed to the gift from the paternal family and Lord Cooke felt that the award was "probably about the minimum that could have been awarded to Mrs White without exposing the award to further increase on further appeal": [2000] UKHL 54, [2001] 1 AC 596 at [63].

¹⁵ [2000] UKHL 54, [2001] 1 AC 596 at [45].

¹⁶ Above at [24].

¹⁷ Above at [25].

¹⁸ *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [8].

- 2.15 The new principle established in *White v White* marked a sea-change in the courts' approach. The many cases that had been put on hold pending the outcome in *White v White* went ahead on a new basis and later, the Court of Appeal began to refer to the "sharing principle" as one of the bases for its orders.¹⁹
- 2.16 Six years later the House of Lords had the opportunity to revisit its new principle in the conjoined appeals in *Miller v Miller, McFarlane v McFarlane*.²⁰ The two cases involved a combination of factual scenarios that enabled the basis of financial provision to be explored; the outcome was a number of different judgments from the members of the House of Lords that enriched, but did not simplify, our understanding of the courts' discretion. In particular, we were told that "several elements, or strands, are readily discernible",²¹ namely financial needs, compensation, and sharing.
- 2.17 Of those strands, needs and sharing are familiar. The relationship between the two is unclear; the best we can say is that in some cases needs are to be met, and the balance (if any) shared, whereas in the wealthier cases financial needs are more than met by the provision of a half share of the entire wealth of the parties. In some cases, inevitably, a half share in the family wealth happens to match what is needed to provide for the financial needs of one party – but this is coincidental.²²
- 2.18 The most mysterious of the three strands enunciated in *Miller v Miller, McFarlane v McFarlane* is compensation. It seems intended to reflect what one party would have had, or been able to earn, if certain choices had not been made within the marriage. Thus Mrs McFarlane lost out on projected high earnings as a solicitor because she gave up her job in order to look after the children. In our 2011 CP we suggested that compensation in this sense has always been an aspect of financial needs; and indeed in subsequent cases the courts have been wary of making separate orders for compensation because of the risk of "double-counting".²³

The limits of sharing

- 2.19 The sums of money involved in *White v White* were not particularly high compared with some of the very high-net-worth cases seen during the previous decade.²⁴ But for very wealthy individuals the implications of the decision in *White v White*, and of the Court of Appeal decisions that came after it were immediately

¹⁹ *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at para [65].

²⁰ [2006] UKHL 24, [2006] 2 AC 618; see J. Miles, "Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions" (2005) 19(2) *International Journal of Law, Policy and the Family* 242.

²¹ [2006] UKHL 24, [2006] 2 AC 618 at [10].

²² See, for example, *Young v Young* [2013] EWHC 3637 (Fam) at [179].

²³ The 2011 CP, para 2.55; *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [15] by Lord Nicholls; see also *G v G (Financial Remedies: Short Marriage: Trust Assets)*, [2012] EWHC 167 (Fam) at [185], and *CR v CR* [2007] EWHC 3334 (Fam) at [83].

²⁴ *Conran v Conran* [1997] 2 FLR 615; *Dart v Dart* [1996] 2 FLR 286; *A v A (Financial Provision)* [1998] 3 FCR 421.

obvious. The 1990s position had been that there was in all cases a cap on the amount that a wealthy divorcé would have to pay; no matter how extreme the wealth involved, awards did not exceed £15m at most. But the application of the yardstick of equality meant that that had come to an end.

- 2.20 It may be the indignation of some of the wealthy about this change that has led to the references to London, in the press, as “the divorce capital of the world”.²⁵ This is ironic; the courts in this jurisdiction in fact came very late to the principle that has guided divorce settlements throughout continental Europe for decades: that the couple’s wealth should be shared equally. Had Mr and Mrs White been from Sweden, for example, an equal division of their wealth would have taken place as a matter of course and without scope for dispute; had they been French, division would have been nearly equal, with an allowance for the contribution made by Mr White’s father. This is because Sweden and other Scandinavian countries along with the Netherlands, for example, operate a system of total community of property, while France is one of the countries that operate a system of community of acquests, automatically sharing equally property acquired by either spouse during the marriage.
- 2.21 In the 2011 CP we discussed the European community of property systems in some detail, as well as some of the common law systems of equitable distribution.²⁶ The picture overall is that England and Wales has been a latecomer to the party; the sharing principle is uncontroversial, and has been for many years, in so many other jurisdictions.
- 2.22 However, the late development of the sharing principle, and the extraordinary fact that it arose from the exercise of judicial discretion and not from statute,²⁷ had the consequence that it left the wealthy divorcé without any formal, reliable means of fencing off property from the sharing principle. In all countries that operate a regime of community of acquests, for example, it is clear that property acquired before the marriage will not be shared, unless the couple arranges otherwise by contract. In countries that operate a system of total community, pre-acquired or inherited property can readily be excluded from sharing by contract. That exclusion is not subject to challenge and the overseas courts have, for the most part, no discretionary jurisdiction to adjust the sharing arrangement so made.²⁸
- 2.23 The introduction of the sharing principle as a development of discretion meant that there were no formal limits to sharing. That in turn meant that the principle was open to challenge in a number of different ways, all dependent upon the court’s discretion – with a consequent lack of predictability.

²⁵ See, for example, R Dyson, “English courts still top the league for generous divorce payouts”, *The Telegraph*, 16 December 2013.

²⁶ See Part 4 of the 2011 CP.

²⁷ By contrast, see, for example, section 75 of the Family Law Act 1975 in Australia and section 11 of the Property (Relationships) Act 1976 in New Zealand.

²⁸ See, for example, research recently carried out at Withers comparing “maintenance” in sixteen jurisdictions, for which our thanks go to Suzanne Kingston.

The “stellar contribution” as a challenge to sharing

- 2.24 One early challenge was the idea of the “stellar contribution”. How can a spouse’s business profits be shared, runs the argument, when that spouse’s inspiration and business drive were so exceptional that they cannot be said to be matched by the other’s domestic contribution? It is now clear that where the party who generated the couple’s assets has shown exceptional talent and industry, he may take more than half on the basis of that exceptional contribution.²⁹ But the Court of Appeal stressed in *Charman v Charman* that these cases should be unusual and that departure from equality for this reason should generate sharing awards between 45%:55% and 33.3%:66.6%; further departure was disapproved.³⁰
- 2.25 Arguments of stellar contribution now appear to be rare and, more recently, debate has focused on the distinction between matrimonial and non-matrimonial property.³¹

Non-matrimonial property as a limit on sharing

- 2.26 A consistent theme within the case law has been that, provided that financial needs are met, the courts will generally not make orders that require a party to share non-matrimonial property; that is, property that he or she has inherited or been given, or which was acquired before the marriage or the civil partnership. The precise limits of the concept of non-matrimonial property are unclear. Does it include property acquired in one party’s name before marriage but during cohabitation? Can it include the matrimonial home? The answers offered by the courts to these questions are not consistent and, as we explain in Chapter 8, are the subject of considerable disagreement within the legal profession (and no doubt among the general public too).

Marital property agreements: contracting out of sharing

- 2.27 It will be obvious from what has been said above that in countries that operate not a discretionary sharing principle but a rule of community of property, marital property agreements are important. We are not aware of any community of property jurisdiction where it is not possible to contract out of the country’s default community regime and into another – from total community, for example, to a community of acquests,³² or into separation of property. In some countries it is permissible to vary by contract the proportions in which community property will be shared.³³ These contractual arrangements are quite simply choices to move

²⁹ *Cowan v Cowan* [2001] EWCA Civ 679; *Lambert v Lambert* [2002] EWCA Civ 1685; *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam); *H v H (Financial Provision – Special Contribution)* [2002] 2 FLR 1021.

³⁰ *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [90].

³¹ G Howell and J Montgomery (eds), *Butterworths Family Law Service* (Issue 182) para [866.2].

³² See this Report’s Glossary and para 2.20 above.

³³ See the guide produced by Notaires de France, *Choisir son contrat de mariage*, available at <http://www.notaires.fr/notaires/memos-thematiques>, of which a translation can be found at <http://www.reading.ac.uk/nmsruntime/saveasdialog.aspx?IID=7017&slD=34870> (last visited 7 February 2014).

from one regime to another. There is no judicial discretion involved.³⁴

2.28 The sharing principle does not make England and Wales a community of property jurisdiction, if community of property is defined as a system of *rules* for the sharing of matrimonial assets.³⁵ But the authority of the House of Lords in *White v White*,³⁶ and the authority of the Court of Appeal decisions that came afterwards, mean that the sharing principle has taken root; it is hardly surprising that in the wake of this there has been considerable pressure on the courts to make orders that reflect marital property agreements in cases where they have been made.

2.29 Twenty years ago, such cases were almost unheard of, and the courts were very sceptical of the few marital property agreements that they encountered. For example, in *F v F*, in 1995, Lord Justice Thorpe said that a pre-nuptial contract "must be of very limited significance".³⁷ Yet just over three years ago, the Supreme Court said this:

The 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.³⁸

2.30 The decision in *Radmacher v Granatino* demonstrated the increasing willingness of the courts to reflect the terms of a marital property agreement in financial orders. But in another sense nothing has changed; it remains impossible for a marital property agreement to oust the court's jurisdiction to make financial orders. So where one of the parties does not wish to abide by the agreement it is open to him or her to apply to court for financial provision; and the principle set out above indicates that the court will then start from the terms of the agreement.³⁹ Only if it would be unfair to hold the parties to it will the court instead make an order in different terms. It is not known how the courts will assess fairness, nor how far they will depart from the terms of an agreement in order to protect either financial needs or an entitlement to compensation. Case law since *Radmacher v Granatino* was decided has not generated any general

³⁴ Although in some countries – France, the Netherlands and Portugal, for instance – there are restrictions on post-nuptial contracting. See J M Scherpe, "Marital Agreements and Private Autonomy in Comparative Perspective" in J M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (2012) p 488.

³⁵ See, European Union: European Commission, *Commission Green paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition*, COM(2006) 400, p 2; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0400:FIN:EN:PDF> (last visited 7 February 2014). See also J M Scherpe, "Marital Agreements and Private Autonomy in Comparative Perspective" in J M Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (2012) pp 475 and 476.

³⁶ [2000] UKHL 54, [2001] 1 AC 596.

³⁷ *F v F* (*Ancillary Relief: Substantial Assets*) [1995] 2 FLR 45, 66.

³⁸ *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 at [75].

³⁹ See *V v V* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315 where Charles J stated that the effect of *Radmacher v Granatino* was to add a new rationale to be applied in financial relief proceedings: "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" at [36]. Munby P in *S v S* [2014] EWHC 7 (Fam) extends this reasoning to agreements between parties to arbitrate and to arbitral awards.

principles to shed light on those questions.

- 2.31 This is as far as the courts can go in validating marital property agreements. Only statutory reform can make such agreements contractually valid and capable of being enforced as contracts without the possibility of the court being able to override the contract by making an order under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004. In Chapter 5 of this Report we explain that we are recommending such reform, subject to the proviso that enforceable agreements will not be able to oust the court's jurisdiction to make orders to meet financial needs. In effect, the new qualifying nuptial agreements will enable the parties to contract out of sharing (and out of compensation insofar as that concept differs from financial needs), but not out of their responsibilities to provide for each others' financial needs after divorce.

The limits of financial needs

- 2.32 That explanation of qualifying nuptial agreements does of course beg a question as to the extent of responsibility for financial needs. The answer is not entirely clear as there is no definition of "needs" in English law. We have said that the "reasonable requirements" approach was disapproved by the House of Lords in *White v White*,⁴⁰ but the implications of that have not been clearly set out by the higher courts.
- 2.33 In the majority of cases the disapproval of "reasonable requirements" will have made no difference. The extent of the available resources means that for either partner to be maintained by the other at the marital standard of living for life is an unattainable aspiration. It is a matter of making ends meet, and the courts do the best they can. In most cases there is no question of any periodical payments between spouses (although there may be regular payments of child support);⁴¹ if periodical payments are ordered they may be for a limited term. The courts' priority is likely to be to make use of the family's resources in order to provide a home for the children and one of the parents. Anything approaching the reasonable requirements standard, in most cases, is not feasible.
- 2.34 In the very wealthy cases the picture is different. As we noted above, where there is very great wealth the courts tend to assess the financial needs of the applicant, check that they will be met by a half share of the matrimonial property, and then simply make a sharing award.⁴² But we can perhaps get a better sense of the way that needs are assessed when we look at very wealthy cases where sharing is not ordered, particularly after a short marriage where the respondent's wealth was generated before the relationship began, but the wealth available is such

⁴⁰ [2000] UKHL 54, [2001] 1 AC 596.

⁴¹ Just under 15% of all disposals of applications for financial orders in 2011 were for periodical payment claims. See Ministry of Justice, *Judicial and Court Statistics (annual) 2011* (2012) pp 27 and 28 and table 2.6, available at <https://www.gov.uk/government/publications/judicial-and-court-statistics-annual> (last visited 7 February 2014).

⁴² As Sir Mark Potter, P said, "It is also clear that, when the result suggested by the needs principle is an award of property less than the result suggested by the sharing principle, the latter result should in principle prevail..." *Charman v Charman* [2007] EWCA Civ 503 at [73]. For further discussion of the relationship between needs and sharing, see the 2012 SCP at paras 4.96 to 4.104.

that it places no constraints upon what can be ordered to meet needs.⁴³

- 2.35 In those cases we find that needs are still assessed primarily by reference to the marital standard of living. Mr Justice Charles in *G v G* said that “the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties”.⁴⁴ We do find acknowledgement that there is no longer a right to be kept at the marital standard of living for life;⁴⁵ but it is not known what standard is aimed for. The only indication of what is wanted in *Lawrence v Gallagher*, for example, is a reference to the need “for each to live comfortably in their own homes”.⁴⁶
- 2.36 This links to the idea of need being “generously interpreted” which derives from the speech of Baroness Hale in *Miller v Miller, McFarlane v MacFarlane*,⁴⁷ In recent case law concerning high net worth, or “big money” cases, this concept has gained ground, when the court is assessing the applicant’s needs.⁴⁸ However, this is not a term found in statute and, accordingly, judges have criticised the use of the term, as a judicial gloss that can create confusion and which should not be accorded a separate life.⁴⁹
- 2.37 At the other end of the spectrum is the idea, from *Radmacher v Granatino*, of “real need” identified by Lord Phillips (giving the judgment of the majority) who commented that:

⁴³ See *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508; also *Lawrence v Gallagher* [2012] EWCA Civ 394, [2012] 1 FCR 557.

⁴⁴ [2012] EWHC 167 (Fam), [2012] 2 FLR 48 at [136].

⁴⁵ See for example: Lady Hale’s comments about the transition to self-sufficiency in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [158]; Bennett J’s comments in *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 at [168] (“It must have been absolutely plain to the wife after separation that it was wholly unrealistic to expect to go on living at the rate at which she perceived she was living”); and Charles J’s comments in *G v G* [2012] EWHC 167 (Fam), [2012] 2 FLR 48 at [136] (“the objective of achieving a fair result ... is not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage”).

⁴⁶ [2012] EWCA Civ 394, [2012] 1 FCR 557 at [42] by Thorpe LJ.

⁴⁷ [2006] UKHL 24, [2006] 2 AC 618 at [140].

⁴⁸ *Lauder v Lauder* [2007] EWHC 1227, [2007] 2 FLR 802; *VB v JP* [2008] EWHC 112 (Fam), [2008] 1 FLR 742; *McFarlane v McFarlane* [2009] EWHC 891 (Fam), [2009] 2 FLR 1322. See also the discussion in G Howell and J Montgomery (eds) *Butterworths Family Law Service* (Issue 184) para [846].

⁴⁹ *Robson v Robson* [2010] EWCA Civ 1171, [2011] 1 FLR 751; *J v J (Financial orders: wife’s long-term needs)* [2011] EWHC 1010 (Fam), [2011] 2 FLR 1280.

Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two, needs and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result, in the event of the marriage breaking up, in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement.⁵⁰

- 2.38 It may be that the reason why the majority in the Supreme Court in *Radmacher v Granatino* spoke of “real need”, which sounds narrower than “need”, was because, in the same paragraph, they referred to the *compensation* of long-term disadvantage generated by the devotion of one partner to the family and home.⁵¹ The concept of compensation may simply make explicit what has always been regarded as an element of needs, that is, making provision, on divorce, for the long-term financial consequences of the marriage. This is not a new concept but the term “compensation” may be useful because it draws attention to financial consequences of divorce that may not be immediately obvious.
- 2.39 The recognition that an award focused on this type of disadvantage is a form of compensation may help the courts to focus their attention upon the real value of what has been lost. It is arguable that the introduction of compensation as a separate concept therefore simply teases out the complex notion of “needs generously interpreted”, to which the Supreme Court majority in *Radmacher v Granatino* referred.⁵² We note that this was not the view of Baroness Hale in *Miller v Miller*, *McFarlane v McFarlane* who took the view that compensation for relationship-generated disadvantage “goes beyond need, however generously interpreted”.⁵³
- 2.40 But this, at least, appears to be the way that the courts have subsequently applied the concept, as the introduction of compensation as a distinct concept has made no difference in the level or the nature of the awards made. However, the effect of doing so may be to express the idea of “need” more narrowly, as “real need”, because its long-term aspect is now considered under this different head. That said, the concept of “real need”, as expressed in *Radmacher v Granatino* does not appear to have been taken up in subsequent case law.⁵⁴
- 2.41 Does the uncertainty regarding the extent of responsibility for meeting “needs” matter? Arguably not. The “big money cases” are a minority, and those involved are unlikely to suffer real hardship, despite the energies and costs expended upon battles over budgets and the level of needs.⁵⁵ And for the rest of the

⁵⁰ [2010] UKSC 42, [2011] 1 AC 534 at [81].

⁵¹ Above. The majority in *Radmacher v Granatino* took the view that there was no question of compensating Mr Granatino for the economic effects of his career change, on the basis that his was an individual choice, not a family decision; see [121], but see also the comments of Lady Hale at [194].

⁵² [2010] UKSC 42, [2011] 1 AC 534 at [28].

⁵³ [2006] UKHL 24, [2006] 2 AC 618 at [140].

⁵⁴ See para 2.30 above.

⁵⁵ See 29 Bedford Row’s consultation response, quoted in Chapter 5 at para 5.51.

couples, the vast majority, it can be said that it is simply a matter of finding a practicable solution. The family law professionals with whom we have spoken are generally confident about advising on financial needs, but at the same time highly aware of the fact-sensitive nature of the law and of the value of judicial discretion. Because of that, they are generally resistant to the introduction of any legal definition of financial needs.

- 2.42 Moreover, while the statute does not prescribe any objective for the making of financial orders,⁵⁶ in practice the outcomes tend eventually, not towards life-long support, but towards independence. We say that on the basis that in most cases it seems that the major form of spousal support ordered or negotiated at the point of divorce or dissolution – if any – will be a transfer of some or all of one party's interest in the family home to the other. Only a small proportion of divorces and dissolutions result in any award of periodical payments; this has been clear for some years,⁵⁷ and is confirmed by the latest judicial statistics.⁵⁸ Of those, not all will be joint lives orders; even assuming half are joint lives orders, that is a very low proportion indeed. Some of the cases where no periodical payments are ordered will, instead, have involved capitalised maintenance – but, necessarily, very few. Child support may be paid in many cases; but not, of course, indefinitely. Accordingly, people move on. Sooner or later, and in some cases only after children have grown up and left home, people become self-supporting; the available economic evidence supports that conclusion.⁵⁹
- 2.43 Accordingly, with confident practitioners and a generally sensible outcome, it can be argued that the law is good enough.
- 2.44 However, we think that there are two problems which, together, justify intervention – although, as we explain in Chapter 3, the change we advocate is non-statutory and does not seek to change the law. One problem is geographical inconsistency; the other is a lack of transparency.

Geographical inconsistency

- 2.45 First, there is evidence of significant regional differences in the levels of support likely to be awarded in different courts. This is not so much about amounts as about duration.

⁵⁶ See paras 2.4 and 2.5 above.

⁵⁷ C Barton and A Bissett-Johnson, "The Declining Number of Ancillary Financial Relief Orders" (2000) 30(Feb) *Family Law* 94.

⁵⁸ Just under 1% of all disposals of applications for financial orders in 2011 were contested periodical payment claims; just over 3% of all disposals of applications for financial orders were for initially contested but subsequently claims settled by consent for periodical payments; and around 11% of all disposals of applications for financial orders were uncontested periodical payment claims. See Ministry of Justice, *Judicial and Court Statistics (annual) 2011* (2012) pp 27 and 28 and table 2.6, available at <https://www.gov.uk/government/publications/judicial-and-court-statistics-annual> (last visited 7 February 2014).

⁵⁹ H Fisher and H Low, "Who wins, who loses and who recovers from divorce?" in J Miles and R Probert (eds) *Sharing Lives, Dividing Assets* (2009) at 227. The writers note that the income loss faced by women after divorce returns to average pre-divorce rates after about nine years; some of that recovery is of course due to repartnering (at which point any liability of the former spouse to make periodical payments ceases).

- 2.46 When family law practitioners are asked for how long needs have to be met, there is inevitable uncertainty. In the “big money” cases, where we should be able to see more clearly what is happening in relation to needs, there is an acceptance that the obligation to provide financial support diminishes over time,⁶⁰ but support is still capitalised on a *Duxbury* basis and so on the basis of the payee’s expected lifespan. In the majority of cases, as we discussed above, periodical payments are not awarded. Where they are, they may be designed to last for the duration of the children’s minority (at least by way of housing),⁶¹ but there is no clear view as to how long after that they should continue.⁶² There is a view that no term will be imposed unless it is clear that the claimant will be able to be self-supporting within a relatively short time.⁶³ There is authority to the effect that there should generally be no term⁶⁴ while the children are still dependent,⁶⁵ but there is anecdotal evidence that that principle is not always observed, and that there are significant regional differences in the extent to which long-term support is awarded.
- 2.47 Some of this uncertainty is inevitable because of the fact-specific nature of the cases. To some extent, however, it does give rise to concern – and particularly so, we think, if the inconsistency is geographical. A 2003 Law Society publication entitled “Financial Provision on Divorce: Clarity and Fairness” noted that regional differences made it important “to know one’s district judge” and this trend is one that has continued.⁶⁶
- 2.48 An article in 2009 quoted a practitioner who said:

I think in [county court A] they are keen to limit joint lives maintenance whereas in [county court B] they’re not. That actually became clear when we had a Resolution seminar and the people who were presenting it were from [area B] and everyone in the room from [area A] – we were doing scenarios similar to your ones – and everyone in the room said, five years of maintenance with a bar, and the

⁶⁰ See for example *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 at [314] to [321] by Bennett J; *G v G* [2012] EWHC 167 (Fam), [2012] 2 FLR 48 at [179] to [187] by Charles J.

⁶¹ Either being made as a term order, or on a joint lives basis but with the expectation that the payer will apply at a later stage for them to cease.

⁶² See the consideration of duration in the closing pages of the judgment in *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 at [312] to [327] by Bennett J.

⁶³ C Bradley and E Moore, “The Maintenance Conflict: Crystal Ball Gazing Versus a Meal Ticket for Life” (2011) 41(Jul) *Family Law* 733.

⁶⁴ Or, if there is a term, that there should be no section 28(1A) direction. A direction pursuant to section 28(1A) of the Matrimonial Causes Act 1973 (Sch 5, para 23 of the Civil Partnerships Act 2004) prevents a term attached to an order for periodical payments from being extended in the future. In the absence of such a direction, a payee could apply for the term to be extended, provided that application is made before it expires. However, following the Court of Appeal case of *Fleming v Fleming* [2003] EWCA Civ 1841, [2004] 1 FLR 667, the extension of a term order for maintenance must be justified by exceptional circumstances.

⁶⁵ *Suter v Suter and Jones* [1987] Fam 111, [1987] 2 FLR 232.

⁶⁶ The Law Society, *Financial Provision on Divorce: Clarity and Fairness* (2003) p 9.

presenter said: are you serious? No way! It became clear that there was a huge difference of approach.⁶⁷

2.49 If that is true, we do not know whether the geographical inconsistency arises from geographical variations in the employment market and other factors which might provide an objective justification for the difference, or whether it is an ideological difference which cannot be so justified. Even if there are regional differences in income and employment patterns, differences in judicial practice are problematic if they give rise, not to fact-sensitive decision-making, but to forum shopping (that is, practitioners choosing particular courts in order to get the result their clients want).

2.50 In 2010, the Law Reform Committee of the General Council of the Bar said to us:

There exists an almost "policy based" approach by courts as to whether they provide for joint lives, or term orders. For example, the Principal Registry of the Family Division and High Court tend to make joint lives orders, other major court centres do not. The impact is that clients and solicitors openly forum shop and an element of geographical lottery is introduced to these orders.⁶⁸

2.51 In 2011, an article was published in the Family Law journal where the authors noted:

As practitioners we have experienced cases with similar facts where the maintenance order made in courts outside London differs to that in central London in terms of whether a joint lives or term maintenance order is made and the level of maintenance. From speaking to other practitioners around the country it seems that they have had similar experiences.⁶⁹

2.52 One of the questions asked in the Resolution survey, conducted specifically to support this project,⁷⁰ was whether practitioners had ever issued proceedings in a particular court, or area of the country, because of a belief that the outcome to their client would be more favourable than issuing elsewhere. The majority of the 234 practitioners who responded (57%) indicated that they had issued proceedings in a particular location or court because they thought that would yield a more favourable outcome for their client.⁷¹

⁶⁷ E Hinchings, "Chaos or Consistency? Ancillary Relief in the 'Everyday Case'" in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (2009) at page 185.

⁶⁸ In response to our consultation on the contents of the 11th Programme of Law Reform, advocating a project on joint lives orders.

⁶⁹ C Bradley and E Moore "The Maintenance Conflict: Crystal ball gazing versus a meal ticket for life" [2011] 41(Jul) *Family Law* 733.

⁷⁰ Available at http://lawcommission.justice.gov.uk/consultations/matrimonial_property.htm.

⁷¹ A survey reported in the media, but not otherwise published, by Pannone, tends to the same conclusion. Reported by F Gibb, "Wives Seeking Divorce Get Better Settlements in the City", *The Times*, 30 April 2013 and M Chorley, "Why An Ex in the City Gets a Better Divorce Settlement than Wives in the Provinces", *The Mail Online*, 30 April 2013.

- 2.53 There is sufficient evidence of regional inconsistency, and of its being used strategically by legal advisers, for us to regard it as problematic.

Lack of transparency

- 2.54 Second, there is a lack of transparency. Certainly, family lawyers are familiar both with the law and with the practice of their local courts, and they can advise on the likely outcome of litigation and so enable their clients to settle.⁷² But most people cannot afford lawyers. Many who previously had access to legal advice are no longer entitled to legal aid. They are able to access the courts, of course; but the process is more difficult without lawyers (for both the parties and the judiciary)⁷³ and there is great concern that the court system will not be able to cope.⁷⁴ In any event, at present most divorces are not accompanied by litigation about financial orders,⁷⁵ and the court system does not have the capacity to accommodate the adjudication of a greater proportion of disputes; so it is no answer to the problem of the withdrawal of legal aid to say that the parties always have access to judicial discretion. This is not a reality.
- 2.55 Accordingly, a couple seeking to negotiate a financial settlement on divorce, without the means to afford lawyers and without the inclination to go through the court process, may have great difficulty in discerning what their legal rights and responsibilities are. They may be under the impression that the law requires them to share everything on a 50:50 basis. They may be under the impression that the wife is entitled to lifelong support, or to no support – and that confusion may be exacerbated by the first issue set out above: the fact that there appear to be significant differences in the levels of support awarded by courts in different parts of the country.

⁷² See E Hitchings, J Miles and H Woodward, “Assembling the jigsaw puzzle: understanding financial settlement on divorce – key findings” (2014, forthcoming), and S Beinhart, J Eekelaar and M Maclean, *Family Lawyers: The Divorce Work of Solicitors* (2000) pp 185 to 187.

⁷³ One consultee, who sits as a Recorder, told us of the problems faced by the judiciary at FDR hearings where both parties are unrepresented, reporting that one recent case “just turned into a directions hearing where I tried to isolate the issues that needed to be heard and told them what the court could and could not do... . It had a time estimate of a day rather than the 1/2 day it would otherwise have taken”.

⁷⁴ See, for example, K Holt, “Territory skirmishes with DIY advocacy: a Dickensian misadventure” (2013) 43(Sep) *Family Law* 1150 and H Genn, “Do it yourself justice: access to justice and the challenge of self-representation” (2013) 32(4) *Civil Justice Quarterly* 411. See also the recommendations made by the *Judicial Working Group on Litigants in Person: Report* (2013) to deal with an increase in litigants in person, available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf (last visited 7 February 2014).

⁷⁵ In 2012, 125,116 petitions for divorce, nullity or judicial separation were filed and 47,986 applications for one or more ancillary relief orders were made, meaning that approximately 38% of divorces are accompanied by litigation about financial orders. See Ministry of Justice, *Court Statistics (quarterly) Main Tables* (2013) table 2.1, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264142/cs-q2-2013-main-tables.xls (last visited 7 February 2014).

OUR CONSULTATION AND CONCLUSIONS

- 2.56 The law relating to financial orders is inherently unclear. It is not possible to discern from the statute what the law requires, although the courts and family lawyers administer the law with confidence. In our Supplementary Consultation Paper we asked questions designed to elicit the views of consultees as to whether this was an acceptable situation and whether the law should be changed so as to include, in statute, an explicit statement of the objective to be achieved in meeting financial needs.
- 2.57 As will be seen in Chapter 3 we have concluded that statutory amendment is not appropriate. But we have recommended the production and publication, by the Family Justice Council, of non-statutory guidance. It will be addressed both to lawyers and, in a different format, to the public, with the aim of minimising regional inconsistencies and addressing the problem of lack of transparency. We say more in Chapter 3 about the level of guidance that we think would be achievable and useful.
- 2.58 That guidance cannot introduce an objective in the law. Reverting to the metaphor at paragraph 2.5 above, it cannot tell the bus driver where he is supposed to go. However, we are recommending that the Family Justice Council in its guidance take on board and emphasise the fact that in the majority of cases, the outcome of the financial settlement made on divorce is independence. That independence is attained sooner or later, and whether it is sooner or later depends on factors inherent in the marriage – its length, the presence or absence of children, decisions made within the marriage, the marital lifestyle and so on. That outcome is consistent with the availability of no-fault divorce in a way that the reasonable requirements approach was not.
- 2.59 If guidance is prepared on that basis, acknowledging the general run of outcomes and the appropriateness of independence as an eventual outcome where possible, the courts and the public will know – at the risk of over-working that metaphor – where the bus usually goes. We say that this is where it ought to go. We are not changing the law, but we are encouraging what we see as best practice and as the most appropriate outcome. What we hope will result from that is not only more consistent practice in courts across the country, but also better access to law – and therefore fairer and more appropriate settlements – for those who do not have the assistance of lawyers.

CHAPTER 3

FINANCIAL NEEDS

INTRODUCTION

- 3.1 The law relating to the financial needs is relevant to every divorce and dissolution. In most, although not all, cases some provision has to be made for financial needs, and in the vast majority of divorces and dissolutions it is the only financial issue. This is because the couple's pooled resources are insufficient to do anything other than go some way towards meeting the needs of the children if any and then of the parties themselves.
- 3.2 In Chapter 2 we explained the current law and practice relating to financial needs. It is, of course, possible to view this as a mature discretionary jurisdiction, well-developed by a trusted judiciary, offering high-quality individualised justice and needing no change. Indeed, a number of our consultees took that view.
- 3.3 Nevertheless, there is ample evidence that change of some kind is needed, because of the practical problems discussed in Chapter 2: the lack of transparency in the law and the fact that practice is not wholly consistent.
- 3.4 Whilst a family lawyer would be able, in any given case, to predict within a range what sort of outcome the court might order, the lawyer can do so only because of his or her expertise, along with knowledge of the case law, and also of local practices.¹ A member of the public reading section 25 of the Matrimonial Causes Act 1973, and without any other guidance, can have no sense of what the outcome would be within the range of possibilities that is opened up by the menu of available orders. As a result, individuals trying to sort out their financial situation on divorce without lawyers do not know what they are supposed to achieve. There are myths about 50:50 division, and probably also uncertainty about duration of periodical payments for a spouse. As the Family Law team at Irwin Mitchell Solicitors put it in their article following the publication of the 2012 SCP, "To say that the uncertainty is concerning is an understatement."² The withdrawal of legal aid means that more couples will experience these difficulties.³
- 3.5 Secondly, so far as financial needs are concerned, we explained in Chapter 2 that one difficulty lies in the fact that practice is not wholly consistent. There is evidence of significant differences in the way the law is applied, both between individual judges and between different areas of the country. In so far as this

¹ Chapter 2, paras 2.45 to 2.53.

² E Marshall, K Henderson, A Hawes and J Nicholson, "The law relating to needs and spousal maintenance: one firm's view" (2013) 43(Mar) *Family Law* 323.

³ See K Holt, "Territory skirmishes with DIY advocacy: a Dickensian misadventure" (2013) 43(Sep) *Family Law* 1150 and H Genn, "Do it yourself justice: access to justice and the challenge of self-representation" (2013) 32(4) *Civil Justice Quarterly* 411. See also the recommendations made by the *Judicial Working Group on Litigants in Person: Report* (2013) to deal with an increase in litigants in person, available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf (last visited 7 February 2014).

produces real inconsistency rather than fact-sensitivity, it is a cause for concern, particularly if it gives rise to “forum shopping”.⁴

- 3.6 Both those difficulties can be said to have their roots in the fact that the statute does not state the objective to be achieved in making financial orders.⁵ The courts have developed objectives, which can be discerned by those familiar with the case law;⁶ yet the presence of multiple objectives in the case law means that the courts have an extraordinarily wide discretion. Hence the lack of transparency in the law, as well as the potential for judicial inconsistency. The scale of the second problem is rather smaller than the first, because only a small fraction of cases are heard by a judge;⁷ but a consistent approach to the exercise of discretion is important not only for the few for whom it is available, but also for the many who bargain in the shadow of the law. For that majority, a consistent approach in the courts gives a message about what they should try to achieve in making their own arrangements.
- 3.7 In the 2012 SCP we asked a number of consultation questions about ways to reform the law so as to resolve these problems. In this Chapter we explain, first, our consultation questions and set out consultees’ views. We then explain the conclusions we reached about reform, namely that the best way forward will be non-statutory guidance to be issued by the Family Justice Council and addressed both to lawyers and to members of the public. We add some notes about the content of that guidance. Finally, we explain our other, more long-term recommendation, which is that work should be done with a view to the development of guidelines that would involve figures, rather than only words, and so would give more practical assistance both to practitioners and to individuals.
- 3.8 Care is needed with terminology in this context. “Needs” is a term used in England and Wales; some other jurisdictions use the term “maintenance”, US writers tend to speak of “alimony”, Canadians of “spousal support”, but both tend to refer only to payments made on a periodical basis. They refer to income and not to capital. In contrast, we use the term “needs” to refer to how the law of England and Wales understands spousal support, encompassing a wide range of provision: income and capital, present and future. “Needs” includes payments made with a view to providing income, whether made on a regular basis or capitalised, but it also includes the provision of a home, including privately owned housing where that is appropriate, and provision for old age. It is therefore significantly wider than the continental concept of “maintenance”. In the 2012 SCP we used the term “spousal support” but here we use both terms, according to context, so that “needs” and “spousal support” are synonyms. Thus we can ask “what level of needs should be met?” or “what level of spousal support should be paid?”; the two questions are the same.

⁴ Chapter 2, para 2.52.

⁵ Chapter 2, paras 2.4 and 2.5.

⁶ Chapter 2, paras 2.10 to 2.18.

⁷ Chapter 1, footnote 11.

CONSULTATION ON NEEDS IN THE 2012 SUPPLEMENTARY CONSULTATION PAPER

Principled reform (Part 4 of the 2012 SCP): the options explained

- 3.9 In Part 4 of the 2012 SCP we discussed the options for a principled reform of the law relating to needs, with a view to resolving the two practical problems identified at the start of this Chapter.⁸ We expressed the view that the current law with its mixture of principles and objectives derived from case law is not satisfactory and that there should be a single objective, so that the courts and – even more importantly – the parties know what is to be achieved by an award designed to meet financial needs.
- 3.10 In the light of both the academic literature and the evidence from other jurisdictions, we took the view that there are two potential objectives pursued in making financial awards to meet needs. One is compensation: an award that makes up for the losses suffered by a spouse as a result of the marriage and/or of the choices made during the marriage. The other possibility is that needs are met in order to enable the parties to make the transition out of the financial “merger over time” that inevitably takes place during a marriage or civil partnership of almost any length. We discussed these as two possible – but mutually exclusive – objectives for the financial arrangements made on divorce or dissolution.⁹ We also considered the introduction of restrictions on payments, whichever objective was adopted, in order to hasten or enforce the attainment of independence. We asked consultees for their views about the two alternative objectives (both of which we explain in more detail below), and about the possibility of enforcing independence. We did not consult about the “reasonable requirements” approach, according to which a divorced spouse is entitled to support at the marital standard of living for life. The justification for this disappeared when divorce law was reformed in 1969 and it is not a viable option for reform.¹⁰
- 3.11 We now say more about the alternatives on which we consulted, before setting out consultees’ responses.

Principles justifying the meeting of needs: (1) compensation

- 3.12 Marriage and civil partnership involve financial choices, and very often they also involve a division of labour. The choices that the partners make may have a short- or long-term effect on one or other party’s ability to earn and to be self-supporting; the obvious example is the loss of a career when a spouse gives up work, or moves into part-time employment, in order to look after children. Other examples include the spouse who loses the chance of promotion or of a better job by relocating for the sake of his or her partner’s career or lifestyle preferences.

⁸ We also explored the reasons why financial needs should be met at all. Marriage and civil partnership inevitably involve some level of practical and financial interdependence, and the ending of the relationship generally leaves responsibilities that have to be met which may impact on people unevenly. Very few consultees argued that there should be no liability for spousal support at all.

⁹ See Part 4 of the 2012 SCP.

¹⁰ Chapter 2, para 2.5.

- 3.13 Making provision for needs can be seen as compensation for this sort of loss, requiring the spouse who comes out of the marriage in a stronger financial position to account to the other for what he or she has lost.
- 3.14 This is, on the face of it, a logical basis for support. It has a long academic pedigree, enunciated by Ira Ellman in his article "The Theory of Alimony".¹¹ He made an economic analysis of the traditional housewife marriage, in which the wife invests early in the marriage and suffers serious losses in her earning capacity in return for the promise of lifelong support. The husband in this sort of arrangement postpones his investment until later; he carries on earning and has housework and childcare done for him, but makes a pay-back later by supporting his wife in their old age. Accordingly, Ellman reasoned, when a marriage breaks down it is likely that all the losses will have been incurred by one party while the other has as yet lost nothing. If only to avoid a perverse incentive for men to divorce their wives, these losses should be compensated.
- 3.15 This is no longer a universal model for marriage, and it is unlikely to be typical of many civil partnerships, although it is by no means irrelevant to contemporary life. However, it suffers from some drawbacks as a basis for spousal support.
- 3.16 For one thing, it entails, logically, that a spouse who is the financially weaker party but who lost nothing by marrying or as a result of his or her contributions to married life gets nothing by way of spousal support. The woman with a low-paid job who married a rich man and stopped work for a while (without having children) can go back to that job. We believe that many people are very uncomfortable with this outcome in the context of marriage and civil partnership. Divorce and dissolution are not, we found, generally seen as a clean break from responsibility or as an opportunity to send either party straight back to the position they were in immediately prior to marriage.
- 3.17 A further difficulty with the compensatory approach is evidential. It involves proving what would have happened had the financially weaker party not given up work, and that involves imponderable questions. Would the person have risen to the height of his or her profession, or would he or she have given up work anyway after marrying someone else?
- 3.18 We are not aware of any jurisdiction, where the needs of parties on divorce are met on a discretionary basis, that uses a pure compensatory approach in this sense.¹² Indeed, when Ira Ellman came to devise "spousal support" guidelines as a law reform proposal for the USA, as Chief Reporter for the American Law

¹¹ (1989) 77(1) *California Law Review* 1. See also, L Cohen, "Marriage, Divorce and Quasi Rents; or, 'I Gave Him the Best Years of My Life'" (1987) 16 *Journal of Legal Studies* 267 and E M Landes, "Economics of Alimony" (1978) 7 *The Journal of Legal Studies* 35.

¹² However, financial relief for cohabitants in Scotland is based on a principle of compensation: see Scottish Executive, *Family Matters: Living Together In Scotland* (2006) at page 5, available online at <http://www.scotland.gov.uk/Resource/Doc/113318/0027450.pdf> (last visited 7 February 2014), and section 28 of the Family Law (Scotland) Act 2006, which refers to "derived economic advantage" and "suffered economic disadvantage".

Institute,¹³ he turned to a different model that avoids both the difficult practical outcomes that a compensatory model can cause and the evidential difficulties.

Principles justifying the meeting of needs: (2) the “merger over time”

- 3.19 A different principled basis for providing for needs derives from the theory known as the “merger over time” and endeavours to unravel that merger by generating transitional – albeit often long-term (and, in certain cases, life-long) – provision for needs. This method does not require evidence of what might have happened or of careers and opportunities given up.
- 3.20 Most versions of the “merger over time” theory, which has a considerable foundation in academic writing,¹⁴ involve some degree of income-sharing for a period following divorce. Both the extent of sharing and its duration are proportionate to the length of the marriage. They also depend upon the length of time for which shared responsibilities (particularly for children) are going to continue despite the divorce, because that makes a difference to individuals’ ability to make a transition from the economic merger involved in most marriages and civil partnerships to independence. The merger over time theory accepts that in some cases, because of age or the length of the marriage or both, “de-merger” is not possible and needs have to be met indefinitely.
- 3.21 The merger over time theory justifies a particular approach to needs. It explains why support is paid and it explains what the end result is supposed to be: a de-merger of the merged financial lives. The theory by itself does not tell us how long it is supposed to take to de-merge, and therefore to adapt it to real life requires some decisions that turn on particular policy preferences. Is there to be a swift transition or a long and gradual one? Even if we say that the transitional period is proportionate to the length of the marriage, does that mean that it should be equal to that length, half that length, twice that length or some other proportion?
- 3.22 English law may be viewed as already embodying the merger over time theory. We observed in Chapter 2 that most divorces end in financial independence, sooner or later.¹⁵ In other words, deliberately or otherwise, the courts are enabling the parties to make the transition to independence, but in a way that is characteristic of this jurisdiction: ensuring, generally, that the transition is not too

¹³ The American Law Institute describes itself as “the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law”. It consists of 4,000 lawyers, judges, and law professors; it “drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law”. See <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited 7 February 2014).

¹⁴ See, for example, S Sugarman, “Dividing Financial Interests on Divorce” in S Sugarman and H Kay (eds), *Divorce Reform at the Crossroads* (1990) pp 159 to 160 and 162 and J W Ellis, “Surveying the Terrain: A Review Essay of Divorce Reform at the Crossroads” (1992) 44 *Stanford Law Review* 471, 495.

¹⁵ Chapter 2, para 2.42.

sudden, does not happen while there are very young children, and may not happen at all if the parties are near to retirement age.¹⁶

Using rules on provision for needs as a way of enforcing independence

- 3.23 Some jurisdictions take a much stricter view, placing what appear to be arbitrary limits on the duration of periodical payments in order to force the financially weaker party to become independent at an early stage – a prominent and geographically proximate example being Scotland, where support is given for a limited period.¹⁷ The court must not make any order for periodical spousal maintenance at all if the principles of the division of matrimonial property can be satisfied by a capital payment, property transfer or pension share. This helps to ensure a clean break and discourages future litigation in respect of variation. However, we expressed some scepticism about such systems in the 2012 SCP because we felt that they left the less well-off at a disadvantage.¹⁸

Our consultation questions on principled reform

- 3.24 In the light of that discussion, the 2012 SCP asked questions about principled reform. We wanted to make the issues accessible to as wide a readership as possible, so we asked a set of abstract questions and then “translated” them into a set of scenario-based questions to illustrate and elicit views about the issues raised. We asked:

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?

Should spousal support:

(1) be restricted to the compensation of loss caused by the relationship; or

¹⁶ Although there are widely differing views as to the age at which it becomes unreasonable to expect someone to return to employment.

¹⁷ Spousal support in Scotland is available only in very restricted circumstances. Principle 9(1)(d) of the Divorce (Scotland) Act 1985 directs that “a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce”. More open-ended provision is possible under Principle 9(1)(e) in cases of serious financial hardship. In practice, however, the courts have interpreted this Principle very narrowly. The concept of “joint lives” orders “is almost unheard of north of the border”: P Cunliff, “Notable differences” [2011] *Family Law Journal* 14, 17. We are grateful to Professor Fran Wasoff and John Fotheringham for their assistance with these areas of Scottish law.

¹⁸ This is very different from the approach taken in Sweden, where spousal support is of very limited duration because it is regarded as the responsibility of the state and is funded through taxation. Dr Jens M Scherpe (in “A Comparative Overview of the Treatment of Non-Matrimonial Assets, Indexation and Value Increases” (2013) 25(1) *Child and Family Law Quarterly* 61, 65) explained that “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”. And see further M Jänterä-Jareborg, “Marital Agreements and Private Autonomy in Sweden” in J M Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2012) pp 377 to 378.

(2) seek to unravel the “merger over time” by redressing the disparity in lifestyle caused by the divorce or dissolution?

In answering the question ... 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.

3.25 We also asked if consultees felt that the law should place more emphasis on 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?¹⁹

3.26 We have set out our scenario questions in an Appendix to this Report. Although the scenarios and the accompanying questions were set out in the main body of the 2012 SCP, few consultees discussed them; those who did discuss the issues raised mainly restricted themselves to the familiar example of a housewife and a high earning husband.

CONSULTEES’ RESPONSES TO OUR QUESTIONS ON PRINCIPLED REFORM

Compensation or the merger over time?

3.27 Consultees were not in favour of introducing compensation as a single principle. Valentine Le Grice QC spoke for the majority when he said:

Compensation is a useless concept in assessing spousal support. [If] 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.

3.28 The Association of Her Majesty’s District Judges agreed that compensation had not been further developed in the law for good reason. They commented:

¹⁹ The 2012 SCP, paras 4.113 to 4.115, 4.117, 7.2 to 7.4 and 7.6.

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.

3.29 There was real concern that the concept of compensation would create confusion. Mary Welstead agreed that “compensation relies too much on discretion and I think the time has come for some ‘bright line’ rules rather than judicial discretion”.

3.30 The majority response on behalf of the Judges of the Family Division was similarly concerned about the practical pressures which would be placed on the legal system by compensation, saying:

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.

3.31 Those few consultees who expressed limited support for the concept of compensation did so generally in relation to fact-specific scenarios. For example, Manches LLP generally thought “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”. They nevertheless saw a potential role for compensation in relation to short, childless marriages where they thought that “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”. The family law team at Charles Russell LLP agreed that a short marriage was the “only circumstance in which compensation of loss was relevant and achievable”.

3.32 Joanna Miles thought that there was a role for compensation, but as a complementary concept within a formulaic calculation rather than “an ‘all or nothing’ determining factor”. She said:

... 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.

3.33 Joanna Miles felt that this accorded with the treatment of compensation under the current law, commenting 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)*)”.

- 3.34 In contrast, merger over time found significant support from consultees. Resolution highlighted many of the benefits of the principle in their response, noting:

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.

- 3.35 The Law Society expressed similar support for the concept of merger over time noting that it 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.

- 3.36 Consultees were critical of the artificial analysis of marital decisions required by a compensation approach. A number, like Resolution, saw merger over time as reflecting the realities of married life and separation. Dr Emma Hitchings described merger over time as “a principle grounded in the lived reality of the individuals as they leave their relationship”. As Julia Thackray said, “people expect their marriage 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”. Professor Anne Barlow echoed these sentiments, saying:

[Merger over time] 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.

- 3.37 Irwin Mitchell Solicitors told us that they preferred merger over time to compensation but noted that “the major flaw of the ‘merger over time’ approach is, however, that it does not tell us ‘what has to be paid by way of spousal support and for how long’ It is not clear, for example, why ‘the length of the marriage’ is proposed as the logical duration of support”.²⁰ They felt, therefore, that it was “necessary to have recourse to other principles to answer these questions”.

- 3.38 Although merger over time had considerable support, a number of influential consultees declined to make a choice between the two concepts. The

²⁰ We did not propose that the duration of support should be equal to the length of the marriage, although we did argue that the duration of the marriage is highly relevant to the duration of support.

Association of Her Majesty's District Judges thought that it would be inappropriate to prefer one approach over the other, and that they "both have their superficially logical attractions". Mr Justice Charles was more critical, saying that "both concepts introduce conceptual problems" and preferred "an approach based on relationship generated need to effect a fair transition to independent living". The Family Law Society²¹ felt that they were being "unnecessarily constrained in choices" and the majority response from the Judges of the Family Division noted that they did "not consider that either of these proposals would improve the current law".

- 3.39 A significant minority of consultees thought that merger over time was preferable to compensation, but that it was insufficient as a stand-alone concept. For example, the Family Law Bar Association felt that there was "more merit" in merger over time but that it was "not perfect, and it does not provide a complete answer to case study 3 [the civil partner who sustained a severe disability in an accident]". They considered that there "may be a number of factors which can properly justify ongoing spousal support. These are but two examples ... we prefer an approach which articulates a number of reasons which may justify ongoing support rather than the identification of just one".

Other factors relevant to the assessment of needs

- 3.40 In evaluating the compensation and merger over time models, consultees were also asked to consider the relevance of certain factors including length of marriage and standard of living, and ongoing joint responsibilities. Broadly speaking, there was support for the relevance of all suggested factors, although consultees disagreed about their relative importance.
- 3.41 It was generally accepted that length of marriage and ongoing contributions to the marriage were relevant in assessing need. The Law Society told us that "it seems unfair to force one party to support another for the rest of his or her 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". Irwin Mitchell Solicitors reiterated this point, noting that "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".
- 3.42 The most contentious factor was standard of living. Many consultees thought that this was significant. For example Irwin Mitchell Solicitors said, "Where spouses have dependent children, the spouses' respective standards of living are relevant and should be comparable". Dr Robert George agreed, saying he did 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 need according to their circumstance". The Association of Her Majesty's District Judges thought that length of the marriage as a factor was "less significant than the standard of living".

²¹ The Family Law Society describes itself as "a gender-neutral organisation, founded in 2004 to help families experiencing the pain of parental separation": see http://c0371814.myzen.co.uk/wordpress/?page_id=10 (last visited 7 February 2014).

- 3.43 Joanna Miles disagreed, saying that “the marital standard of living was too slippery a concept” and that “some degree of sharing of income disparity post-divorce ... seems a better way forward”. Baroness Ruth Deech QC told us “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”. Tony Roe Solicitors pointed out that considering standard of living was not very relevant in “most lower and middle money cases [as] 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”.

Housing

- 3.44 Consultees also thought that occupation of the former matrimonial home was an important factor, although they construed the question more broadly to consider provision for accommodation generally. The Law Society said “suitable accommodation is emotionally and financially crucial to the well-being of both parties”. There was particular concern about the importance of accommodation to a spouse with ongoing care of children.
- 3.45 Joanna Miles advocated a different approach for spouses with care of children saying:

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.

Enforcing independence

- 3.46 We asked a further question: whether consultees would support an approach to needs which had a defined objective (whether compensation or the transition out of the merger over time), but which “embodied incentives towards independence by placing limits on the extent of the support that might be given”.²²
- 3.47 Consultees were generally supportive of the proposal that needs should embody incentives towards independence, or, as one member of the public put it, “not encourage people to create dependency”. Indeed, many consultees told us that the law already encourages independence (for example, the majority of the Family Division judges).
- 3.48 However, not all consultees were reassured by the current law. The Family Law Bar Association told us 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 independence would be of assistance”.

²² The 2012 SCP, paras 4.117 and 7.6.

- 3.49 We were warned – and we are well aware – that there are cases where clean breaks are unachievable. The majority response from the Judges of the Family Division told us that “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 impossible”.
- 3.50 Some consultees took issue with the use of the words “embody incentives” towards independence. Rhys Taylor, for example, felt that this evoked the kind of debates about the use of the word “incentives” in the welfare context, which was inappropriate in the context of a marriage. He felt it would be wrong “to adopt an approach to spousal support which would ‘embody incentives’ to force independence more quickly than might otherwise be reasonably achieved”, preferring realistic statutory assumptions about what could be achieved.
- 3.51 Of those consultees who advocated a more prescriptive approach, some wanted a stated limit on years of support; others suggested a limit on the proportion of the payer’s income to be paid. The Chancery Bar Association thought that it might be appropriate to consider “a tapered level of support e.g. 40% of paying parties’ net income in first 3-5 years and thereafter falling to 20%”.
- 3.52 Others took a less prescriptive view and advocated either guidelines with scope for departure, or a presumption. Tony Roe Solicitors wondered about the possibility of a “rebuttable presumption ... that spousal periodical payments should not be payable for a period of years beyond the length of the marriage, unless there are children”.
- 3.53 Resolution favoured “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”. They felt that:
- 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.
- 3.54 Another possible approach advocated was for time limits on periodical payments not to apply to certain categories of payee spouse. For example, Irwin Mitchell Solicitors thought that term orders were inappropriate for those over a certain (to be determined) age.
- 3.55 Most consultees felt that the presence of children necessarily impacted on the ability of both spouses to move to independence. Some members of the family team at Farrer & Co were concerned that there were real problems in incentivising independence 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”. Certainly, there was no real appetite in consultees’ responses for leaving spouses with care of children without adequate income.

- 3.56 Consultees disagreed about whether disabled dependent spouses should be encouraged towards independence.²³ One anonymous consultee told us that “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”. Joanna Miles questioned whether there was a justification for one spouse having to support the other, after the end of the marriage, purely because the other spouse had suffered a catastrophic accident.
- 3.57 Responses to our Case Study 3, which discussed spousal support for Pat, who had suffered a devastating disability whilst in a civil partnership, were varied. Manches LLP thought that the working civil partner 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. Rhys Taylor said that he “would not be deflected from saying that support should continue until independence has been reached” even in the face of an example where independence was unlikely to be achievable. Tony Roe Solicitors agreed, saying “Chris does have a responsibility to provide for Pat’s care after the ending of the civil partnership even though [Pat’s] needs might not be generated by the relationship”.
- 3.58 Irwin Mitchell Solicitors thought that Pat’s care ought to be the responsibility of the state rather than Chris. The Family Law Bar Association thought that Chris’ limited earning capacity made it inappropriate to require spousal support, but that a much larger income might require “modest” payments to Pat.

OUR CONCLUSIONS FOLLOWING CONSULTATION

- 3.59 In the paragraphs that follow we set out, first, our policy conclusion following consultation and, second, our conclusions about how best to implement that policy and our recommendation for the way forward.

Our policy conclusion

- 3.60 The two practical problems we are seeking to solve are the lack of transparency in the law relating to needs (leading to confusion and difficulty when people do not have legal advice), and inconsistency in the application of the law.²⁴ Both could be resolved, or at least considerably ameliorated, if the Matrimonial Causes Act 1973 set out an objective to be met by provision for needs.²⁵
- 3.61 Our consultation was therefore primarily about the possibility of introducing an objective, as we explained above.
- 3.62 We can draw a number of strands from the consultation responses. Overall this is a highly controversial area and there is a great deal of resistance to reform. Certainly there was no unanimity about the need for change. A number of consultees preferred to retain multiple objectives within the law. This preference

²³ We received an interesting reminder that the disabled spouse may not be the party requiring support. Our consultee was the wealthier spouse and had considerable care needs. She found herself making payments to her former spouse for spousal support which she found “unbelievable”.

²⁴ Paras 3.3 to 3.6 above.

²⁵ As it did before the reform of 1984 (see Chapter 2, para 2.5) – although of course we do not suggest reverting to that deleted objective (para 3.10 above).

is, we think, an expression of the confidence that lawyers rightly have in judicial discretion. It is helpful to retain a choice of objectives so as to enable tailor-made solutions. But we remain convinced that the presence of multiple objectives, with no overriding rationale, generates confusion and give insufficient assistance to litigants in person and to those who are not accessing the courts at all.

- 3.63 Turning to the alternatives we offered, clearly there is little support for compensation as the reason for meeting needs. Consultees felt that this justification could generate litigation due to its backwards-looking approach, which would require arguments over quantification and a dissection of roles within the marriage, and also because it would provide too much discretion, potentially generating confusion. They were also concerned that confining spousal support to the compensation of loss could cause hardship and injustice in some cases.
- 3.64 The idea of unravelling the merger over time, so as to enable the parties to make a transition to independence, garnered more support. Consultees took the view that this approach was grounded in the reality of life and marriage, recognising the diversity and complexity of relationships, and looking forward to the transition to the parties' lives after separation. They felt that it recognised that financial relief should have some relation to the length of the marriage and respected the fact that marriage is a serious, joint commitment which may take time to unravel. Generally, consultees pointed to the many elements involved in meeting needs including the occupation of the former matrimonial home and housing more broadly, and the relation of needs to the marital standard of living and the spouses' responsibilities, in particular the ongoing care of children.
- 3.65 However, while there was support for the idea that the law should encourage independence by setting limits on levels of support provided to meet needs, there remained misgivings about this approach, which we share. We are not in favour of a rigid time limit to the payment of periodical payments, for example, and we think that any such recommendation would be highly contentious despite the support in principle for a transition to independence. We explained in the 2012 SCP how it would operate unfairly, causing particular hardship to those who are not sufficiently well off to be able to capitalise income provision;²⁶ and individual hardship will impose costs on society as a whole.
- 3.66 By contrast, the principle of merger over time fosters the conclusion that, on divorce, the transition to independence should not be sudden. Especially important in this jurisdiction, with our particular understanding of needs, is to build into the merger over time idea the expectation of a home. In practice, in the light of the fact that the proportion of divorces which are followed by ongoing periodical payments is small, we know that independence is what in fact happens sooner or later. So we support the adoption of the merger over time justification for meeting needs, aiming for independence but without adding in artificial constraints to make independence happen quickly.
- 3.67 Accordingly, we conclude that the objective of financial orders made to meet needs should be to enable a transition to independence, to the extent that that is possible in light of the choices made within the marriage, the length of the

²⁶ The 2012 SCP, Part 4, paras 4.79 to 4.81.

marriage, the marital standard of living, the parties' expectation of a home, and the continued shared responsibilities (importantly, childcare) in the future. We acknowledge the fact that in a significant number of cases independence is not possible, usually because of age but sometimes for other reasons arising from choices made during the marriage.

- 3.68 That policy is perhaps the least surprising that we could have reached. It reflects what happens in the vast majority of cases already. It does not point to any change in direction for the courts; it is consistent with the majority of current decisions while setting out a clear objective for those who do not have legal advice.

Implementing our policy

Statutory amendment?

- 3.69 The 2012 SCP envisaged that a consideration of the appropriate objective for the meeting of needs would lead us to recommend statutory reform. Until 1984 there was a statutory objective for the provision of needs. Our predecessors recommended its abolition, but did not provide a replacement – which we could now do. At first sight that is the obvious route to improving the law.
- 3.70 Statutory amendment would take the form of an amendment to section 25 of the Matrimonial Causes Act 1973, and its counterpart in Schedule 5 to the Civil Partnership Act 2004. It would take the form of an additional objective, subordinate to the existing “first consideration” (being the needs of the parties’ minor children); the section would set out the objective to be attained when the court made an award designed to meet the parties’ financial needs. It might also specify how that objective was to be reached, taking into account the merger over time issues that we set out above.
- 3.71 However, there are disadvantages to this approach. The reality of the courts’ practice, which is that financial needs are the only issue in the vast majority of cases, is not reflected in the statute at all. It would not be clear how the other section 25 factors related to this objective, which would apparently refer to just two of the words among the matters set out in section 25(2)(b). Any further explanation of “financial needs” would run into very difficult problems because the obvious contrast is with “sharing” and “compensation” – the other two “strands” identified in *Miller v Miller*, *MacFarlane v McFarlane*,²⁷ neither of which is mentioned in the statute.
- 3.72 Nor would it be obvious what the effect of the amendment should be. Our policy is not designed to give rise to any general change in outcomes; a statutory amendment, by contrast, would be likely to be viewed as intending to change things, and would certainly be vulnerable to interpretations that conflicted with our intentions.
- 3.73 Perhaps our most important misgiving about amending the statute is that our policy is closer to clarification, or even to a statement of best practice, than a change in the law. Independence, attained in a way that reflects the merger over time, is what happens now in the vast majority of cases. As we said in Chapter 2,

²⁷ [2006] UKHL 24, [2006] 2 AC 618.

a combination of the mainstream practice of the courts, of economic factors and of human factors such as the tendency to re-partner,²⁸ means that people do generally attain independence, in the sense that they move away from financial dependence upon their former partner and move on.²⁹ As Dr Robert George put it, commenting in his consultation response about the objective of transition out of the merger over time, it 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”.

- 3.74 The difficulties in drafting an amendment to the statute could no doubt be overcome; but they are considerable. Moreover, realistically it would be some time before statutory amendment could be enacted. Because our preferred policy reflects so closely what generally happens now, we think that a change in the law should be avoided. Instead, we should find a way to make explicit what is already happening in most courts, so as to encourage consistency within the courts and to inform the public.

Non-statutory guidance?

- 3.75 Instead of statutory amendment, then, we have explored the idea of authoritative guidance, addressed both to lawyers and to the public.
- 3.76 For lawyers, guidance would aim to reinforce the current practice in most courts, and discourage the use of discretion either to prolong dependence or to force unduly early independence. It can point the courts in the direction of fixed term awards unless there is a strong reason for a joint lives award, while emphasising the need for ongoing support where there are small children and so on. Guidance cannot change the law and therefore cannot require judges to adopt our policy. But it can explain and it can encourage. As the Family Law Bar Association put it in their consultation response, the effect of guidance:

... 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 [emphasis in response].

- 3.77 The same guidance could be “translated” into a less technical and much shorter document aimed both at non-legally qualified mediators and at litigants in person, with the aim of making the law more transparent. Such a document could not provide all the answers or guidance on the specific facts of a situation, but it would make the law more transparent and should go some way to counter the obvious myths we referred to above.³⁰ As only a small minority of financial settlements are decided by judges, such guidance would be invaluable for the

²⁸ See page 239 and figure 11.5 of H Fisher and H Low, “Who wins, who loses and who recovers from divorce?” in J Miles and R Probert (eds) *Sharing Lives, Dividing Assets* (2009) p 227, where the authors report, “... the rate of repartnering is striking: within four years 51 percent of men and 43 per cent of women are either remarried ... or cohabiting ...”.

²⁹ Chapter 2, para 2.42 and H Fisher and H Low, “Who wins, who loses and who recovers from divorce?” in J Miles and R Probert (eds) *Sharing Lives, Dividing Assets* (2009) at 227.

³⁰ See above at para 3.4.

vast majority of people who are divorcing without access to judicial time and attention and, in its fuller form, their lawyers, if any.

- 3.78 Accordingly we think that this is a more fruitful way forward than statutory amendment. It will certainly be able to take effect more quickly than would statutory amendment, and will be far less vulnerable to confusion and misinterpretation.

Consultees' views about guidance

- 3.79 The 2012 SCP asked some further consultation questions, in Part 5, about the options for improvement of the situation in the short term, pending any major statutory amendment. We have not reported on the answers to those questions at length in this Report because they are no longer directly relevant; we are not proposing statutory amendment. But responses gave some helpful views about the usefulness of guidance (hence the comment of the Family Law Bar Association, quoted above) and about who should provide it.
- 3.80 There was a general sense of concern about introducing more potentially “nebulous concepts”³¹ into the statute and reforming the law on financial provision in a piecemeal fashion. Many favoured the provision of non-statutory guidance as an alternative, although there was significant disagreement about how that guidance ought to be developed. Many consultees favoured our suggestion that the Family Justice Council ought to have a role in developing it. The response from the Judges of the Family Division was in favour of guidance, considering that “if any future guidance is to be promulgated it should be in the form of Practice Guidance formulated by the FJC Working Party and endorsed by the President”. The Association of Her Majesty’s District Judges agreed that “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”.
- 3.81 Other consultees felt that the Family Justice Council should not work on the guidance in isolation. The response from the Centre for Child and Family Law Reform agreed that the Family Justice Council should have a role in developing guidance “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 It would also be vital that the senior judiciary agree with the guidance and promulgate it robustly in their decisions and comments”.
- 3.82 Some consultees had misgivings about guidance developed in this way. Valentine Le Grice QC said, “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”. The Family Law Bar Association were similarly troubled, saying:

³¹ A term used by Dr Thérèse Callus in her consultation response.

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.

- 3.83 Resolution were concerned that judges would ignore non-statutory guidance, saying:

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.

- 3.84 The family law team at Charles Russell LLP thought that guidance would “need to be frequently updated to dovetail with case law” and we agree that this would be important.

- 3.85 There was support for guidance to be made accessible to the public. Alec Samuels told us “law and practice is readily accessible by the lawyers Information certainly needs to be provided for the public and laymen generally”. The Chancery Bar Association recognised the “real concern ... that the absence of public funds for divorcing couples requires the Guidance to be readily available to the lay parties”. Joanna Miles was concerned that “plain English” experts should be involved to ensure the resulting guidance was accessible to litigants in person.

Our recommendation

- 3.86 Clearly guidance cannot change the law. In answer to the concerns raised by the Family Law Bar Association, it cannot be treated as statute or as law, nor can it bind the courts. But the existence of guidance does not threaten the rule of law in any way. Guidance can disseminate information about the ways in which the courts' discretion is currently exercised; and it can encourage the use of discretion in a particular way and with a particular objective. Whether that encouragement is accepted depends upon the authority of the body giving the guidance. We think that it is important that it comes from a judicial source, and we think that the Family Justice Council – with its judicial members, and chaired by the President of the Family Division – will command respect among the judiciary because of its wide range of membership, and the experience of its members.
- 3.87 As we noted above, this is an area where consensus is unlikely. But we think that the authority and experience of the Family Justice Council mean that it is best placed to produce guidance, addressed primarily to the courts but published, additionally, in plain English and in an accessible format for members of the public. Steps would need to be taken to disseminate it so that those involved in divorce and dissolution can use it and be guided by it; it should be made widely available in printed form and on the internet.

- 3.88 **We recommend that the Family Justice Council prepare guidance as to the meaning of financial needs, encouraging the courts to make orders that will enable the parties to make a transition to independence, to the extent that that is possible in the light of choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and their continuing shared responsibilities.**
- 3.89 **We recommend that the guidance prepared by the Family Justice Council be addressed primarily to the courts, but that it should be produced additionally in a plain English format and made widely available to the public, in printed form and electronically.**
- 3.90 **We recommend that the guidance be kept under review by the Family Justice Council and updated regularly.**
- 3.91 Internet publication is obviously important, in view of the growing familiarity of the public with the internet and its use as a source of everyday information. One possibility would be to have the guidance linked to the Government online information hub being developed in response to one of the recommendations of the Family Justice Review,³² as well as other non-Government online divorce resources. However, its source and authority – deriving from the Family Justice Council and not from Government – should always be made clear. A paper version could also be handed out to members of the public who collect court forms for divorce and dissolution, such as the petition and acknowledgement of service.

CONTENT OF THE GUIDANCE

- 3.92 We think that the guidance we envisage will need to cover the following areas.
- (1) What are needs?
 - (2) At what level should needs be met?
 - (3) The duration of provision for needs and the transition to independence.
- 3.93 We offer here a brief sketch of what we think guidance should include under each head, setting out our understanding of the “mainstream” position. It is important to appreciate that in an area where there are no rules or strict entitlements, there is a limit to what guidance can achieve. We move on later in the Chapter to consider whether there is scope for guidance that might include figures, on an indicative basis, rather than only words. In the meantime, carefully worded guidance can point the courts and the parties to the result to be achieved.

What are needs?

- 3.94 It is well known to lawyers that “financial needs” is a very broad concept, potentially encompassing every aspect of provision of a home and for daily life, in the short and longer term. An elucidation of the subject matter of needs is perhaps the least critical element of the proposed guidance because on this

³² Such as <http://www.sortingoutseparation.org.uk/> (last visited 7 February 2014).

issue, at least, there is already considerable information available to the public.³³ The courts need no reminder of the breadth of needs, but it will be helpful to the public for the guidance to indicate as many elements of needs as possible so that it cannot be argued, for example, that needs does not include the provision of a home, an income for living expenses and so on, including in some cases, the provision of a pension by way of a pension sharing order.³⁴

- 3.95 Far more difficult, and more inaccessible to the public as things stand, are the questions as to the level of provision for needs, and the duration of that provision.

At what level should needs be met?

- 3.96 Exactly how, and at what level, needs will be met will depend on the resources available and, usually, the marital standard of living. Replicating the marital standard of living in two homes, after divorce, will be rare: most parties will not be able, in the short to medium term, to live at the standard they enjoyed during the marriage. That said, their former standard of living will be relevant in so far as any reduction in standard of living as a consequence of the financial settlement made on divorce should not fall disproportionately on one party. In addition, the transition to independence, if possible, may mean that one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living, unless he or she can afford to do so from his or her own resources.³⁵

Where there are children

- 3.97 If there are children who must be cared for and limited resources available, the parent who primarily cares for those children should be securely housed in priority to the other parent. Preferably she or he and the children should remain in the family home after divorce if they wish and if that will not prevent the other parent from being able to be housed. If such an outcome would be unfair in terms of the capital split then the other parent could retain an interest in that property, under a trust or charge, that can be realised at a later date, usually on the youngest child leaving secondary or tertiary education. Alternatively, it may be that both parents can reasonably afford to retain or buy a property, perhaps by downsizing.
- 3.98 It may be that neither parent can afford to buy (or retain) a property, if doing so would mean that one parent could not even afford to pay rent. That might be the case if the former marital home was heavily mortgaged. Or the parties may never have owned a property, in which case, unless there are significant savings that could be used towards purchasing a home, both should expect to rent.
- 3.99 Cases where divorcing spouses or partners have children are likely to be those where income need is greatest. This is because caring for children usually

³³ Such as the online resources mentioned at para 3.91 above. See, for example, R Rogers, "Divorce: how to calculate 'reasonable needs'" *Marilyn Stowe Blog*, 15 January 2010, available at <http://www.marilynstowe.co.uk/2010/01/15/divorce-calculate-reasonable-needs-by-rachel-roberts/> (last visited 7 February 2014).

³⁴ The purpose of sharing of a pension could be characterised as being to secure a fair share of the parties' assets on divorce but, ultimately, except in wealthy cases, also helps to meet the needs of a party for financial provision after retirement.

³⁵ See para 3.109 below.

restricts the ability of the parent who does most of the childcare to work. While children are very young it may not be realistic to expect the parent with care of the children to work at all. The parent who cannot work, or can work only part-time, is likely to have less income and therefore may need maintenance payments from his or her former spouse. In the majority of cases these payments are likely to be by way of child maintenance, possibly either payable under, or calculated in line with, a maintenance assessment by the Child Support Agency, which uses a relatively simple formula based on a percentage of the payer's income.

- 3.100 Whether a former spouse needs to receive periodical payments to meet his or her income needs, in addition to child maintenance, depends on both parties' level of income, and their needs generated by their housing situation. It will often be the case that, if there are children, all the paying spouse can afford are maintenance payments for the children, as he or she may need the remainder of their income to meet his or her own needs. It may also be the case that tax credits raise the income of the payee, so that no further provision is required from the former spouse.
- 3.101 Only if it can be afforded by the paying parent, and is needed by the parent with primary care of the children, can the latter expect to receive spousal periodical payments from the former, in addition to child maintenance. Such support may be needed to meet any mortgage payments, for example, or to meet other basic living expenses, such as utility bills. We turn below to how long those payments might be made for.
- 3.102 Sharing the care of children equally may mean a reduced difference between former spouses' incomes, but the parent who earns more is still likely to make payments to the other for those children, albeit usually at a lower level.

Where there are no children

- 3.103 Both spouses in this situation will, of course, need to have a place to live after divorce and the same considerations set out above, as to what can be done with the resources available, will apply. However, in the absence of children, there is unlikely to be any compelling reason why the former marital home should be retained by one of the parties after divorce, unless that can easily be afforded.
- 3.104 One spouse, in this situation, may need to receive periodical payments from the former spouse after divorce. He or she may have given up a job to run the home or they may work in a job that is less well remunerated than the other's. The only way in which the lower-paid partner's needs can be met may be by the other spouse making periodical payments. Again, this will only be possible if the other spouse can afford to make such continuing provision.

The duration of provision for needs and the transition to independence

- 3.105 As we recommend above,³⁶ we think that the objective in financial settlements and awards should be to enable a party to make the transition to independence. That will not be possible in every situation. Where there are children, it is likely that one spouse will be making child maintenance payments to the other,

³⁶ At para 3.88.

potentially for a long period, until the youngest child leaves secondary, or even tertiary, education. But we focus below on the duration of any ongoing provision for a former spouse.

- 3.106 If continuing provision for a spouse's needs is required this may be by way of continuing periodical payments. But it could be that, probably rarely, needs are met by income generated from an investment fund, provided by way of a lump sum payment from the paying spouse. More commonly, from retirement age, each party may have to rely on his or her share of pension assets that have been accrued, possibly with an adjustment on divorce using a pension sharing order. For both parties, retirement of the paying spouse may bring about a reduction of standard of living. There could be a mix of all three methods of provision.

Joint lives orders where no or limited income or earning capacity

- 3.107 The transition to independence may not be possible where one party does not have, and is not likely to acquire, the means with which to support himself or herself. This may be because she or he gave up working to care for the home and/or children and, after a longer marriage, is now in late middle age or older. While we think parties should be encouraged to work, and judges should not presume that older people cannot do so, it may simply not be realistic for a party to re-enter the job market. So, if one spouse has no, or limited, earning capacity and no prospect of increasing this, and the other spouse can afford to make spousal periodical payments, then provision for the former's needs may have to be made on a joint lives basis, to continue until remarriage or the death of one of the parties. Or it may be appropriate for such provision to be subject to a term that ends at the age at which the party can access pension provision without incurring any reduction in such income due to early retirement provisions.
- 3.108 Either party, where an order for periodical payments is made, can apply to the court to vary this order, as to duration or amount. This will be on the basis that there has been a material change in circumstances since the time that the original order was made. Or the parties could agree, in writing, such a variation between themselves, although this would not prevent the court from making a further variation if an application was made to this effect. A change of circumstances might be that the paying party has suffered a reduction in income, or the party receiving payment may have an increased earning capacity following retraining. The position is more complicated with respect to periodical payments for a child, as these will largely be governed by the child support legislation, which uses a formula.

Term orders to enable a transition to independence

- 3.109 It may be appropriate to impose a term on the payment of periodical payments, allowing time for a party to develop his or her ability to meet needs, perhaps by retraining or re-establishment in the job market. It should not be a barrier to the imposition of a term that, at the end of the term, the payee spouse, while able to meet his or her own needs, cannot necessarily do so at the standard of living enjoyed during the marriage.

- 3.110 We would expect the length of such terms to be in the region of two³⁷ to 10³⁸ years. If continuing provision is expected to be required for longer than that then, given the difficulties of foreseeing changes in circumstances, we would expect that provision would better be made by way of a joint lives order.
- 3.111 Where there are minor children, the term could endure until such time as the care of their children no longer prevents the parent with primary care from meeting his or her own needs through employment, therefore making a transition to independence. The term might end on the youngest child reaching secondary school age, providing that allows sufficient time for the payee spouse to establish or exercise an earning capacity. However, the specific details of what is appropriate will vary according to the facts of each case, and it may be the case that financial settlements contain provisions that reduce in stages the level of payments made during the term, depending on what can reasonably be expected of the payee spouse with regard to employment.
- 3.112 The age of the parties at the time of divorce will be significant for whether any continuing provision should be limited to a term. This links to, but is not the same as, the length of the marriage. For example, even after a long marriage of, say, 20 years, if the parties married young, they may only be in early middle age at the time of divorce. At this age an individual may have 20 to 25 potential years in the labour market without childcare responsibilities. It may not be unfair to encourage a party in his or her forties - or older, depending on specific circumstances - to make the transition to independence, by limiting any periodical payments to a term.
- 3.113 There is also the question of whether the term should contain a bar preventing it from being extended.³⁹ Such a bar is unlikely to be appropriate if there are young dependent children being cared for by the payee spouse but may be appropriate if the children are older. It may also be appropriate where, in the situation of an older separating couple, provision by way of continuing periodical payments is only to continue until such time as pension provision can be accessed.⁴⁰

No, or limited, continuing provision

- 3.114 In certain circumstances, continuing periodical payments should be avoided in favour of a clean break. The most likely scenario is that of a short, childless

³⁷ As in the case of *L v L (Financial Remedies: Deferred Clean Break)* [2011] EWHC 2207 (Fam), [2012] 1 FLR 1283, where a term of two and a half years was set. The wife was 44 at the time of separation, and a successful businesswoman having worked throughout the marriage. The wife also owned a mortgage-free, 350 acre farm.

³⁸ As in the case of *D v D (Financial Provision: Periodical Payments)* [2004] EWHC 445 (Fam), [2004] 1 FLR 988 in which Coleridge J allowed the husband's appeal against a joint lives order and imposed a 10 year term. Coleridge J stated, at [25], "It is not, in my judgment, fair to the parties for the courts to carry out a careful, equal division of assets as this district judge did and then leave open in an unrestricted way the possibility for that fairness to be revisited in years to come".

³⁹ Under section 28(1A) of the Matrimonial Causes Act 1973 or para 23 of Sch 5 to the Civil Partnerships Act 2004. However, following the Court of Appeal case of *Fleming v Fleming* [2003] EWCA Civ 1841, [2004] 1 FLR 667, we note that the extension of a term order for maintenance must be justified by exceptional circumstances meaning that the distinction between a term order with such a bar, and one without, may not be that significant.

⁴⁰ See para 3.106 above.

marriage. Spouses of such marriages are unlikely to have fully merged their lives and resources and we would expect the transition to independence to be swifter than in other cases. While a periodical payments order might be appropriate where, for example, there is very little capital and a great disparity between the parties' incomes, this will be unusual. Any such payments would, we think, typically only be made for a short term of no more than two or three years. A bar to extending the term is likely to be appropriate.

- 3.115 In rare cases, where resources allow, income needs may be met by a division of the capital that the parties have, in excess of what is required for housing, so capitalising any ongoing provision that would otherwise be made by periodical payments.

The place of compensation alongside provision for needs

- 3.116 How does a right to reliance-loss compensation⁴¹ work with, or not work with, an objective of transition to independence? If compensation is not the overall objective, it is difficult to accept that it could be an additional objective. It should not compromise transition where transition is possible. If a party can work and support him- or herself now, then there is an argument that it is not beneficial to either party for one spouse to be in receipt of life-long maintenance for reasons of compensation. Such a compensation basis could imply that the payee party's income should be increased, by receipt of periodical payments, to what it would have been had she or he continued working as, for example, an investment consultant.
- 3.117 On the other hand, is it possible to regard reliance-based compensation as one of the ways the court can achieve transition to independence? After a 10 year marriage with children let us assume that the wife is going to have an impaired earning capacity for the next 10 years because of the age of the children; she needs support, because a transition to independence is not yet possible. Could the measure of that support be what she would have been earning if she had not married, rather than the marital standard of living which might have been higher or lower? This is not consistent with our policy nor with the courts' current approach. It is less worrying, however, in a short marriage case where the court might realistically be able to use it in order to "turn the clock back".
- 3.118 So, we take the view that compensation should not be an addition to the merger-over-time-based transition to independence, because that compromises independence. Nor does it work generally as an alternative measure of transitional support (that is, the route to independence, used instead of the merger-over-time-based ideas) because that might be to the advantage or disadvantage of the person compensated. In any event, using such a measure runs into the evidential problems that have motivated consultees to reject compensation as a general basis for needs claims.⁴²

⁴¹ See Chapter 2, paras 2.38 to 2.40. We use the term "reliance-loss compensation" in this context to refer to a situation where a person has made financial decisions in reliance upon the continuation of the marriage or civil partnership and of the financial partnership. Whether or not there is fault in the divorce, that reliance fails when the marriage or civil partnership breaks down.

⁴² See paras 3.27 to 3.33 above.

- 3.119 Equally, to say that reliance-based compensation cannot happen would be to go too far. The policy outlined above leaves room for reliance-based compensation in short marriage cases. In these cases the objective of independence may be achieved by providing the payee spouse with what would have been earned had he or she not given up a job to join in an endeavour of his or her partner's. For example, this might well solve the problem of how much of a wealthy party's capital needs should be given up in order to facilitate the transition of his wife of, say, 15 months who simply needs to be enabled to make a fresh start. That may amount to the value of a house, or it may provide a deposit on a house which she can then buy herself. Either approach is plausible under the current law, fits with the very English value placed on owned housing, and is acceptable under our policy.

In conclusion

- 3.120 Guidance of this kind will not always be capable of dealing with every case. There may be those cases, exceptional in nature, where the guidelines that we have set out do not produce a fair result, or clear answer. That is inevitable. However, this does not negate the desirable nature of a single objective, rather than a range. If there is a choice of objectives, the court can opt for what is seen as most appropriate in an individual case; but that leaves the general public in a position where the law does not tell them what to aim for. We think that a single objective is workable and that the difficulties in its operation in some marginal cases are outweighed by the benefit of clear law. But we take the view that the existence of such exceptional cases should not undermine the results of the work that we hope the Family Justice Council will undertake, building on what we have set out above.

LOOKING TO THE FUTURE: COULD A FORMULA BE FEASIBLE?

The use of formulae in other jurisdictions

- 3.121 One further aspect of the 2012 SCP provoked particular interest and controversy. Many jurisdictions, both civil law and common law based, have faced the same difficulties with the law relating to spousal support as we have found here, as a result of the breadth of the discretionary jurisdiction set up in the statute. As a result, some jurisdictions have devised methods of calculating spousal support, using an arithmetical formula. These are jurisdictions where "spousal support" tends to mean income payments, in the context of a community of property regime which means that capital is divided equally, so great care is needed with the comparison. But it is useful to see what has been achieved elsewhere.
- 3.122 Perhaps the most famous of these is found in the American Law Institute's Principles of the Law of Family Dissolution ("the ALI Principles"). The ALI Principles are a law reform proposal, but they reflect the current law and draw together principles and practice from across the different states within the USA. They advocate spousal support that addresses the different impact upon the parties of the ending of the relationship. They provide a formula for calculating spousal support, which adjusts the differential in income that the parties are going to experience following divorce, to an extent and for a period that are both proportionate to the length of the marriage and to the period spent looking after children. The longer the marriage and the longer that responsibility is to be undertaken, the more the payee gets and the longer he or she gets it for.

- 3.123 The 2012 SCP also discussed the Canadian experience, where a mixture of principles (compensatory and non-compensatory or needs-based) in the statute and some Supreme Court decisions generated confusion and uncertainty in the last decade of the twentieth century. The federal Government was sufficiently concerned about this to sponsor a working group, led by two academics but including practitioners, members of the judiciary and mediators with a view to devising a formula for the calculation of spousal support. The group began work in 2001,⁴³ and in 2008 published the final version of the Spousal Support Advisory Guidelines (“the SSAG”).⁴⁴ These were devised “from the ground up” by starting from current practice as reflected not just in reported decisions but in responses of members of the working group to a wide range of typical fact scenarios. Their development also included significant elements of consultation and feedback from practitioners and judges across the country.
- 3.124 The SSAG are not unlike the ALI Principles, since they operate on the same data and, again, generate a level of support that adjusts income to an extent, and at a period, that depends upon length of marriage and also upon childcare responsibilities – both therefore reflect the merger over time theory by adjusting disparity so as to reflect the extent of that merger, using time and childcare responsibilities as proxy measures of the extent to which the spouses have been interdependent. The SSAG differ from the ALI Principles in that they generate not an answer but a range. The parties are given a low figure and a high figure and can negotiate within that range. They also differ from the ALI Principles in being non-statutory and in not dealing with the issue of entitlement. They deal only with amount and duration of support, with entitlement being established under the existing statutory principles.
- 3.125 However, the ALI Principles, whilst widely debated by academic commentators, have not been so widely implemented in practice.⁴⁵ Only a handful of states have statutory spousal support guidelines for alimony awards, although other states have taken steps towards developing alimony guidelines.⁴⁶ By contrast, the SSAG in Canada have been very successful. They are widely used, and their use

⁴³ See the project’s background paper: C Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December 2002), available at <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ss-pae/index.html> (last visited 7 February 2014).

⁴⁴ C Rogerson and R Thompson, *Spousal Support Advisory Guidelines* (2008) available at <http://canada.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html> (last visited 7 February 2014). See also the more recent article discussing both the development and the reception of the SSAG; C Rogerson and R Thompson, “The Canadian Experiment with Spousal Support Guidelines” (2011) 45 *Family Law Quarterly* 241.

⁴⁵ J T Oldham, “Changes in the Economic Circumstances of Divorces, 1958-2008” (2008) 42 *Family Law Quarterly* 419, 441 and footnote 146.

⁴⁶ See M Kisthardt, “Re-thinking Alimony: The AAML’s Considerations for Calculating Alimony, Spousal Support or Maintenance”, 2008 *Journal of the American Academy of Matrimonial Lawyers* 21, 61; L Morgan, “Current Trends in Alimony Law: Where Are We Now?” (2012) 34(3) *Family Advocate*, pp 8 to 11. The ALI Principles have also been referred to by American courts in a number of cases. See, for example, *In re Marriage of Michael*, Iowa No 12–0912, 2013 WL 6037112, Nov 15, 2013 at paras 6 and 7, and *Slorby v Slorby* 760 N.W.2d 89, ND, Feb 3, 2009 at [23].

has been the subject of regular analysis with a view to ironing out problems.⁴⁷ They have been the subject of court decisions; in *TC v AK* the Quebec Court of Appeal described them as a “solid and creative” tool,⁴⁸ and noted that they “do not aim to exclude or replace the individualized analytical process” required by statute. They “are intended to foster a measure of equality in the treatment of people before the court”.⁴⁹ In *Fisher v Fisher* the Ontario Court of Appeal said that the guidelines “do not impose a radically new approach. Instead, they suggest a range of both amount and duration of support that reflects the current law”.⁵⁰

- 3.126 In December 2012 we held discussions with Professor Carol Rogerson, who, along with Professor Rollie Thompson, was the co-author of the SSAG. She sees the guidelines as reflecting mainstream practice and therefore as a way of reducing the number of “outlier” decisions.
- 3.127 Formulae for spousal support are not unknown in Europe, although – like the SSAG – they do not have legislative force. Some have been developed by the German regional courts;⁵¹ some have been developed in France for the calculation of the “prestation compensatoire”, which is intended as a compensatory payment but in fact appears to address disparity in living standards between the spouses on divorce.⁵²

Formulae in family law in England and Wales

- 3.128 There are probably two principal barriers to the development of a formula to indicate the level of financial needs in this jurisdiction.
- 3.129 One is the memory of the original version of the Child Support Act 1991, whose calculation required some one hundred items of information and produced some notoriously inappropriate results. The formula itself, combined with well-documented IT and operational difficulties encountered by the Child Support Agency, produced chaos.⁵³ Today, the child support formula is very simple and criticism of the current version is rarely voiced, but memories of the initial version

⁴⁷ See the “Advisory Guidelines Case Law Updates and Commentary” available online at <http://library.law.utoronto.ca/spousal-support-advisory-guidelines> (last visited 7 February 2014).

⁴⁸ [2011] QCCA 1554 at [96].

⁴⁹ Above at [103].

⁵⁰ [2008] ONCA 11 at [98].

⁵¹ See A Dutta, “Marital Agreements and Private Autonomy in Germany” in J M Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2012) pp 158 to 199.

⁵² See Divorcé(e)s de France, available at <http://www.divorcefrance.fr/content/view/18/34/> (last visited 7 February 2014). The sample of 25 cases involved awards ranging from around 46,000 euros to around 250,000 euros. See also (2010) 9 *Actualité Juridique de la Famille*, Special Issue on “Calcul de la prestation compensatoire”: S David, “Calcul de la prestation compensatoire: propositions d’un expert”, 350; D M Saint Leon, “Méthodes de calcul: point de vue d’un magistrat”, 360; A Depondt, “La méthode de calcul d’un notaire-expert”, 365.

⁵³ D Henshaw, *Recovering Child Support: Routes to responsibility* (2006), page 5, available at <http://webarchive.nationalarchives.gov.uk/20121102173058/http://www.dwp.gov.uk/docs/henshaw-complete22-7.pdf> (last visited 7 February 2014).

are still vivid.⁵⁴ That experience, and a great respect for judicial discretion, combine to make formulae something of an anathema for English family lawyers.

- 3.130 The other is legal and practical. Most of the jurisdictions where a formula is in use operate a community of property regime. The couple's property is divided equally on divorce,⁵⁵ and spousal support is seen as a matter only of income. That is very different from the position in England and Wales where we see spousal support, or "financial needs", as a matter of both capital and income and crucially as including provision for housing in a way that simply cannot be achieved by dividing the couple's capital equally. We also have a strong preference for capital orders over income orders; we prefer the financial and psychological advantages of the clean break to the imposition of an ongoing financial relationship.
- 3.131 In the light of this, any formulaic approach to spousal support⁵⁶ for use here would have to be set up so as to generate both the level of support currently awarded and the form of support. The formula could generate a range of periodical payments, which could be capitalised if the parties wished,⁵⁷ and if this could be afforded (which may be uncommon). It may also be possible to generate an overall figure, which would normally be paid as an unequal share of the equity in the family home (in cases where there is any), so as to reflect current practice and so as not to discourage the clean break. While this will be a complex undertaking it should not present an insuperable problem. Careful attention will have to be paid to factors such as regional disparities in house prices and salaries,⁵⁸ the prevalence of debt, and the fact that income has two functions: it can be spent, but it also represents borrowing capacity. All these are factors in an economy where the well-being of a family is seen as being closely linked to its ability to borrow in order to own its own home.⁵⁹ In some cases the provision of owner-occupied housing, after divorce, may simply not be possible.

Consultation responses

- 3.132 In the 2012 SCP we explained the use of formulae in other jurisdictions and asked:

⁵⁴ The current, simple formula can be examined by using the online calculator available at <http://www.cmoptions.org/en/calculator/> (last visited 7 February 2014).

⁵⁵ Either all of it, if a regime of total community is in force, or only property acquired after the marriage in states where a community of acquests is in force; and, in all cases, subject to contrary provision in a marital property agreement.

⁵⁶ We continue to use this term to mean "financial needs" in the English sense.

⁵⁷ As do the SSAG (see SSAG Chapter 10 on Restructuring) and the ALI Principles (see § 5.10).

⁵⁸ See Standard Note (SN/SG/1922), Regional house prices: affordability and income ratios (29 May 2012), available at www.parliament.uk/briefing-papers/SN01922.pdf (last visited 7 February 2014).

⁵⁹ Although we have to ask, as some consultees have said in discussion with us, whether this is bound to continue for the future: is our dependence on capital going to be sustainable in the current economic climate, or will renting homes become a more acceptable and manageable option?

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?;⁶⁰ and

What preliminary work would be needed to research and pilot a new approach? In particular (1) who should do the work? (2) what methodology should be adopted? And (3) what sort of timescale would be required?⁶¹

3.133 We asked about methodology because we were aware that years of work went into the Canadian SSAG, and also that the lack of preparatory work and testing was one of the reasons for the disastrous failure of the 1991 child support formula.

3.134 We also asked a scenario-based question (reproduced in Appendix C). Consultees were asked whether the couples in our scenarios would find it helpful, or frustrating, to be able to look up and use a calculation that would give them a figure, or a suggested range, for the amount payable by way of support.

3.135 Predictably, there was no majority support for the introduction of a formula. Twenty-three consultees preferred a reformed discretion while 19 were in favour of a formula; but within the 23 were nearly all the practitioners (including Resolution and the Family Law Bar Association) and all the judiciary, making that a much more significant majority in favour of discretion than the bare numbers would indicate.

3.136 The majority response from the Judges of the Family Division gave short shrift to the idea of a formula:

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.

3.137 Less vehement but equally clear was the Association of Her Majesty's District Judges:

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.

3.138 Among the practitioners, Julia Thackray and Tony Roe Solicitors highlighted the benefit to those going through divorce that would be offered by guidance as to

⁶⁰ The 2012 SCP, paras 4.116 and 7.5.

⁶¹ The 2012 SCP, paras 4.118 and 7.7.

the appropriate result, for example for those left without legal advice as a result of the withdrawal of legal aid. Julia Thackray said:

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 here. 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.

3.139 And while Tony Roe Solicitors responded to the formula option at paragraph 4.116 of the 2012 SCP by saying, "No. Not under any circumstances", in responding to the question about the scenarios they conceded, "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 that might be".

3.140 Much of the professional opposition to a formula was focused on the idea of a rigid statutory formula giving a single answer. The idea of guidelines, starting points or ranges attracted less opposition, and the Canadian experience aroused interest. So the family law team at Charles Russell LLP said:

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.

3.141 Resolution said:

... 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.

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.

- 3.142 David Norgrove, who chaired the Family Justice Review, submitted a short response which focused on this issue alone. He said:

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. ...

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.

- 3.143 Most of the members of the public who responded were vehement in their support of a formula. The comments of one anonymous consultee were typical of these responses:

Certainty of outcome on divorce is extremely important. We have "Palm Tree Justice" right now. ... I would favour a publicly available table of % financial settlement results on a divorce with maximum and minimum % in different situations.

- 3.144 Another said:

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.

- 3.145 Most of the academics who responded favoured formulaic guidelines. Joanna Miles said:

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).

3.146 Professor Anne Barlow said:

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 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.

3.147 Dr Thérèse Callus said:

[Reform] 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. ... 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.

The consultation events held in December 2012

3.148 Alongside the consultation responses we should also report on two significant consultation events held in December 2012 which moved on the debate about formulae considerably. On 3 December a family law symposium was held at Inner Temple. A panel discussion was chaired by Sir James Munby and featured Professor Carol Rogerson as guest speaker. We hosted a question and answer session from the floor. Around 80 invited practitioners attended.

3.149 The following day the Nuffield Foundation hosted a seminar for academics and practitioners, at which Professor Rogerson spoke again, and where there was opportunity for extended discussion.

- 3.150 We felt that those events – which took place at the very end of the consultation period – prompted a change of view in some practitioners. Professor Rogerson’s presentation was effective in demonstrating that a formula need not be a strait-jacket, and indeed that the Canadian situation was not so far remote from ours. She pointed out that when the working group was first set up to consider the devising of a formula, it was not at all certain that the project would be successful. Today, the formulaic guidelines are widely used and respected.

Conclusions about formulae

- 3.151 We can draw a number of conclusions from the consultation responses. One is that a child-support-style formula that gave a single answer in a given case would not be acceptable to us or to the family law profession.⁶²
- 3.152 However, there remains potential for development of guidelines similar to the Canadian SSAG. These are not wholly opposed by our legal practitioner consultees. We agree, of course, that a world where everyone had access to legal advice and to judicial discretion that provided “a bespoke approach in each case so as to achieve fairness”⁶³ would be ideal. But that is not available. In the light of that, we have recommended a transparent objective for spousal support as described above,⁶⁴ and guidelines showing the way in which that objective is to be achieved. In addition, it may be helpful to people to have access to a calculation that could be made available online, as is the child support formula, and that would indicate at least a “ball-park” – a range within which people could then negotiate.
- 3.153 We do not think that that formula should be statutory; the Canadian experience shows that non-statutory guidelines work well and are likely to arouse far less opposition than legislation.
- 3.154 It would take a great deal of work to develop a formula generating a range of outcomes in each case. Responses to our question about methodology⁶⁵ generated a variety of views but almost all who contributed to this point agreed that it would be a major, multi-disciplinary undertaking.
- 3.155 We can perhaps isolate three points. One is the need for empirical data. A formula would need to be generated “from the ground up” as it was in Canada and would need evidence of current court determinations.⁶⁶ We have been saying for some years that there is a serious lack of data in this area,⁶⁷ some research is

⁶² Despite the views of some professionals, such as Baroness Ruth Deech QC.

⁶³ Family Law Bar Association response.

⁶⁴ Paras 3.88 to 3.90.

⁶⁵ The 2012 SCP, paras 4.118 and 7.7, quoted at para 3.131 above.

⁶⁶ As the objective would be to capture current best practice we do not agree with consultees who suggested that a public opinion survey would be required. However, if at any stage the whole of the law of financial provision came under review, that sort of work would be vital.

⁶⁷ Tenth Programme of Law Reform (2008) Law Com No 311, para 5.6.

now in progress,⁶⁸ but more would be needed. It is most likely to be undertaken by academics with access to external funding.

- 3.156 Second, there would be a need for that evidence to be studied and work carried out by an interdisciplinary team. This is not a job for the Family Justice Council, we think, because a broader range of expertise is needed. Nor is it a task for one academic alone, nor even for a team of lawyers. An interdisciplinary team should include academics from a range of disciplines – including social scientists and economists – and practitioners. The Canadian experience shows that the involvement of the judiciary is essential and valuable. We envisage that the work would involve a close study of the empirical data, followed by a process of experimentation with different forms of calculation so as to devise something that would replicate the mainstream of current outcomes as far as possible.⁶⁹
- 3.157 Thirdly, the project would need time. Estimates among consultees ranged from one to five years, and we think that five years might be about right. Experience elsewhere makes it clear that the investigation and development of a formula takes a considerable time; this is not an area where a quick fix is possible.
- 3.158 The work needed to try to develop a formula would involve a great many people. We are mindful of the fact that the successful development of the Canadian SSAG depended in part upon the fact that the Government sponsored the endeavour. To “sponsor” the development need not involve massive funding; although Government might undertake the empirical research itself, realistically it is more likely that the research would be carried out in the university sector with Research Council or third sector funding. The working group itself is likely to be convened on a part-time basis; Government’s involvement might extend to space, travel expenses and a secretariat, and perhaps payment for a small number of full-time research assistants. Whether such limited funding would be forthcoming is, of course, a big question but we do not know how things will develop in the future. Some consultees suggested that the Law Commission should be involved in this work, and we note that possibility. However, the project would require wide-ranging cross-disciplinary leadership.

⁶⁸ Dr Emma Hitchings and Joanna Miles are currently conducting a research project funded by the Nuffield foundation on final settlements in financial disputes following divorce. They are carrying out empirical research focusing on the stage within court proceedings at which consent orders are made; they are also examining the content of orders made at different stages and the characteristics of cases. Further information about the project is available at <http://www.nuffieldfoundation.org/final-settlements-financial-disputes-following-divorce>. Hilary Woodward of Cardiff University Law School is currently conducting research in this area, focused on pensions in the context of divorce. The project title is “Pensions on divorce: an empirical study”: see <http://www.nuffieldfoundation.org/pensions-and-divorce> (last visited 7 February 2014).

⁶⁹ We used the word “pilot” in the 2012 SCP; we do not envisage piloting in the sense of experimenting with the use of a formula on as yet unresolved cases. We would expect that the group’s work would involve a long process of testing out different versions of the formulae on both hypothetical cases and real (anonymised) examples.

- 3.159 **We recommend that Government support the formation of a working group, to be convened once suitable empirical data become available, to work on the possible development of a formula to generate ranges of outcomes for spousal support. The group would be composed of academics from law, the social sciences and economics, and of family law practitioners and judges. Government support should extend at least to the provision of meeting space, travel expenses and a secretariat; ideally it would also involve the funding of research assistance for the duration of the project (which we envisage could last some five years).**

CHAPTER 4

MARITAL PROPERTY AGREEMENTS AND THE PUBLIC POLICY RULES

INTRODUCTION

- 4.1 In this Chapter we look at marital property agreements, by which we mean agreements made between spouses in order to make provision for the financial consequences of separation, divorce or dissolution. This was the initial focus of our project, and we discuss it in the central chapters of this Report. In this Chapter we make a recommendation for statutory reform in the light of the observations made in the Supreme Court's decision in *Radmacher v Granatino*¹ about the abolition of the common law rule that such contracts are void for public policy reasons. In Chapters 5 and 6 we turn to our recommendations for the introduction of qualifying nuptial agreements. In Chapter 7 we add some practical explanation of the use of qualifying nuptial agreements.
- 4.2 In the paragraphs that follow we explain the current law, showing how it developed from 19th century case law; we set out our consultation question and report on the response of consultees and we explain the recommendations that we now make and the provisions of the draft Bill.

THE DEVELOPMENT OF THE CURRENT LAW

Contracts between spouses

- 4.3 The law of contract imposes no restriction upon the ability of spouses to make contracts with one another, provided that the usual requirements for the formation of a valid contract are observed. However, the fact that two parties to a contract are married may call into question whether there is the requisite intention to create legal relations.² In addition, some of the contract law on mistake, duress, undue influence and misrepresentation has been developed specifically in the context of agreements between spouses, in particular in the context of the law of mortgages, where one spouse may provide security for the other's debt.³ Subject to these points, however, there is no doubt that spouses can make contracts with each other.
- 4.4 Spouses may make marital property agreements that seek to govern the financial consequences of separation, divorce and dissolution. The status of such agreements has evolved over time⁴ and a distinction in how the courts treated such agreements has been drawn, historically, between two categories. First, there are separation agreements, made at or around the time of separation, secondly, there are pre- and post-nuptial agreements, which provide for the financial consequences of a future separation.

¹ [2010] UKSC 42, [2011] 1 AC 534.

² H G Beale (ed), *Chitty on Contracts* (31st edition) Vol 1: General Principles, para 2-172.

³ Above, paras 7-089, 7-093 and 7-112 to 7-127.

⁴ Chapter 2, paras 2.27 to 2.30.

Pre-nuptial and post-nuptial agreements and the common law rule of invalidity

- 4.5 The courts in the 19th century occasionally had to consider the contractual validity of agreements which made provision not for a separation that had happened, or was being actually negotiated, but for a future separation; that is, a separation that might or might never happen. Where agreements related to a future and hypothetical separation, the courts came to the conclusion that they were void for the public policy reason that such contracts might encourage separation or divorce.⁵ It is hard to imagine today a society where husbands and wives were subject to an enforceable duty to live together; but in that context it was natural for the courts to regard with suspicion and disapproval an agreement which contemplated, and made financial provision for, a future separation. Today, of course, the duty to cohabit and the ability of husbands to confine their wives have been swept away, and divorce is available by consent.
- 4.6 This rule, that pre- and post-nuptial agreements were void, is referred to as “public policy rule 1” by Lady Hale in her judgment in *Radmacher v Granatino*;⁶ and it is useful to adopt that label because of the existence of another public policy rule, as follows.

Separation agreements and section 34 of the Matrimonial Causes Act 1973

- 4.7 There was, however, a willingness on the part of 19th century judges to enforce separation agreements.⁷ In the case of *Westmeath v Westmeath*⁸ agreements which dealt with the consequences of a future separation, which were void, were contrasted with agreements dealing with the consequences of an existing separation, which were not. The latter did not fall foul of the public policy objection that they would encourage separation and divorce. So separation agreements, as defined at paragraphs 1.10 and 1.11 of Chapter 1, were not void for public policy reasons.
- 4.8 However, the courts voiced a second public policy objection – “public policy rule 2”⁹ - to marital property agreements generally, which applied equally in the context of a separation agreement. This was outlined by the House of Lords in 1929 in *Hyman v Hyman*.¹⁰ In that case the wife agreed not to apply to court for financial provision on separation in return for financial consideration provided by the husband. It was held that the parties could not oust the court’s jurisdiction to order financial provision. Behind this rule lay the economic need to ensure that parties to a marriage did not pass their responsibility to maintain their former spouse on to the state.

⁵ *Cocksedge v Cocksedge* (1844) 14 Sim 244, 13 LJ Ch 384; *Cartwright v Cartwright* (1853) 3 de GM & G 982, 22 LJ Ch 841; *H v W* (1857) 3 K & J 382, 3 K & J 382; and *Brodie v Brodie* [1917] P 271.

⁶ [2010] UKSC 42, [2011] 1 AC 534 at para [143].

⁷ *Jones v Waite* (1842) 9 Clark & F 101; *Wilson v Wilson* (1848) 1 HL Cas 538; *Hunt v Hunt* (1862) 4 De GF & J 221.

⁸ (1830) 1 Dow & CI 519.

⁹ Referred to as such by Lady Hale in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 at para [144].

¹⁰ [1929] AC 601, 629.

- 4.9 This stance at common law left the parties in a potentially difficult position. The separation agreement, if it included a provision seeking to prevent either party from going to court for financial provision, might be found to be entirely void. Or the paying party might be bound by the agreement whereas the payee could go to court and ask for increased provision, creating an asymmetry between the parties. Following a report on separation and maintenance agreements by a Royal Commission,¹¹ Parliament made provision in the Maintenance Agreements Act 1957 for maintenance agreements made between spouses intending to separate to be binding, but not for such agreements to oust the discretion of the court to make orders. Further changes were recommended by the Law Commission¹² and were implemented in the Matrimonial Proceedings and Property Act 1970, consolidated as sections 34 to 36 of the Matrimonial Causes Act 1973.¹³
- 4.10 Section 34 of the Matrimonial Causes Act 1973 is entitled “Validity of maintenance agreements”. Section 34(1) provides that while any provision purporting to restrict the right to apply to the court for financial provision is void, such a provision shall not prevent the remainder of financial arrangements in the agreement from being binding. In other words, whilst it does not abolish public policy rule 2, it ensures the contractual validity of agreements unaffected by Rule 1, namely separation agreements.¹⁴
- 4.11 Section 35 gives the court power to vary the agreement (so addressing the asymmetry noted above), while section 36 deals with the alteration of agreements after the death of one party.
- 4.12 These provisions were enacted in a society where divorce was far less common than today¹⁵ and specifically to deal with separation agreements. They are called “maintenance agreements” because the function of such agreements was almost invariably to arrange periodical payments for a separated wife. The drafting of section 34 specifically excludes agreements made by parties before marriage, as the definition of a maintenance agreement contained in section 34(2) states that the agreement must be “made ... *between the parties to a marriage* ... [emphasis added]”. So pre-nuptial contracts remain out of its scope. That post-nuptial contracts, in the sense we understand them today and as distinct from separation agreements, would fall within the section is unlikely to have been foreseen by the draftsman at a time when such agreements were unknown in this jurisdiction.

¹¹ Report of the Royal Commission on Marriage and Divorce 1951-1955 (1956) Cmd 9678.

¹² Financial Provision in Matrimonial Proceedings (1969) Law Com No 25.

¹³ See *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 at [23].

¹⁴ And, following *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298, post-nuptial agreements.

¹⁵ See figure 2, “Divorce rates by sex, 1971-2011”, Office for National Statistics, *Divorces in England and Wales 2011* (2012); available online at http://www.ons.gov.uk/ons/dcp171778_291750.pdf (last visited 7 February 2014).

- 4.13 The reported use of these sections of the Matrimonial Causes Act 1973 has been very thin;¹⁶ we have not found a case in which a maintenance agreement was varied using the court's powers under section 35 of that Act. In *Simister v Simister (No 2)*¹⁷ the judge held that the husband had to establish that the court's jurisdiction to vary the maintenance agreement had in fact been engaged, that is, that there had been a change in circumstances warranting a variation of the maintenance agreement in question, before an order could be made. However, after that had been established, the court then made an order using its more familiar powers under section 23 for financial provision, varying the periodical payments to the wife.
- 4.14 Other cases established that the court has no jurisdiction under section 35 to add a lump sum payment to a maintenance agreement after the applicant has remarried¹⁸ but that an application to vary does not die with the applicant, so that the applicant's estate can proceed with the application.¹⁹ It has also been established that the court has the power to backdate the variation of a maintenance agreement.²⁰ Nevertheless, in the most recent case citing section 35, *F v F (Financial Remedies: Premarital Wealth)*²¹ in 2012, the court declined to hold that a share agreement entered into by the parties was a maintenance agreement and instead amended the agreement using its powers under section 24.
- 4.15 So, while the court has the power to vary the provisions of maintenance agreements, in the context of such agreements being made on separation, this power is little used as the more wide-ranging powers of sections 23 and 24 are available, at least on divorce. The utility in practice of section 35, as fewer people separated without divorcing, decreased and, before the case of *MacLeod v MacLeod*,²² it is doubtful whether many family lawyers ever had occasion to examine closely sections 34 to 36 of the Matrimonial Causes Act 1973.

The public policy rules and the modern law

- 4.16 At the beginning of the 21st century, therefore, both public policy rules²³ remained in place.²⁴ Marital property agreements made before or after marriage, contemplating a future separation, were void because they might encourage

¹⁶ As Wilson LJ (as he then was) put it, "Sections 34 and 35 have been dead letters for more than thirty years. To the best of my recollection, neither at the bar nor on the bench have I been party to a case in which they have even fallen to be considered..." See *Radmacher v Granatino* [2009] EWCA Civ 649 at [134].

¹⁷ [1987] Fam Law 50, [1987] 1 FLR 194.

¹⁸ *Pace (Formerly Doe) v Doe* [1977] Fam 18, [1976] 3 WLR 865.

¹⁹ *Joseph v Joseph* (26 November 1998) Fam (unreported).

²⁰ *Warden v Warden* [1982] Fam 10, [1981] 3 WLR 435.

²¹ Also referred to as *WF v HF* [2012] EWHC 438 (Fam), [2012] 2 FLR 1212.

²² [2008] UKPC 64, [2010] 1 AC 298.

²³ See paras 4.5 to 4.8 above.

²⁴ See, for example *N v N (Jurisdiction: Pre-nuptial Agreement)* [1999] 2 FLR 745 at 752 by Wall J: "An agreement made prior to marriage which contemplates the steps the parties will take in the event of divorce or separation is perceived as being contrary to public policy because it undermines the concept of marriage as a life-long union".

separation and divorce; and any provision purporting to oust the court's jurisdiction to make orders for financial provision on divorce was also void. As the courts moved towards affording greater weight to marital property agreements a curious position arose. Agreements contemplating a future separation were at the same time unenforceable as contravening public policy rule 1, and yet were matters which the court would be willing to take into account, potentially decisively, as part of its section 25 exercise.²⁵

4.17 In *MacLeod v MacLeod*, the Judicial Committee of the Privy Council held that the first public policy rule no longer applied to post-nuptial agreements. They gave two reasons for restricting that decision to post-nuptial agreements, one technical and one general:

- (1) the existence of a statutory jurisdiction to vary such agreements, contained in sections 34 and 35 of the Matrimonial Causes Act 1973; and
- (2) post-nuptial agreements were considered safer than pre-nuptial agreements because they were not seen as the price of a wedding and therefore the parties were less vulnerable to pressure.²⁶

4.18 The *MacLeod v MacLeod* case was not strictly binding on future court decisions in England and Wales as it was a Privy Council decision on an appeal from the Manx High Court, but such decisions are treated as highly persuasive. However, in 2010, the Supreme Court in *Radmacher v Granatino* took a further step. Clearly unconvinced by the two reasons given by the Privy Council in *MacLeod v MacLeod* for not abolishing public policy rule 1 for pre-nuptial contracts,²⁷ it said that:

We wholeheartedly endorse the conclusion ... that the old rule that agreements providing for future separation are contrary to public policy is obsolete and should be swept away But ... this should not be restricted to post-nuptial agreements. If parties who have made such an agreement, whether ante-nuptial or post-nuptial, then decide to live apart, we can see no reason why they should not be entitled to enforce their agreement.²⁸

4.19 Strictly, this statement was not binding on the lower courts. It was not an issue on which the case itself was decided. Naturally it is regarded, nonetheless, as being of the highest authority and is likely to be followed.

²⁵ As pointed out by Lord Justice Rix in the Court of Appeal in *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [64]. We set out the history of the court's growing willingness, since the mid 1990s, to take such agreements into account in our 2011 CP at paragraphs 3.27 to 3.37.

²⁶ [2008] UKPC 64, [2010] 1 AC 298 at [36].

²⁷ We explained in the 2011 CP why we too were unconvinced. We noted that the emotional pressures that may exist after marriage may, in some circumstances, be as great as that which may be experienced by parties negotiating a pre-nuptial agreement. We were fortified in that view by the fact that some other jurisdictions view post-nuptial agreements as in need of greater judicial control than those made before the marriage. See paras 3.78 to 3.82 of the 2011 CP.

²⁸ [2010] UKSC 42, [2011] 1 AC 534 at [52].

- 4.20 It may well be, therefore, that public policy rule 1 has now for all practical purposes been abolished. But that change has not been made by legislation. The question then arises whether it should be made explicit in statute; and whether any further changes are needed as a consequence of the abolition of the public policy rule. Is there a need, in particular, to extend the statutory provisions about “maintenance agreements” – particularly sections 34 to 36 of the Matrimonial Causes Act 1973, but there are others²⁹ – to cover pre-nuptial agreements?

OUR CONSULTATION QUESTION

- 4.21 In our 2011 CP we provisionally proposed that, for the future, an agreement made between spouses, before or after marriage or civil partnership, should not be regarded as void, or contrary to public policy, by virtue of the fact that it provides for the financial consequences of a future separation, divorce or dissolution.³⁰
- 4.22 There was considerable support for this provisional proposal, even amongst consultees who opposed any further reform, with 30 out of the 36 consultees who responded to this provisional proposal agreeing with it.
- 4.23 Resolution agreed that “the matter should be placed beyond doubt” and several consultees offered comments emphasising the redundancy of the public policy rule. Joanna Miles said that “legislation should make clear” the obsolescence of the rule and 29 Bedford Row described public policy rule 1 as “quaintly old-fashioned”. Dr Jens M Scherpe voiced a similar view, stating that “the law has moved on” from “concerns that might have been appropriate in their time”. The Chartered Institute of Legal Executives also emphasised the outdated character of the rule:

It is not satisfactory that the current law is based on a rule developed by the courts in the nineteenth century, at a time when the public policy was that marriage was indissoluble.

- 4.24 Mishcon de Reya pointed out the inconsistency between the continued existence of the public policy rule and the ability of the courts to have regard to a marital property agreement as part of all the circumstances of the case. The Family Law Society expressed support for our provisional proposal by making a different point, telling us that “the democratic right of private ordering of affairs between legally consenting adults” had to take precedence over the public policy rule.
- 4.25 Some consultees qualified their support for our provisional proposal by setting out that while they favoured the removal of public policy rule 1, they would be less comfortable with agreements being able to exclude the jurisdiction of the court.³¹

²⁹ For example, section 17 of the Inheritance (Provision for Family and Dependents) Act 1975, which gives the courts the power to revoke or vary “maintenance agreements” where provision is made for payments to continue after the death of the payer.

³⁰ The 2011 CP, paras 3.84 and 8.3.

³¹ Professor Lorna Fox O’Mahony said that she could support the provisional proposal “within the context of the court’s overriding (and primary) duty to ensure fairness between the parties” but would be more concerned about allowing agreements to oust the court’s jurisdiction. Mishcon de Reya agreed that the court’s jurisdiction should not be capable of being ousted but still supported the abolition of the public policy rule.

A small minority of consultees opposed our provisional proposal; four of the 36 consultees who responded disagreed with it. The majority of the Judges of the Family Division felt that the issue was already dealt with by the existing case law.

- 4.26 Another reason put forward was rooted in a more general opposition to marital property agreements: marital property agreements, it was suggested, undermine the importance of marriage and are incompatible with the notion of marriage as a binding life-long contract. One member of the public, for example, felt that pre-nuptial agreements could not logically exist alongside marriage as marriage should be undertaken for life but “a pre-nup explicitly provides for the marriage to be terminated before the death of either party”. Christian Concern said that it “profoundly disagreed” with our provisional proposal as although the nature of marriage had changed due to the introduction of no-fault divorce, this would not “justify it being further undermined by the introduction of nuptial agreements”.
- 4.27 Two consultees did not express a firm view for or against our provisional proposal. The Mission and Public Affairs Council of the Church of England believed that an agreement should not be recognised if it “of its nature frustrates the act of marriage as a lifelong undertaking” but it also felt that some agreements “may be consistent with the intention of marriage as lifelong”. It did not see these latter agreements as being necessarily contrary to public policy.

OUR RECOMMENDATIONS

Abolition of public policy rule 1

- 4.28 We remain of the view that the evolution of the law and changed social attitudes have rendered this public policy rule obsolete. That of course makes no difference to the fact that marital property agreements do not tie the hands of the court; clearly they cannot in general do so and the abolition of this public policy rule – which may already have been effected by the Supreme Court in *Radmacher v Granatino* – did not alter that position.³² However, we think that the matter should be put beyond doubt and so our recommendation is for statutory provision to this effect.
- 4.29 **We recommend that for the future an agreement made between spouses, before or after marriage or civil partnership, shall not be regarded as void, or contrary to public policy, by virtue of the fact that it provides for the financial consequences of a future separation, divorce or dissolution.**
- 4.30 Clause 1 of the draft Bill puts this recommendation into effect, while making it clear that any provision in the agreement that seeks to oust the court’s powers to make orders for financial relief, or the right of either party to apply for such an order, remains void.
- 4.31 What is the effect of this reform? If public policy rule 1 has already been abolished by the Supreme Court in *Radmacher v Granatino*, then it has no effect

³² [2010] UKSC 42, [2011] 1 AC 534.

at all. The purpose of the statutory provision is simply to put the matter beyond doubt. Hence the reference in clause 1 to the common law rule “if it still exists”.³³

- 4.32 We might more usefully ask what is the effect, if any, of the abolition of public policy rule 1 (whether effected by the Supreme Court or to be effected by statute). The answer must be, on its own, “very little”. Because public policy rule 2 remains intact, the fact that an agreement between husband and wife is a valid contract does not change the court’s jurisdiction to make financial orders. Whatever was agreed years before the divorce, if the parties do not agree to abide by their contract then either is free to apply for financial orders. The court will decide, on the basis of the principle in *Radmacher v Granatino*, whether or not to make orders inconsistent with the agreement by asking whether it would be unfair to do so.
- 4.33 However, we consider that some marginal changes arise from the abolition. One is that contractual enforceability may now be an option where there is no relevant judicial discretion. Imagine a couple whose pre-nuptial agreement gave the wife certain property in the event of separation. They separate. The husband dies before transferring the property to the wife. Because the pre-nuptial agreement was a valid contract, the wife can enforce the contract against the husband’s estate.
- 4.34 Another is that arguments about severability will become less important. Imagine an agreement made at the time a civil partnership is celebrated between A and B, that in six months’ time A will transfer his second home to B, and that, if the civil partnership is ever dissolved, B will not receive any financial provision from A. Before the decision in *Radmacher v Granatino*, the enforceability of the agreement to transfer the house was dependent upon its being severable from the provision about the dissolution of the civil partnership – which it might be, if the provision about civil partnership was not expressed to be the consideration for the transfer of the house. If it was not severable, then the whole agreement was void on the basis of public policy rule 1. The point might matter if either party became bankrupt. If the contract is valid as a whole, then the validity of the agreement to transfer the house is clear.
- 4.35 Aside from such unusual cases, however, the effect of the abolition of the public policy rule is largely symbolic, and it avoids the discomfort of an agreement that the law technically regards as contrary to public policy being, in some cases, an important or decisive factor in the determination of an application for financial orders.

Statutory provisions about maintenance agreements

- 4.36 What, then, is to be done (if anything) about sections 34 to 36 of the Matrimonial Causes Act 1973, and other statutory provisions relating to maintenance

³³ See clause 1(2) of the draft Nuptial Agreements Bill at Appendix A.

agreements – in particular section 17 of the Inheritance (Provision for Family and Dependents) Act 1975?³⁴

- 4.37 These provisions are not used. Very few practitioners were aware of them before they were brought to unexpected prominence by the decision in *MacLeod*. Although the Privy Council regarded their existence as a reason to abolish the public policy rule for post-nuptial agreements, the Supreme Court was clearly not swayed by that reasoning, and did not regard the non-availability of the section 35 variation jurisdiction as an argument against abolishing the public policy rule for pre-nuptial agreements.³⁵
- 4.38 One option is therefore to repeal sections 34 to 36 of the Matrimonial Causes Act 1973 (together with section 17 of the Inheritance (Provision for Family and Dependents) Act 1975. That is the simplest option.
- 4.39 However, three reasons made us decide instead to recommend extending those sections to cover pre-nuptial agreements.
- 4.40 In a number of cases, referred to above,³⁶ it was argued that the power in section 35 to vary or set aside a maintenance agreement was important in order to establish that the court then had jurisdiction to make financial orders that were not consistent with the earlier agreement. We do not think that that is the case, but it may be that dicta in these decisions will be followed.
- 4.41 More plausibly, there will be cases where a court makes orders that are inconsistent with a marital property agreement, but where there are provisions in the agreement that the court cannot, under its powers in the Matrimonial Causes Act 1973, address. For example, the agreement may make provision for payments to be made to a third party (for school fees, perhaps, or mortgage repayments). The court cannot order such payments. There may be a need for the court to be able to vary the contractual provision in order to make the overall “package” workable. We are not aware that such cases have in fact arisen, but we have been told that practitioners may in some cases rely on the section 35 power when drafting agreements.
- 4.42 There may be a very few couples today who are separated and wish to obtain financial provision without wishing to become judicially separated or to divorce. Unlikely though it is, the power of variation in section 35 would then be useful, because in this situation there would no engagement of the court’s powers under sections 23 and 24 of the Matrimonial Causes Act 1973.
- 4.43 **We recommend that sections 34 to 36 of the Matrimonial Causes Act 1973 and section 17 of the Inheritance (Provision for Family and Dependents) Act 1975 be amended to cover pre-nuptial agreements.**

³⁴ As explained at footnote 28 above, section 17 of the Inheritance (Provision for Family and Dependents) Act 1975, gives the courts the power to revoke or vary “maintenance agreements” where provision is made for payments to continue after the death of the payer.

³⁵ See para 4.17 above.

³⁶ See paras 4.13 to 4.15.

- 4.44 Clause 2 of the draft Bill therefore amends Section 34 of the Matrimonial Causes Act 1973 so as to extend it to pre-nuptial agreements.
- 4.45 This clause also removes the label “maintenance agreements”, which is inappropriate today where agreements are now likely to contain – or indeed exclude – capital provision. Reference is made now to “section 34 agreements”. And the “financial arrangements” which characterise such agreements are now simply defined, at clause 2(3), as provision for the financial consequences of separation, including dissolution or annulment of a marriage or civil partnership.³⁷
- 4.46 Amendment of sections 34 to 36 of the Matrimonial Causes Act 1973 also prompts an amendment to section 17 of the Inheritance (Provision for Family and Dependents) Act 1975. This section currently enables personal representatives to apply to the court for the variation of a maintenance agreement for the benefit of a surviving spouse, when an application is made under section 2 of that Act for family provision. We are not aware of its having ever been used but, for the sake of symmetry with the amended sections in the Matrimonial Causes Act 1973, the term “maintenance agreements” is removed, and a new definition of “financial arrangements”, matching that used in section 34 of the 1973 Act, is provided.

³⁷ Clauses 2(9) and (10), and 3(7) and (8), amend the language of further statutory references to “maintenance agreements”, so as to match what is now the language of section 34 of the Matrimonial Causes Act 1973 and paragraph 67 of Schedule 5 to the Civil Partnerships Act 2004, without changing their substance.

CHAPTER 5

QUALIFYING NUPTIAL AGREEMENTS

INTRODUCTION

- 5.1 In Chapter 2 we sketched out the current law relating to marital property agreements, culminating in the decision in *Radmacher v Granatino*.¹ We noted that the Supreme Court's decision developed the law as far as was possible without statutory reform. Our consultation, published some three months after that decision, essentially asked to what extent reform was still needed.
- 5.2 In this Report we recommend two reforms. One is the statutory confirmation of the abolition of the common law rule that a contract making financial provision for a hypothetical (rather than an actual) separation is void for public policy reasons. We have explained that recommendation in Chapter 4. In this Chapter we explain our decision to recommend the introduction of a new form of marital property agreement: the qualifying nuptial agreement.
- 5.3 The qualifying nuptial agreement will be a reliable way for couples to decide in advance how their property will or will not be shared, without having the fairness or unfairness of their agreement scrutinised by the court. We have built in a number of safeguards to ensure, as far as is possible, that such agreements are only made knowingly and willingly, and without giving rise to hardship (whether foreseen or unforeseen). To that end, an agreement can only be a qualifying nuptial agreement if it meets certain requirements as to its formation. The most important of these are legal advice and financial disclosure. And it is an important plank of our policy that qualifying nuptial agreements will not be able to be used to contract out of making provision for either party's financial needs. We explained in Chapter 2 the breadth of meaning of that expression, and in Chapter 3 the measures we recommend for increasing transparency and consistency in the law relating to financial needs. By ensuring that needs cannot be compromised by a qualifying nuptial agreement, we make it clear that an agreement which leaves a spouse or former spouse without reasonable provision for income, housing, and the other elements that family lawyers understand as "needs", will continue to be subject to the courts' control.
- 5.4 As a result, we do not expect qualifying nuptial agreements to become the norm for either spouses or civil partners. We regard them as a specialist tool for use, broadly, in two situations.
- (1) Where both partners have been married or been in a civil partnership before and wish to preserve, particularly for the children of earlier relationships, property they have acquired or generated before the later marriage or civil partnership.
 - (2) Where the parties' wealth exceeds what is required to meet either party's needs, so that they can safely make their own arrangements for the sharing of that excess.

¹ [2010] UKSC 42, [2011] 1 AC 534.

- 5.5 This is not to say that others cannot use marital property agreements. But it is only where financial needs can be met by the parties on divorce or dissolution that a qualifying nuptial agreement will be able to take the parties' financial arrangements entirely outside the jurisdiction of the court.
- 5.6 It is also worth noting that whilst qualifying nuptial agreements may be separation agreements as well as pre- and post-nuptial agreements, we focus on their use as pre- and post-nuptial agreements. It is unlikely that separation agreements will be framed as qualifying nuptial agreements due to the courts' strong preference for upholding them. Separation agreements do not raise the same issues as do pre- and post-nuptial agreements because they are agreed at the point when they are going to take effect; separating couples are unlikely to make a separation agreement whilst simultaneously applying to the court seeking a different outcome.² It might be that in the future separating couples choose to make their separation agreements as qualifying nuptial agreements, but this is likely to be seen as unnecessary.
- 5.7 In this Chapter we discuss, first, the responses to our consultation both on the principle of the introduction of qualifying nuptial agreements and on their potential scope. We then explain the recommendations that we make and the corresponding provisions of the draft Bill. Finally, we discuss another proposal made in the 2011 CP about the potential effect of qualifying nuptial agreements on claims under the Inheritance (Provision for Family and Dependants) Act 1975, and on which we make no recommendation. In Chapter 6 we look at the formal pre-requisites that we recommend for qualifying nuptial agreements, and in Chapter 7 we explore the practical uses for them.

QUALIFYING NUPTIAL AGREEMENTS: IN PRINCIPLE

Our consultation question and the responses

- 5.8 In our 2011 CP we explored the possibility of the introduction of a new form of agreement – the “qualifying nuptial agreement” – which would be binding and would exclude the jurisdiction of the court under the Matrimonial Causes Act 1973, provided certain safeguards were met.³
- 5.9 The majority of those who responded to this question were broadly in favour of their creation. These consultees gave many detailed and varied reasons for their support and suggested several possible approaches to reforming the law in this area.
- 5.10 The uncertainties left following *Radmacher v Granatino*⁴ were picked up by a number of consultees. Even following this decision the extent to which the court will uphold marital property agreements, and the circumstances in which they will be deemed unfair, are unclear. Some consultees felt that the introduction of qualifying nuptial agreements would go some way towards providing a remedy for

² Applications to court have been made soon after the conclusion of agreements: see the Court of Appeal cases of *Edgar v Edgar* (1981) 2 FLR 19, [1980] 1 WLR 1410 and *Xydhias v Xydhias* [1999] 1 FLR 683, [1999] 1 FCR 289.

³ The 2011 CP, paras 5.69 and 8.4.

⁴ [2010] UKSC 42, [2011] 1 AC 534.

this by providing individuals with greater certainty about the financial consequences of divorce, dissolution or separation. The Family Law Bar Association felt that certainty was the strongest argument in favour of qualifying nuptial agreements, given the “significant uncertainty in current ancillary relief case law”.⁵

- 5.11 A major argument raised by several consultees was that individuals should be able to choose for themselves how to arrange their financial obligations on divorce, dissolution or separation. A member of the public thought that:

We need to restore an element of autonomy and choice to the individuals concerned that is currently being removed by courts. We need to enable the public to sort out their own lives rather than trying to do it for them.

- 5.12 Some consultees questioned how far qualifying nuptial agreements would genuinely promote autonomy, as opposed to undermining it. Christian Concern discussed the “widely recognised concern” that one party might be placed under “immense pressure” to sign an agreement.⁶

- 5.13 Joanna Miles acknowledged that there is always a risk that an individual might come to regret making a pre-nuptial agreement but added that:

While I may be restricting my partner’s future choices, I can only do that in consequence of a choice made by that individual to enter into the agreement in the first place.

- 5.14 It was argued that a greater degree of certainty and autonomy over how property will be divided on divorce could encourage individuals to marry. Two members of the public said that they would not wish to marry again unless qualifying nuptial agreements were introduced. Furthermore, binding qualifying nuptial agreements may be particularly helpful to those couples in special circumstances which the Matrimonial Causes Act 1973 does not address, for example, couples who have already been married and would like their property to go to their children of a

⁵ Furthermore, several consultees who had experienced the current system of financial orders first-hand felt aggrieved by the outcome and thought that the availability of qualifying nuptial agreements could have addressed some of their problems by providing greater certainty in advance. The Mission and Public Affairs Council of the Church of England also felt that *Radmacher v Granatino* could have “potentially shapeless results”.

⁶ We take this concern very seriously; it is addressed by appropriate safeguards, such as the requirement to seek independent legal advice, and the rules relating to duress and undue influence in the law of contract, discussed further in Chapter 6.

previous marriage,⁷ or those who own a family business which they wish to keep within the family.⁸

- 5.15 Introducing qualifying nuptial agreements would also bring the English system into line with other jurisdictions. 29 Bedford Row noted that “almost every other legal system” allows such agreements in some form. The Unquoted Companies Group characterised the current law as “increasingly out-of-step with international practice”, and pointed out that some claims for financial orders are deliberately begun in England due to the courts’ “potentially more ‘liberal’ approach to marital property agreements”.
- 5.16 Resolution thought that the solution should be to amend section 25 of the Matrimonial Causes Act 1973 to provide that marital property agreements would be accepted by the court subject to certain safeguards. They felt that to introduce qualifying nuptial agreements alongside non-qualifying ones could create layers of extra litigation, as parties challenging agreements might need to apply first to the county court or Queen’s Bench or Chancery Division to have the agreement declared non-qualifying and then make a new application in the family court.
- 5.17 Mishcon de Reya thought that marital property agreements should always be capable of review by the court on the grounds of fairness. However, they disagreed with the concept of fairness given in *Radmacher v Granatino* – they did not think that the existence of a marital property agreement between the parties should be capable of altering what is fair, as the majority in *Radmacher v Granatino* held.⁹
- 5.18 A significant minority of consultees were against the introduction of qualifying nuptial agreements. Some made principled arguments, for example, that such agreements were inimical to the nature of marriage, or would undermine gender equality, or that reform would be inappropriate as it would only benefit the rich. Others raised practical concerns, arguing that introducing qualifying nuptial agreements would lead to more litigation, not less. Others did not consider that there was a need for reform, either because the current law was satisfactory, or because the law should be allowed to develop in the wake of *Radmacher v Granatino* before a decision was made as to whether further changes would be

⁷ The Family Law Bar Association felt that “autonomy arguments are more validly made in relation to mature couples”, particularly if they have been married before, though they questioned whether autonomy-based arguments could be used in every case.

⁸ Unquoted Companies Group thought that allowing businesses to be excluded from the sharing principle in financial orders would help to ensure the “continuity and viability of businesses and the employment and investment that they provide”. The Historic Houses Association made a similar point in relation to the preservation of historic houses. Another consultee, Aina Khan, suggested that marital property agreements had the potential to be “of real benefit to British Muslims”. She felt that many young Muslims, perhaps a majority, were “frightened of entering into marriage” due to the current system of financial orders, and were instead “having just an Islamic marriage, which has no status under English law”. We would stress, in response to that comment, that while the use of a qualifying nuptial agreement will enable couples to design their own provisions relating to the sharing of property, it will not enable any arrangement that takes away a former spouse’s entitlement to provision for financial needs, whether the motivation for that arrangement is religious or secular.

⁹ [2010] UKSC 42, [2011] 1 AC 534 at [75].

necessary.¹⁰ Several consultees also noted that the current state of the law on financial orders, which following *White v White*¹¹ measures awards according to a “yardstick of equality” and does not confine the non-earning or less wealthy spouse to provision based upon needs, has been hard-won. They felt that introducing qualifying nuptial agreements would be a step backwards as it would allow wealthier spouses to avoid this principle of equality.

- 5.19 Several consultees thought that introducing qualifying nuptial agreements would undermine what they felt to be the fundamental nature and incidents of marriage. Christian Concern thought that:

The law should encourage marriage as a life-long, permanent union which creates the ideal and most stable environment for the raising of children. Introducing Nuptial Agreements will undermine marriage by redefining it as a temporary commitment akin to a business or commercial contract.

- 5.20 Dr Robert George saw marriage as a “privileged status” with “prescribed legal consequences”, which one accepts when one decides to marry. He argued that if one wishes to enjoy the benefits of marriage, one must accept its burdens, such as the financial obligations which arise on divorce and questioned the idea that financial agreements deserve different treatment from the law compared with any of the other obligations of marriage:

Divorce, for example, is allowed only under the circumstances set out in the Matrimonial Causes Act 1973. Individuals cannot specify before they marry that, for them, adultery will not count as evidence of irretrievable breakdown, or that the wearing of a yellow hat will constitute an additional ground for divorce. These restrictions on the availability of divorce are necessary consequences of the state’s regulation of marriage, but one cannot imagine that the Supreme Court thinks that this is an undue restriction on “respect for individual autonomy”, nor “patronising and paternalistic”. Since property division on divorce is simply a particular manifestation of the marital obligation of mutual support, it is hard to see why the autonomy argument is any stronger in relation to ante-nuptial agreements than it would be in these hypothetical examples about the grounds for divorce itself. If autonomy is powerful enough an argument to allow people to escape one of the incidents of marriage, why not others?

¹⁰ David Hodson called *Radmacher v Granatino* “one of the best case law innovations in family law” and said that it “dramatically removes the need for immediate primary legislation”. Such legislation should only be contemplated if “confusions and contradictions and uncertainties from the High Court and Court of Appeal” arise in the future. District Judge Tony North felt that legislation would only be needed if *Radmacher v Granatino* led to “numerous anomalies”. However, Mrs Justice Florence Baron felt that “the Court must retain residual power to monitor overall fairness” in all cases but disagreed with the approach of the Supreme Court in *Radmacher v Granatino*, which she felt created “the worst of all worlds” as the new “unfairness” test would result in much court time being spent on attempting to “loosen the magnetism” of a marital property agreement.

¹¹ [2000] UKHL 54, [2001] 1 AC 596.

The empirical research

- 5.21 In 2010 and 2011 Professor Anne Barlow and Dr Janet Smithson undertook research to investigate public attitudes towards binding pre-nuptial agreements.¹² This research was carried out in two phases: the first used a nationally representative survey of 2,827 people and the second was a follow-up study involving 26 participants, selected to ensure a balance of genders, ages, incomes, relationship histories and current relationship statuses. Phase one took place before the judgment in *Radmacher v Granatino*, whilst phase two was carried out after the judgment had been given.¹³ It should be noted that the binding pre-nuptial agreements envisaged in the research, and about which the respondents were asked, did not include any safeguards or any limit on the kinds of arrangements that could be reached between the parties. In particular, the scenarios presented did not involve restrictions on the parties' ability to oust the court's jurisdiction on needs when making a pre-nuptial agreement.
- 5.22 The researchers concluded from the results of phase one that, by a small majority,¹⁴ the public were in favour of couples being permitted to make binding pre-nuptial agreements but that they also had concerns about the ultimate fairness of such agreements. These concerns were linked to the difficulty of making an agreement that can adapt to changes in circumstances and so remain fair even in the, perhaps distant, future, as well as a more general feeling that parties to long marriages, where there had been children, should not be free to leave one another without adequate sharing of resources. Professor Barlow and Dr Smithson found that attitudes were shifting, although not radically, and that the public now see pre-nuptial agreements as "a possibility – for others, if not for themselves" and as being "likely to be considered in a wider range of situations, no longer restricted just to an elite band of people in 'big money' cases".¹⁵
- 5.23 In particular, respondents thought that the use of a pre-nuptial agreement would be sensible in two situations: first where there were children from previous relationships, and secondly where the agreement was designed to protect inherited wealth. The survey also found that where there had been a short marriage, with no children, 60% of participants thought that a pre-nuptial agreement between the couple should be binding.
- 5.24 However, participants in the survey were not comfortable with agreements remaining binding in other circumstances. Responding to an example where the couple had been married for 20 years and the wife had given up work to have children, only 16% of respondents thought that a pre-nuptial agreement that the husband would keep the matrimonial home and pay no maintenance should be binding. In another example, where the couple had been married for 10 years,

¹² A Barlow and J Smithson, "Is Modern Marriage a Bargain? Exploring perceptions of pre-nuptial agreements in England and Wales" [2012] 74(3) *Child and Family Law Quarterly* 305.

¹³ Only one of the participants in the follow-up study had heard of the judgment; see page 306 of the above.

¹⁴ 58%, with 21% disagreeing and 21% neither agreeing nor disagreeing; see page 307 of the above. These figures have to be read in the context that the survey asked about pre-nuptial agreements without stipulating that provision for financial needs would fall outside their scope.

¹⁵ Above, p 307.

without children and both working, but where the husband had suffered from recent health problems meaning that he could no longer work, only 32% of those surveyed thought that a pre-nuptial agreement that neither would make any claim on the other's income or business assets should be binding. Those interviewed for the follow up study thought that having children was an important factor that would alter the subsequent fairness of an agreement.

Discussion

- 5.25 In both our own consultation and in the research conducted by Professor Barlow and Dr Smithson, a majority of consultees were in favour of the broad proposition that couples should be permitted to make binding nuptial agreements. However, arguments were also made against holding couples to such agreements, with consultees raising concerns about gender equality or arguing that agreements providing for a future breakdown are contradictory to the status of marriage as a life-long commitment. Participants in Barlow and Smithson's study also worried about the fairness of upholding agreements made in very different circumstances to those existing at the time of the separation.
- 5.26 We take the view that the introduction of qualifying nuptial agreements would not devalue or discourage marriage; as noted above, two members of the public who responded to our consultation said quite the opposite, and felt that they would not marry without a pre-nuptial agreement. It seems that concerns about gender equality and fairness are linked to a general view that the financially weaker spouse, perhaps financially weaker because of childcare responsibilities, should not be left with nothing at the end of a marriage. We agree, and have met that concern by recommending that qualifying nuptial agreements cannot prevent the court from making provision for a party's needs. This is a crucial element of our recommendation. Ensuring that qualifying nuptial agreements must make provision for the parties' needs also prevents the state from having to shoulder responsibility for a party left without sufficient resources after the break-up of a marriage or partnership.
- 5.27 In our view, there are strong arguments in favour of reform. In the 2011 CP we set out three main arguments in favour of the introduction of qualifying nuptial agreements,¹⁶ and we return to them here.

Autonomy

- 5.28 Why should it not be possible for a couple to choose the financial consequences of the ending of their relationship, rather than having those consequences imposed upon them? Those who enter into marital property agreements have the capacity for marriage or civil partnership, and indeed to enter into other contracts between themselves;¹⁷ why should they not have capacity to enter into an agreement about their future financial status? It has been suggested that the paternalism of the law of financial orders is inappropriate in a modern world. In

¹⁶ The 2011 CP, paras 5.18 to 5.43.

¹⁷ Subject to the law's concerns about intention to enter into legal relationships where the parties are close family members: see, for example, *Balfour v Balfour* [1919] 2 KB 571 and H G Beale (ed), *Chitty on Contracts* (31st edition) Vol 1: General Principles, paras 2-172 to 2-177; and Lady Hale's comment in *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 at [154].

2009 the Court of Appeal said that to assume one party is “unduly susceptible to ... demands ... is patronising, in particular to women”.¹⁸ Lord Justice Wilson suggested that it would be preferable for the “*starting point* to be for both parties to be required to accept the consequences of whatever they have freely and knowingly agreed”.¹⁹

5.29 Our consultees also raised this argument; Andrew Turek said:

It is my experience and observation that the present law imposes a burden on divorcing couples and on society which is not necessary and which is derived from an assumption, which may once have been true but is not now, that in marriage and divorce grown men and women (especially women) are unable to recognise and protect their own interests.

5.30 However, we accept as we did in the 2011 CP that the argument for autonomy has to be regarded with caution: those who marry or form civil partnerships are adults and can take their own decisions, but it is a matter of experience that people are willing to agree, when they are in love, to things that they would not otherwise contemplate. As we discuss in more detail below, we know that people tend to be unrealistically optimistic about both the likelihood that they will divorce and their future fortunes.²⁰ A fiancé(e) may enter into an agreement at the other’s request in the firm belief that the relationship will never end. He or she may not really want the agreement to take effect, or may not have thought through the consequences of entering into it.

5.31 Furthermore there may be pressure. Practitioners in a study by Dr Emma Hitchings talked of the pressures their clients may face when being encouraged to sign a pre-nuptial agreement. Dr Hitchings reported that:

Time and again practitioners raised the “typical scenario” of the financially stronger party exerting emotional pressure upon their client (normally the financially weaker party), through the “I won’t marry you if you don’t sign the agreement” argument.²¹

Indeed, the law already recognises the possibility of pressure within a close relationship, in the context of the law relating to undue influence in contracts, and we have more to say about this in Chapter 6.²²

5.32 We think that it is possible, to some extent, for the law to counteract pressure by imposing certain pre-conditions for the validity of a qualifying nuptial agreement and we have attempted to ensure that our suggested reform would do so. For example, as we go on to describe, we recommend that the parties to a qualifying nuptial agreement must take legal advice and receive disclosure, and that

¹⁸ *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [127].

¹⁹ Above (emphasis in original).

²⁰ See below, paras 5.70 to 5.76.

²¹ E Hitchings, *A Study of the Views and Approaches of Family Practitioners Concerning Marital Property Agreements* (2011) p 112.

²² Chapter 6, from para 6.16.

qualifying nuptial agreements should not be concluded within the 28 day period leading up to the day of the wedding. We accept, however, that legal pre-conditions cannot entirely eliminate the probability that some people may agree qualifying nuptial agreements that they would later regret.

- 5.33 The other reason for caution is that we have to be very clear about what the autonomy, or freedom, in question is. All couples, under the current law, have the freedom to agree whatever they like by way of financial settlement when their relationship comes to an end. The autonomy that is prayed in aid of binding marital property agreements is not simply the freedom to make an agreement, nor simply the freedom to do as one wishes. It is the freedom to force one's partner to abide by an agreement when he or she no longer wishes to do so. It is freedom of contract, but it is therefore freedom to use a contract to restrict one's partner's choices.
- 5.34 So the autonomy argument is a strong one but it raises concerns as well. These concerns, and the results of both the empirical research and our consultation have led to our decision, discussed below from paragraph 5.68, to limit the scope of qualifying nuptial agreements. We recognise that there may be pressure on one party to sign an agreement, and that that party may enter the agreement unwillingly or with unrealistic optimism. Thus, whilst a party may regret the agreement, or have his or her choices restricted, we have decided that the court's jurisdiction to make provision for needs should not be ousted by a qualifying nuptial agreement and so no party will be left without resources following separation.

Certainty and the cost of discretion

- 5.35 Much stronger, we feel, than the argument for autonomy is the argument for certainty. As one member of the public put it:

Surely the most important point of a pre-nuptial agreement is to provide both parties with a high degree of certainty as to the outcome in the event of a breakdown in their forthcoming marriage and to reduce the need to resort to expensive legal redress in the event of the breakdown.

- 5.36 Again, of course, that freedom exists under the current law, provided there is agreement at the point when the relationship ends. What is being argued is that it is important for the parties to have certainty in advance that a partner will not be able to re-open the financial agreement by resorting to the court, and that that limitation upon one partner's freedom is justified in the interests of both by ensuring that neither will be involved in the uncertainty, stress and cost of litigation. The fact that the terms of a marital property agreement are always subject to the court's review means that it is currently never possible to be certain, in advance, that an agreement will determine the outcome of the financial relief process.
- 5.37 Certainty may be particularly important for those who are remarrying and have children from a previous marriage, and for those who wish to protect inherited or "family" wealth from division upon divorce. Under the current law there is no guarantee that a party who has children from a previous relationship will be able to preserve assets to pass on to those children, whilst a binding qualifying nuptial

agreement would allow a party to do just that. As we set out later in Chapter 8, the law on non-matrimonial property is unclear, both in terms of what property can be considered “non-matrimonial” and in terms of the effect that the existence of non-matrimonial property will have on the eventual division of assets by the court. A qualifying nuptial agreement would allow parties to define, from the outset of the relationship, what property should be split between them and the way in which it should be split. As already mentioned, these two situations are ones in which the public feel that a pre-nuptial agreement may be sensible and pragmatic.²³

- 5.38 It may be argued that couples can, following *Radmacher v Granatino*,²⁴ already be reasonably sure that pre-nuptial agreements will be upheld. However, the fact that the terms of a marital property agreement are always subject to the court’s review means that it is currently never possible to be certain, in advance, that an agreement will determine the outcome of the financial relief process.

The international perspective

- 5.39 As we explained in our 2011 CP, a great number of other jurisdictions allow binding marital property agreements.²⁵ The introduction of qualifying nuptial agreements would bring our laws into step with those jurisdictions, allowing couples who had made their agreements in another country to rely on the binding nature of the agreement if they subsequently moved to England or Wales.²⁶ One consultee, a member of the public, told us of his unhappy experience of moving here with his wife, only to find that it was no longer guaranteed that their pre-nuptial agreement would be upheld by the courts. The introduction of qualifying nuptial agreements could encourage the movement of wealthy foreign nationals to this jurisdiction by offering them the opportunity to replicate, or come close to replicating, the certainty of outcome on divorce and preservation of wealth which they may enjoy in their jurisdiction of origin. This could benefit England and Wales economically. Qualifying nuptial agreements could also reduce disputes between foreign national couples who seek to litigate, on an English divorce, over the status of their foreign agreement, since such couples could simply reproduce the terms of their foreign pre-nuptial agreement as a qualifying post-nuptial agreement upon moving to England or Wales. This could save time, money and stress for those involved, and potentially reduce the burden on our courts.

- 5.40 **We recommend that qualifying nuptial agreements should be introduced by legislation.**

- 5.41 However, an important part of the reasoning that led us to that conclusion is consideration of the scope of these new agreements, and that is so fundamental to our conclusions that we discuss it in the next section of this Chapter before spelling out our recommendation further. Another important element of our

²³ See para 5.23 above.

²⁴ [2010] UKSC 42, [2011] 1 AC 534.

²⁵ The 2011 CP, Part 4.

²⁶ Provided, of course, that the agreement fulfils the pre-requisites necessary for a qualifying nuptial agreement, including the requirement that the couple have received advice given by a qualified lawyer as to the agreement’s effect in law in England and Wales.

reasoning is the need for safeguards to surround the formation of qualifying nuptial agreements, which we discuss in Chapter 6.

THE SCOPE OF QUALIFYING NUPTIAL AGREEMENTS

- 5.42 Qualifying nuptial agreements would exclude or limit the power of the courts to make financial orders. We cannot spell out a recommendation for their introduction without clarity as to the scope of that exclusion.
- 5.43 We made clear in the 2011 CP that qualifying nuptial agreements should not be used to enable anyone to contract out of their responsibilities to children, nor to cast their responsibilities for their partner onto the state. Beyond these two basic safeguards, we asked consultees to tell us what other safeguards, if any, they thought ought to attach to qualifying nuptial agreements. We did so by asking the following consultation question:

We ask consultees to tell us which of the following options they would prefer:

- (1) a “cast-iron” model, imposing no limitations beyond those relating to children and to social security;
- (2) provision for the agreement to be able to be varied or set aside by the court on the happening of specified events;
- (3) provision for the agreement to be varied or set aside by the court if it produced significant injustice;
- (4) provision for the agreement to be varied or set aside by the court to the extent that it failed to meet the parties’ needs and to provide compensation for any losses caused by the relationship;
- (5) provision for the agreement to be varied or set aside by the court if it failed to meet the parties’ needs, narrowly defined.²⁷

The consultation responses

- 5.44 Consultees offered a range of views on these options; there was no overwhelming consensus. A few saw no value in the imposition of any additional safeguards. Far more voiced support for one of the safeguards, but made comments on more than one of the possible options or put forward an alternative option. We include below some of the comments provided to us by consultees on the options presented in the consultation question above. We then go on to explain our recommendation.

(1) “Cast iron” model

- 5.45 A number of consultees who answered this question favoured this option. Andrew Turek warned that without such an approach, “the very litigation which nuptial agreements should obviate will be back under another guise”. Men’s Aid voiced a similar concern, explaining their view that permitting “nuptial agreements to be

²⁷ The 2011 CP, paras 7.65 and 8.19.

set aside or varied defeats the purpose of nuptial agreements and kills off 'certainty'".

- 5.46 A member of the public appeared to support in part the "cast iron" model but took this model further than we suggested by expressing his opposition to any "safety nets", including those relating to children and social security:

As long as both parties have been made aware of the risks of what they are entering into up front AND there has not been a deliberate attempt during the marriage or divorce process to manipulate the assets/income such that one party can no longer fulfil their stated obligations, why should a pre-nuptial agreement not be 100% binding? Offering further safety nets or get out clauses in relation to providing for the needs of any children or leaving one party dependent on state benefits means the key problem of uncertainty remains which defeats the purpose of the pre-nup.

(2) Provision for varying or setting the agreement aside on the happening of specified events

- 5.47 By this we mean that an agreement between the parties would have to be set aside if an event specified in a statutory list occurred. Just two consultees expressly preferred this option, but most opposed it. 29 Bedford Row saw the safeguard as unhelpful because there "are too many uncertainties in life". In its view, "any attempt to provide for future specified events in an agreement is likely to lead to a very long agreement which may nevertheless fail to provide for what actually happens".

- 5.48 A similar concern about this option was voiced by Dr Thérèse Callus:

This requires a certain amount of crystal ball gazing which is neither conducive to a predictable result, nor necessarily fair. It would be impossible to articulate a list in law of relevant events.

(3) Provision for varying or setting aside the agreement if it produced significant injustice

- 5.49 John Eekelaar made the following comment:

The final question then would be whether there should be a "long-stop" provision for the agreement to be varied or set aside by the court if it produced "significant injustice." I am inclined to think there should be, simply because one cannot foresee everything.

- 5.50 Elizabeth Morrison expressed her opposition to this option, seeing it as the case that:

Option (3) is close to the way that pre-nups will be treated under Radmacher and would therefore largely defeat the object of any reform. The same point can be made, although with less force, as to options (4) and (5).

- 5.51 Several consultees put forward suggestions for other standards beyond "significant injustice". These consultees tended to root their suggestions either in

a simpler or modified concept of “injustice” or in a broader notion of “fairness”. 29 Bedford Row, for example, favoured a safeguard based on “serious injustice”, (linking it to “need” narrowly defined, that is, the fifth safeguard option) explaining that:

We are attracted to the New Zealand model where an agreement can be set aside on the basis that giving effect to it would cause serious injustice We acknowledge that this reintroduces discretion but feel that ‘serious injustice’ is a sufficiently high hurdle – much higher than mere ‘unfairness’ – to give a reasonable degree of certainty.

... We feel that any argument that giving effect to an agreement would fail to meet a party’s needs or to provide adequate compensation can and should be raised in the context of serious injustice. Experience of present ancillary relief law shows that the proper level of needs is one of the most contentious features: huge energy and much cost and time are devoted to competing budgets and property particulars in a high number of cases. A hurdle of serious injustice would leave the door open for arguments based on needs and/or compensation, but would provide a focus for resolving such issues and would discourage too ready a resort to court.

... We feel that the criterion of serious injustice would be the best way of achieving the goal of narrowly defined needs.

- 5.52 However, Dr Robert George did not agree that the term “injustice” ought to be qualified, such as through the use of the word “significant”. He suggested an alternative model and explained his opposition to qualified standards:

... I am highly concerned by the word “significant” – why should an agreement which produces “injustice”, but not “significant injustice”, be upheld? Who is to draw the line between “injustice” and “significant injustice”?

... My preferred option would be this:

... provision for the agreement to be varied or set aside by the court if it produced injustice to one or both parties or any minor child of the family, including (without limitation) by failing to provide for that person’s needs (generously interpreted), or by failing to provide compensation for any losses caused by the relationship.

- 5.53 Other consultees discussed notions of “fairness”. Mrs Justice Baron, for example, emphasised the importance of the court retaining a residual discretion to help ensure fair outcomes; her comments also have some cross-over with the option of varying or setting aside agreements on the happening of specified events. She said:

... I am clear that the Court must retain residual power to monitor overall fairness. I am not convinced that “manifest” unfairness is the proper test because it is too limiting. The criterion should be fairness in the context of the particular circumstances of the case.

The birth of children has to be a trigger for re-assessing fairness, although it should not automatically render a fair agreement nugatory.

She also addressed sharing:

To summarise: couples should never be able to contract out of needs (“reasonable requirements”) in the context of a particular marriage. I am not in favour of contracting out of sharing if such can be established by need. The usual form of pre nuptial agreements which prevents sharing is generally unfair, although I can accept a legitimate use for pre-nuptial agreements to preserve pre-acquired and inherited property subject always to provision for needs.

- 5.54 Dr Thérèse Callus similarly placed emphasis on the potential value of fairness as a safeguard:

... In the light of the current law on ancillary relief, the elusive and all-pervading concept of fairness may appear to be the most relevant safeguard to consider. However, I would also reject any proposal to include a statutory definition as this would be extremely difficult to articulate. If fairness is to remain the overarching principle, it is perhaps most appropriate for the court to maintain its discretion in assessing fairness on each individual case before it. Any list could not be exhaustive, so it would be unlikely to produce greater certainty. However, as an elusive concept, it may be helpful for statute to articulate a clearer framework for fairness. If the lowest common denominator of fairness is that no party should be left dependent upon state benefit as a result of a [marital property agreement], I would suggest that the formal status of marriage requires that divorce have particular effects which informal cohabitation does not have. This must surely be that by virtue of the marriage, fairness requires sharing of the marital acquests.

- 5.55 Mishcon de Reya added further to the support for a safeguard based on fairness, stating that “the Court should retain an overall discretion to vary or set aside an agreement if it is objectively unfair”. And the Judges of the High Court, Family Division advanced the following argument:

... fairness should remain the guiding principle, which in turn requires the court retaining sufficient flexibility to ensure fairness can be achieved.

... we would endorse the view expressed by the Supreme Court that it is unlikely to be fair to hold parties to an agreement which leaves one in a predicament of real need – as per proposal (4). In our view any such result would be likely to constitute significant injustice - as per proposal (3).

- 5.56 Another argument based on fairness was presented by Marilyn Young:

... any agreement should be capable of variation or to be set aside by the Court if it made insufficient provision for any child or was

manifestly unfair to one of the parties. There can never, in my view, be a "cast iron" model as a generality.

... To limit the Court's power to intervene to just specified events is, again, dangerous and fettering the Court's powers.

... The Court should have the power to set aside an agreement if it fails to meet the parties' needs and to provide compensation for any losses caused by the relationship — in other words, to make the agreement measure up to what a Court might have ordered had there been no agreement.

- 5.57 Some consultees, however, expressed their opposition to safeguards based on fairness. Tracey O'Dwyer for example, told us that:

I am not in support of a safeguard for where the agreement is unfair. If a person has entered into it freely and with legal advice, then unless they can show undue pressure or something like that, then they should be held to it I believe.

(4) Provision for varying or setting aside an agreement by the court to the extent that it failed to meet the parties' needs or to provide compensation

- 5.58 Professor Lorna Fox O'Mahony favoured this option as, in her view, it provided "maximum scope for the courts to achieve fair and flexible outcomes". The Chartered Institute of Legal Executives saw the benefit of a provision of this kind as follows:

... it would prevent parties attempting to make agreements which may give rise to hardship or which leaves a party with little or nothing following the breakdown of a marriage. It will also allow the lawyers who are providing independent legal advice to each party, to provide advice on the matter, giving clarity on whether an agreement is likely to fall foul of such a provision.

- 5.59 The protection of needs, generously interpreted, was seen as particularly important by some consultees. District Judge John Regan said:

... the law must provide an over arching power to the court to use some or all of the assets protected by such agreement if required to achieve fairness to the other spouse in meeting the reasonable needs [generously interpreted] of that spouse or any child.

I can see a place for the ability to agree with the expectation the court will not go behind an agreement in cases such as a second marriage particularly with the older couple when children will be unlikely a factor; as long as they are required to take full and independent advice and with disclosure, but even in such cases it is not difficult to see a scenario where even then such as the assets of one spouse being depleted, a needs based argument arising.

- 5.60 Certain consultees expressed conditional support for the different options. The Law Society, for example, said that:

We feel that qualifying nuptial agreements should be set aside or varied if the “needs” of a party have not been met.

It emphasised the broader issues which underpin the debates on the suitability of this safeguard:

At the heart of this safeguard is the assessment of the role that should be played by the state and court in regulating private affairs. It is a fundamental question of family law policy generally as to whether or not the state should permit a party to exit a marriage in a position where they are unable to meet their “needs”. It could legitimately be asked whether there could be an objection to a provision that an agreement should not be considered absolutely binding if it did not provide for the financially weaker party’s “needs”. The proposed reform therefore is not just about the enforceability of agreements, but about the role of the family and the relevance of the state’s function generally. We believe that the state has a role to play when necessary and feel that parties should not be left in a position where their “needs” are not provided for.

It voiced its rejection of the notion of a narrow definition of needs:

While we support the move to recognise the “needs” model, we do not support model 5 which is a narrower version of “needs”. We are concerned that this model would be limited to short term outcomes and could prove problematic 10 or even 20 years after the divorce or dissolution.

- 5.61 Some consultees expressed concerns about a safeguard based on the concept of “needs”. These concerns took a number of different forms. Adrian Pellman was particularly concerned, for example, about reliance on a nebulous concept of needs:

“Needs” in the sense of destitution or poverty or serious deprivation is one issue, but the view the family courts take of needs is a very different one. If needs is not very specifically defined it will simply allow the Family Judges to override agreements in a way not contemplated by the parties or parliaments.

... needs unless properly circumscribed would simply drive a horse and carriage straight through any legislation.

- 5.62 Others thought that a provision based on protecting needs and compensation would be too broad. As David Hodson put it:

One has sympathies with this provision to allow the court to intervene. The fundamental problem of course is that it is very wide. What is the point of extensive primary legislation if it will be relatively easy to displace the binding element? It is implicit in the introduction of binding marital agreements that there will be some hard cases and harsh outcomes. However unsatisfactory, the prospect of such relatively easy opt outs will not justify the introduction of this proposed legislation. With misgivings, I have excluded it.

- 5.63 And John Eekelaar did not regard “needs” as a satisfactory concept and put forward an alternative basis for liability:

I take the view that a former spouse should not be liable with regard to the “needs” (even narrowly defined) of the other former spouse that arise after the divorce and are not associated with the marriage. Nor do I think that the concept of “needs” is very satisfactory. Liability should rest on two principles:

(a) the principle of compensation for disadvantages arising from the relationship calculated by reference to the economic disparity between them at the time of separation, which will often cover “needs” however defined. Note that the compensated party should be under a duty to mitigate the loss.

(b) recognition of contributions to the marriage.

Taking the law as it is, I therefore think that there should be provision for the agreement to be varied or set aside by the court to the extent that it *failed to provide compensation for any losses caused by the relationship and/or failed to provide reasonable recognition of the contributions, whether material or otherwise, by each party to the marriage partnership* [emphasis in original].

(5) Provision for varying or setting aside an agreement if it failed to meet the parties’ needs, narrowly defined

- 5.64 In Chapter 2 we discussed the concept of “real need”, referred to in the Supreme Court judgment of *Radmacher v Granatino*.²⁸ This appears to circumscribe the ambit of needs, perhaps in response to the emergence of the concept of compensation.²⁹ It is unclear what this concept means, as it has not been developed further in the case law.

- 5.65 The Family Law Bar Association saw the benefit of framing a safeguard in relation to needs, although it placed less emphasis on the concept of “real need”:

We take the view that the best way ... is to ensure that whatever other arrangements are made for the distribution of assets on divorce, it is not possible to contract out – completely – of meeting the needs of a spouse, albeit restrictively interpreted (and without importing the unnecessary complication of augmenting that with separate “heads of damages” for compensation). We agree that the knowledge that this is one obligation of uniform application, will ensure that meeting these limited needs will be at the forefront of the draftsman’s mind when the agreement is crafted. But giving primacy to needs – “real need” as termed in *Radmacher* – ought not to equate to meeting needs generously interpreted. Were it otherwise, this model (coupled with binding agreements limited to the preservation of non-marital property) would do little more than restate the current state of the law

²⁸ [2010] UKSC 42, [2011] 1 AC 534 and Chapter 2 at paras 2.37 to 2.40.

²⁹ Chapter 2, paras 2.16 to 2.18.

as we understand it (albeit they would provide against the uncertainty of future changes in that law).

... a requirement to meet “real need” squares the circle between giving appropriate weight to the parties’ autonomy, and evading the responsibilities that balance that autonomy.

- 5.66 On balance, Charles Russell LLP also preferred this option. They added that if the safeguard was capable of being “more accurately defined, it was felt it would reduce but not exclude the possibility of subsequent satellite litigation”.³⁰
- 5.67 Two other consultees, the Chancery Bar Association and Joanna Miles, took the view that it would be beneficial to remove the concept of “real need”, the Chancery Bar Association expressing the view that the concept was a barrier to achieving clarity for those engaged in drafting marital agreements.

OUR RECOMMENDATION

- 5.68 We have taken the view from the outset that agreements should not leave either party reliant on social security or deprive a child of child support. We have also reached the conclusion that qualifying nuptial agreements should not be capable of being used to contract out of provision for a spouse’s financial needs. Here we go on to explain in more detail why we reached this view. First, however, we set out why we see a limitation in scope as necessary at all. Why cannot we rely upon formal safeguards, such as legal advice, alone to ensure that people do not make decisions and commitments that they later regret?

Why a limitation on scope is necessary at all

- 5.69 As we discuss in Chapter 6, in order to gain the status of a qualifying nuptial agreement, the parties to the agreement will have to comply with a number of formalities, including legal advice and disclosure. We take the view that these safeguards are unlikely to be sufficient alone to provide adequate protection to the parties entering agreements. Research which examines human behaviour supports this conclusion. This research highlights the limits of the effectiveness of measures such as legal advice both as a safeguard against pressure and in relation to the extent to which people will take notice of the information presented to them.
- 5.70 It has been argued, for example, that people carry out less than perfect preparation for decision-making and people’s capacity to process information is also imperfect. This imperfection becomes more pronounced as the complexity of the decision increases.³¹ As a result, decisions are made which are “satisfactory” rather than “optimal”:

³⁰ They also made this point in relation to the safeguard encapsulated in Option 3.

³¹ See, for example, the discussion in: J G March, “Bounded rationality, ambiguity, and the engineering of choice” (1978) 9 *The Bell Journal of Economics* 587, 590; H A Simon, “Rational decision making in Business Organizations” (1979) 69 *American Economic Review* 493, 502 to 503.

An example is the difference between searching a haystack to find the sharpest needle in it and searching the haystack to find a needle sharp enough to sew with.³²

- 5.71 Research has also indicated that people are “systematically irrational” in their decision-making as they make irrational decisions even if they have all the information necessary to make the decision.³³ Part of this is attributed to the tendency of actors to be overconfident about their capabilities in resolving factual issues which are uncertain, this overconfidence being particularly apparent when the decision being made is difficult.³⁴
- 5.72 It has also been found that people tend to be unrealistically optimistic. In one study, for example, a group of college students were asked whether they were more or less likely than their classmates to divorce a few years after marriage. More than nine times as many students thought that they were less likely to get divorced compared to an average classmate than those who thought that divorce was more likely for them.³⁵
- 5.73 A further study suggests that people tend to be unduly optimistic about their future fortunes. The respondents (who were all about to get married) accurately estimated that 50% of American couples will divorce but, when asked about their personal chances of divorce, put this at zero. Female respondents estimated that, in general, 40% of women who divorce are awarded alimony from the courts; however, when looking at their own chances of being awarded alimony, 81% of respondents thought that the court would award them alimony. All of the respondents thought that their spouse would pay the full amount of court-ordered alimony if requested to do so, but their median estimate of the number of spouses who pay court-ordered alimony was only 40%.³⁶ Research has also indicated that people tend to prioritise present benefits and costs over future benefits and costs.³⁷

³² J G March and H A Simon, *Organizations* (1958) pp 140 to 141.

³³ M A Eisenberg, “The limits of cognition and the limits of contract” (1995) 47 *Stanford Law Review* 211, 216.

³⁴ W Edwards and D von Winterfeldt, “Cognitive illusions and their implications for the law” (1986) 59 *Southern California Law Review* 225, 239. Research into unrealistic optimism includes: N D Weinstein, “Unrealistic optimism about future life events” (1980) 39 *Journal of Personality and Social Psychology* 806; O Svenson, “Are we all less risky and more skilful than our fellow drivers are?” (1981) 47 *Acta Psychologica* 143; and W K Viscusi and W A Magat (eds), *Learning About Risk: Consumer and Worker Responses to Hazard Information* (1987).

³⁵ N D Weinstein, “Unrealistic optimism about future events” (1980) 39 *Journal of Personality and Social Psychology* 806, 809 to 814. It is worth noting, however, that these surveys did not ask individuals who were faced with signing a pre-nuptial agreement about their divorce prospects. We do not know whether individuals would be less optimistic about the survival of their marriage if asked about that expectation when presented with a pre-nuptial agreement by their partner.

³⁶ L A Baker and R E Emery, “When every relationship is above average: perceptions and expectations of divorce at the time of marriage” (1993) 17 *Law and Human Behavior* 439, 443.

³⁷ M A Eisenberg, “The limits of cognition and the limits of contract” (1995) 47 *Stanford Law Review* 211, 222.

5.74 The implications of this research in the specific context of pre-marital agreements can be summarised as follows.

- (1) Individuals who intend to marry tend not to see divorce as a possibility: they “will overemphasize the concrete evidence of their currently thriving relationship ... divorce is a risk that, like other risks, people systematically underestimate”.³⁸ This means that spouses intending to marry are unlikely to give weight to the possibility that the prenuptial agreement may be engaged in the future.
- (2) Individuals cannot accurately predict or take into account the likely impact of the pre-nuptial agreement if it is enforced: this has been said to result from the “exceptionally indefinite” nature of marriage.³⁹ It has been commented that “change in the course of the marriage is foreseeable, but the specifics of the change are not”.⁴⁰ It cannot be known, for example, what the exact income of the parties will be in the future.

5.75 It cannot be assumed therefore that parties to a qualifying nuptial agreement will listen to, take on board and act upon the advice or disclosure they are provided with. Without an additional safeguard, there is a risk of overlooking the other, non-legal, factors which can influence decision-making and may ultimately result in detrimental agreements being reached. We think it is a generally accepted proposition that law in general, and family law in particular, has a protective function, which is reflected in the family legislation such as the Matrimonial Causes Act 1973 and the Children Act 1989. Any legislation introducing qualifying nuptial agreements must be consonant with the overarching public policy basis of family law in general, which can be seen as protecting the vulnerable, supporting families and ensuring fairness.

5.76 This view is further strengthened by research suggesting that couples entering into a pre-nuptial agreement may not do so on a level playing field of power. Dr Sharon Thompson’s study of New York attorneys who advised on pre-nuptial agreements found that all of the attorneys she interviewed thought that there was usually an imbalance of power between the couple negotiating the agreement.⁴¹ This imbalance cannot be prevented; but by limiting the scope of qualifying nuptial agreements we have endeavoured to protect against the hardship that it may cause.

The limit on scope: a prohibition on contracting out of needs

5.77 We have come to the conclusion that the most appropriate limit on the scope of qualifying nuptial agreements is to ensure that they cannot be used to contract out of making provision for financial needs. There is no clear consensus in favour of any single option for limiting the scope of qualifying nuptial agreements, but we

³⁸ M A Eisenberg, “The limits of cognition and the limits of contract” (1995) 47 *Stanford Law Review* 211, 254.

³⁹ Above.

⁴⁰ Above.

⁴¹ S Thompson, *Prenuptial agreements and the presumption of free choice: issues of power in theory and practice* (2014, forthcoming).

see this model as that which offers the most workable balance between autonomy, certainty and protection.

- 5.78 We reject the cast-iron model. This was supported by a minority of consultees and of those who did support this model, some also expressed support for other models or were concerned to limit the scope of qualifying nuptial agreements to specific categories of property. In addition, if it is accepted that family law has a protective function, then the cast-iron approach cannot be recommended.
- 5.79 The second model (setting aside the agreement on the happening of specified events) attracted very little support. The vagaries of life mean that such supervening events will nearly always happen, yet any attempt to list those which might apply runs the real risk of omitting the very event that occurs. It is possible that parties could end up with a lengthy agreement which fails to meet their individual circumstances and is therefore of limited use. In any event, we feel that most of these events (the birth and care of children for example) will generally impact on needs, not sharing, and so the parties will be protected by the prohibition we recommend on contracting out of providing for needs.
- 5.80 There was significant and well-reasoned support for the third model of significant injustice but the support for this option was diffuse as it encompassed significant variations. Consultees suggested that “injustice” or “fairness” would be better measures of the limitation to the scope of qualifying nuptial agreements so there was little consensus on what this option should actually mean in practice. The problem we see with this option is that it is too close to the formulation set out by the Supreme Court in *Radmacher v Granatino*.⁴² Indeed, it would serve only to perpetuate the uncertainty inherent in that formulation. It takes the emphasis away from the parties to an overarching concept which parties and their advisors may find difficult to interpret in practice, decreasing the certainty and choice that parties will seek to achieve by entering into a qualifying nuptial agreement. The lack of clarity in the concept may well fuel litigation as to its precise meaning in any specific case.
- 5.81 Our recommendation for the use of needs as the limit on scope is based on striking the best balance between enabling parties to achieve autonomy and certainty without removing protection of the vulnerable, which we see as a primary function of family law. The protection of needs was seen as particularly important by some consultees, and by the participants in the research undertaken by Professor Anne Barlow and Dr Janet Smithson.⁴³
- 5.82 We do not wish to define needs more narrowly for the purposes of the limitation on the scope of qualifying nuptial agreements (the fifth model). The only existing candidate for a narrower definition would be the concept of “real need”, expressed in *Radmacher v Granatino*, but that has not been developed in the case law and its meaning is unclear. We have suggested that it may represent short-term needs as opposed to long-term needs generated by divorce.⁴⁴ We take the view that the level of need from which parties cannot contract out

⁴² [2010] UKSC 42, [2011] 1 AC 534.

⁴³ See paras 5.25 and 5.26 above.

⁴⁴ Chapter 2, paras 2.37 to 2.40.

through a qualifying nuptial agreement should simply be needs as understood in the general law; those who advise on what will be sufficient provision in a qualifying nuptial agreement will have to steer away from the idea that only “real need” has to be catered for.

5.83 The recommendations we make about financial needs in Chapter 3, above, will serve to strengthen the utility of our recommendation as to qualifying nuptial agreements. As we have discussed family lawyers are generally confident in identifying what will equate to appropriate provision for the needs of a party in a particular case, taking into account all the circumstances, including the lifestyle enjoyed by the couple during the marriage. In those high net worth cases where qualifying nuptial agreements are most likely to be used the fact that wealth will generally exceed needs increases the relevance of the marital lifestyle to the quantification of those needs, as there is more than enough ‘to go around’. This in turn can make needs rather more predictable in these cases, at least for lawyers. Our recommendation, set out in Chapter 6, that both parties to a qualifying nuptial agreement should receive legal advice ensures that the couple will access this expertise.⁴⁵ We believe, therefore, that adopting this model as the limitation on the scope of qualifying nuptial agreements will not cause significant problems in practice and is preferable to a concept such as “significant injustice”, which is more vague, less well understood, and not in common use among practitioners and the judiciary.

5.84 **We recommend that it shall not be possible to use a qualifying nuptial agreement to contract out of provision for financial needs. We make that recommendation without making any separate recommendation that statute should specify a level of needs for this purpose, but instead recommend that it should rely on the meaning of “financial needs” in the existing law.**

The draft Nuptial Agreements Bill

5.85 The draft Bill introduces qualifying nuptial agreements in clauses 5 and 7, by adding Schedule A1 to the Matrimonial Causes Act 1973, and Part 7A to Schedule 5 of the Civil Partnerships Act 2004. In the discussion that follows we refer, for simplicity, only to the provisions added to the 1973 Act; those in the 2004 Act are identical save for references to civil partnership instead of marriage and so on.

5.86 Schedule A1 defines a qualifying nuptial agreement by reference to the pre-requisites for its formation, which we discuss below in Chapter 6. Paragraph 1 of the new Schedule A1 then sets out its effect.

⁴⁵ Chapter 6, para 6.125.

5.87 The effect of a qualifying nuptial agreement is a limitation of the court's powers to make financial orders under the Matrimonial Causes Act 1973. The court is prevented from making orders inconsistent with the terms of the qualifying nuptial agreement except:

- (1) to meet either party's needs;
- (2) in the interests of a child of the family.⁴⁶

5.88 The effect of the limitation of the court's powers in paragraph 1 of Schedule A1 gives the parties the certainty that the agreement will "stick". If the parties so agree, they can apply for a consent order that reflects the terms of their qualifying nuptial agreement, which will be made. Where the parties are no longer in agreement at the point of divorce or dissolution, and one of them applies for financial orders then, provided that the status of the qualifying nuptial agreement can be proved, the court will not be able to make orders against either party save for the benefit of a child of the family, or to meet a party's needs.

5.89 The draft Bill also inserts additional subsections 2A and 2B into section 35 of the Matrimonial Causes Act 1973 to enable the court to vary a qualifying nuptial agreement, but again subject to the same limitations. There has to be provision for the variation of a qualifying nuptial agreement, as there must be for all marital property agreements, in order to ensure that the court can make a comprehensive order where necessary. Agreements may contain terms that orders cannot contain (due to the extent of the court's powers on divorce), for example, to make payments to a third party, and these may need to be varied if the eventual financial outcome has to be adjusted to meet needs.

5.90 While qualifying nuptial agreements will be enforceable as contracts, we think that the assessment of needs provision would have to be carried out by a judge with appropriate experience. Accordingly, we have reached the view that any disputes concerning a qualifying nuptial agreement, including any as to its formal validity, or for its enforcement, should be addressed by a family judge.

5.91 **We recommend that any dispute concerning a qualifying nuptial agreement should be heard by a family judge.**

5.92 We take the view that no specific provision is required for this in the draft Bill. Should one of the parties attempt to raise, in the county court or in the High Court (other than the Family Division), an argument regarding a qualifying nuptial agreement then the correct course of action would be for the judge to order the transfer of the proceedings to the family court or the Family Division.

QUALIFYING NUPTIAL AGREEMENTS AND THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

5.93 The point of a marital property agreement as we have defined it, including a qualifying nuptial agreement, is to manage financial provision on separation, dissolution and divorce. However, they may in certain circumstances have some relevance on the death of one of the parties, occasionally following divorce or

⁴⁶ Paragraph 1(2)(a) and (b) to the new Schedule A1 and subsections 37A(2)(a) and (b) of the new Part 7A.

dissolution and in some circumstances where one of the parties has been widowed (in other words, the parties were still married or civil partners when one of them died).

- 5.94 The Inheritance (Provision for Family and Dependants) Act 1975⁴⁷ enables the relatives of a deceased person, and some others, to make a claim from the person's estate if the deceased's will, or the operation of the rules of intestacy (whichever is relevant), leaves them without reasonable financial provision. The categories of people who can claim include a surviving spouse and a former spouse who has not remarried.⁴⁸ The deceased must have died domiciled in England and Wales for a claim under the 1975 Act to be possible.⁴⁹
- 5.95 The level of provision that can be claimed from the estate is limited in all cases to "maintenance",⁵⁰ save in the case of a surviving spouse, whose claim is not so limited and will normally extend to at least as much as he or she would have been awarded on divorce or dissolution. A claim could be made in the case of the widow whose husband has died leaving all his estate to charity, for example, or to his girlfriend.

Claims by a former spouse

- 5.96 Former spouses may be able to claim under section 1(1)(b) of the 1975 Act, where they have not remarried or formed a new civil partnership; they are limited to reasonable financial provision for their maintenance. However, there is an exception for the situation where the ex-spouse dies within a year of the decree absolute ending the marriage, before financial provision orders on divorce have been made (or determined, if an application has been made). In this situation, the court has the power to award reasonable financial provision at the higher standard applicable to a surviving spouse, not limited to maintenance, although it is not obliged to do so.⁵¹
- 5.97 A claim might be made by a former spouse where financial orders were awarded before the ex-spouse's death. This might happen, for example, where a joint lives order has been made (and not capitalised) and the payer pre-deceases the other; it may be appropriate for the payee to make an application for provision from the deceased's estate.
- 5.98 It follows that any order made by the court on divorce and intended to effect a clean break (whether made by consent or not) will invariably include a provision

⁴⁷ Referred to below as the "1975 Act".

⁴⁸ Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(a) and s 1(1)(b) respectively.

⁴⁹ Above, s 1(1).

⁵⁰ Maintenance is not defined in the 1975 Act but in the Court of Appeal case of *Re Coventry* [1980] Ch 461, [1979] 3 WLR 802 at [485D] Goff LJ defined it as "not just enough to enable a person to get by; on the other hand it does not mean anything which maybe regarded as reasonably desirable for [the claimant's] general benefit or welfare". As will be appreciated, the definition is imprecise and is from a case involving a son's application for provision from his deceased's father's estate.

⁵¹ Under section 14 of the 1975 Act. The higher standard is also applicable in the situation where there has been a judicial separation but the separation is *not* continuing at the date of death, under section 1(2)(a).

pursuant to section 15 of the 1975 Act. This enables the court to make an order “on the application of either party to the marriage ... that the other party to the marriage shall not on the death of the applicant be entitled to apply for an order under section 2 of this Act”, so preventing a former spouse seeking provision from his or her former spouse’s estate. The order can take effect only on divorce and therefore cannot prevent an application by a surviving spouse.

- 5.99 What will be the position where a clean break was effected by a qualifying nuptial agreement, and no court order has been made to prevent an application under the 1975 Act? The answer is simply that such an application will remain possible in those circumstances, but that the powers of the court under the 1975 Act will – because this is a claim by a former spouse – be limited to a claim for maintenance. And since a qualifying nuptial agreement cannot be used to contract out of provision for financial needs, and because we think that, in any event, such provision for needs will be at least as generous, and probably more so, than the standard for provision for maintenance under the 1975 Act, we see no necessity to prevent such applications.⁵² They are likely to be extremely rare.

Claims by a surviving spouse

The “divorce analogy”

- 5.100 Widows and widowers can apply for family provision from the estate of their deceased spouses, and the award that the court can make is not limited to what that person requires for their maintenance.⁵³ Instead, the standard of provision is simply such financial provision as it would be reasonable in the circumstances for a spouse to receive. The court is directed to consider, among other factors, the length of the marriage or civil partnership and the applicant’s contribution to it.⁵⁴
- 5.101 The 1975 Act provides that in making provision for a surviving spouse the court is to have regard to what the spouse would have received on divorce.⁵⁵ The thinking behind that provision seems to have been the wish to ensure that no surviving spouse, on receipt of an award under the 1975 Act, would be placed in a position that left him or her worse off than he or she would have been after divorce.⁵⁶ On occasions such awards have stood between a widow or widower

⁵² There are very few cases on reasonable financial provision for former spouses under the 1975 Act and those that there are have tended to follow the *Re Coventry* [1980] Ch 461, [1979] 3 WLR 802 definition. It seems from the case law that former spouses face a battle to get the court to accept that any financial provision should be made in their favour, particularly where a “clean break” was achieved following divorce, see *Barrass v Harding* [2001] 1 FLR 138, [2001] 1 FCR 297. However, where the court accepts that the applicant should be provided for (such as in cases where periodical payments would have been made but for the deceased’s death), the levels of provision have not been ungenerous, see for example, *Re Crawford (Deceased)* [1983] 4 FLR 273.

⁵³ Inheritance (Provision for Family and Dependents) Act 1975, s 1(2)(a) and s 1(2)(aa).

⁵⁴ Inheritance (Provision for Family and Dependents) Act 1975, s 3; Inheritance and Trustees’ Powers Bill 2013-14, para 6(2) of Schedule 2.

⁵⁵ Inheritance (Provision for Family and Dependents) Act 1975, s 3(2).

⁵⁶ See Intestacy and Family Provision Claims on Death (2009) Law Commission Consultation Paper No 191, paras 3.146 to 3.149.

and homelessness.⁵⁷ There is some evidence, however, that the “divorce analogy” is being used as a ceiling on claims, and we have recommended in another Law Commission Report, entitled “Intestacy and Family Provision Claims on Death”, a clarification to the effect that the court is not required to treat such provision as setting an upper or lower limit on the provision which may be ordered.⁵⁸

- 5.102 Let us suppose that a couple makes a marital property agreement providing that:
- (1) the pre-acquired and inherited property of each will not be shared on divorce; and
 - (2) any savings accumulated after marriage from the profits of the husband’s business will not be shared on divorce.
- 5.103 The agreement does not contain any terms intended to limit what the surviving spouse might receive upon the other’s death. The couple never divorce and the marriage ends some 60 years later when the husband dies. His widow discovers that he has left his entire estate to the Battersea Dogs & Cats Home. If she applies for financial provision under the 1975 Act, the court will apply the “divorce analogy” as the statute directs; but will it look purely at the Matrimonial Causes Act 1973 or will it also look at the marital property agreement?
- 5.104 As to the term about pre-acquired and inherited property, it is likely that on divorce this would be regarded as non-matrimonial property and would not be shared (subject to provision for needs). So the court would have this in mind; it might be reinforced in any conclusions it reached by the existence of a prior agreement.
- 5.105 As to the second condition, it might or might not be appropriate for the court to take the view that the terms of the marital property agreement, designed to address what should happen on divorce, should also influence what happens on a family provision claim.
- 5.106 So to an extent, a marital property agreement will be taken into account by the court, through the “divorce analogy”. The exact effect of this consideration depends on the individual circumstances of the case; what is fair on divorce may not be fair for a surviving spouse and may bear no resemblance to the provision that the court holds is reasonable for him or her. However, the divorce analogy functions as a useful comparison for the court in 1975 Act claims by a surviving spouse and there are cases where the use of the analogy has provided a safeguard against financial hardship.⁵⁹ If our recommendations on qualifying

⁵⁷ See, for example, *Stephanides v Cohen* [2002] EWHC 1869 (Fam), [2002] WTLR 1373; *Moody v Stevenson* [1992] Ch 486, [1992] 2 WLR 640. See also *Adams v Lewis* [2001] WTLR 493.

⁵⁸ Intestacy and Family Provision Claims on Death (2011) Law Com No 331, para 2.146. The draft Bill published alongside the Report is now embodied in the Inheritance and Trustees’ Powers Bill 2013, which is currently before Parliament.

⁵⁹ See, for example, *Berger v Berger* [2013] EWCA Civ 1305, in which the applicant was held to have an arguable case for additional provision on death because the deceased’s will left her with far less than she would have had on divorce (although in fact she failed on other grounds).

nuptial agreements are implemented, qualifying nuptial agreements would be taken into account by means of the “divorce analogy” just like any other marital property agreement.

Provision in a qualifying nuptial agreement about a claim by a surviving spouse

5.107 In the 2011 CP we asked if it should be possible for a qualifying nuptial agreement to include a provision preventing either party from making a claim under the 1975 Act as a surviving spouse, to take effect after the death of one or other party.⁶⁰ It is not currently possible to contract out of the ability to apply under the Inheritance (Provision for Family and Dependants) Act 1975.

5.108 Our question in the 2011 CP was whether or not the scope of qualifying nuptial agreements should go beyond what we have so far discussed: should it be possible to contract out, not only of the court’s discretion in relation to financial orders, but also of the court’s discretion to award family provision under the Inheritance (Provision for Family and Dependants) Act 1975? The advantage of doing so would be the protection of those whose concern for their property is not about divorce but about death. There may well be couples, perhaps in advanced years, whose concern is to safeguard their children’s inheritance, and who may wish to include provision about applications under the Inheritance (Provision for Family and Dependants) Act 1975.

5.109 For example:

George and Freda are marrying late in life. Each has been married before; each has a house and enough savings to provide for him- or herself comfortably for the rest of life, including residential care, and each envisages having something to pass on to the children of the first marriage.

George and Freda therefore execute mirror wills; each leaves his or her estate to the children of their first marriage, and provides that only if the issue of the first marriage pre-decease the other spouse will the surviving spouse take the estate.

Such a will could well be challenged under the 1975 Act. Should it be possible for George and Freda to contract out of the 1975 Act, making a qualifying nuptial agreement to the effect that neither will challenge the other’s will (assuming the issue of the first marriage survive and take the estate)?

⁶⁰ The 2011 CP, paras 7.89 and 8.22.

- 5.110 In the 2011 CP we expressed the view that it was hard to see why such agreements should not be possible if it became possible to contract out of financial provision on divorce or separation.⁶¹ The same considerations of autonomy arise; and the ability to make such agreements and to rely upon their enforceability might well encourage marriage in circumstances where the parties might otherwise be reluctant to commit themselves and, potentially, to put at risk the inheritance of the children from a previous relationship.
- 5.111 We acknowledged in the 2011 CP that life after the death of a partner may be far harder than the parties anticipated, and that real hardship might be the result of such an agreement. We noted that the safeguards that could be imposed upon qualifying nuptial agreements might well address that concern. We suggested that if qualifying nuptial agreements were introduced on the basis that they could not exclude provision for needs, there would be an in-built safeguard for the widow or widower from total exclusion of the ability to apply for family provision on death. However, we thought that a better approach to the potential effect of a term in a qualifying nuptial agreement that related to family provision for a widow or widower would be to use the concepts of the Inheritance (Provision for Family and Dependents) Act 1975 itself.
- 5.112 We explained that the statute embodied the concept of two levels of provision: the maintenance standard for all applicants, and the much more generous standard for surviving spouses. We suggested that it would therefore be possible to provide that a qualifying nuptial agreement might contain a term preventing a future application for family provision by a widow or widower, except in so far as provision was required for the applicant's maintenance. We noted that the Inheritance (Provision for Family and Dependents) Act 1975 fulfils a public role in preventing hardship, and that in doing so it constitutes a limit on testamentary freedom. Our view was that it would be consistent with that approach for the law to place limits on the extent to which it is possible to contract out of the Inheritance (Provision for Family and Dependents) Act 1975.
- 5.113 We provisionally proposed that, if qualifying nuptial agreements were introduced, it should be possible for them to restrict or modify the ability of either party to apply to the court for family provision (as a surviving spouse) under the Inheritance (Provision for Family and Dependents) Act 1975, save in so far as application was made for provision for maintenance (as that term is used in the context of the Inheritance (Provision for Family and Dependents) Act 1975).⁶²
- 5.114 Some consultees expressly rejected the provisional proposal, but most broadly supported it. 29 Bedford Row saw the proposal as a "natural consequence of the overall scheme of binding agreements". The Law Society described itself as being "reassured" by the safeguarding of maintenance in the provisional proposal. Andrew Turek thought that qualifying nuptial agreements should be

⁶¹ In *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007) Law Com No 307 we made no such recommendation for cohabitants (see paras 6.45 to 6.49 of that Report). One of our arguments was that it would be odd for cohabitants to be able to contract out of the Inheritance (Provision for Family and Dependents) Act 1975 when no one else could. But for spouses to be able to contract out when no one else could would be entirely consistent with the facility to make qualifying nuptial agreements, if such agreements were introduced.

⁶² The 2011 CP, paras 7.89 and 8.22.

able completely to restrict or modify the ability of either party to apply to the court for family provision; he thought that there was “no reason why they should not be allowed to exclude the Act altogether”.

- 5.115 Despite that, we have concluded that we should not recommend reform in this way, for two reasons.
- 5.116 One is that despite broad agreement the proposal gave rise to considerable confusion among consultees. It is, after all, an unfamiliar idea. It is comfortable for those who are familiar with the continental model of marital agreements which are likely to be as much about providing for death as for divorce, but is not part of the legal landscape here.
- 5.117 The Family Law Bar Association felt that there could be confusion about the differences between claims made on divorce and death, and that these may not be understood by the parties and their legal advisers in practice. It was pointed out that most practitioners specialising in financial orders do not have experience of 1975 Act claims; as a result, advice might be given “without the advisor having a sufficient understanding of what rights are being contracted away”. It is difficult to assess how far this would be the case in the event that the law were reformed in the way suggested in the 2011 CP but we take the Family Law Bar Association’s concerns seriously.
- 5.118 The main reason for not proceeding with the proposal is the lack of clarity about the relationship between “financial needs” in the matrimonial context and the “maintenance” standard in the 1975 Act context. Because there are so few claims by former spouses under the 1975 Act, it is not really clear what maintenance means for such claims. The Chancery Bar Association warned that the maintenance threshold may be too low.⁶³ It endorsed our statement on the hardship which may accompany widowhood, and suggested that account might need to be taken of the former standard of living. It suggested that:

There should be an overriding discretion in the court to limit (or “override”) the effect of the qualifying nuptial agreement, so far as it attempts to restrict or modify the ability of the claimant to seek financial provision at the higher standard where it is necessary in the interest of the claimant for him to receive provision at that higher standard.

- 5.119 Our recommendation for the introduction of qualifying nuptial agreements comes with the fundamental proviso that parties to such an agreement cannot contract out of making provision for needs. This is a safety net to prevent financial hardship and ensure that one spouse is not left dependent upon the state for financial support. We know that the definition of “needs” is such that it will provide this safety net but we cannot be similarly sure about the definition of “maintenance” in the 1975 Act. There has not been sufficient case law to provide that certainty. Accordingly we have decided not to recommend that it should be possible to use qualifying nuptial agreements to enable spouses to prevent each other from claiming as a surviving spouse under the 1975 Act.

⁶³ It is certainly restrictive, and well below the matrimonial “needs” idea in the context of adult children: see for example *Ilott v Mitson* [2011] EWCA Civ 346, [2012] 2 FLR 170.

- 5.120 We remain, however, of the view that nuptial agreements should be able to reinforce provision made by will by having an influence on any 1975 Act claim challenging that will. A will, of course, is not an agreement (although its terms may, and usually do, arise from discussion between spouses). Its terms are vulnerable to the court's discretion under the 1975 Act. A term in a marital property agreement relating not to divorce/dissolution but to death and to the provision to be made for a surviving spouse would be a relevant consideration for the court under existing law.
- 5.121 In the event that that surviving spouse did make a claim for reasonable financial provision, the marital property agreement would be relevant to the court in two different ways. First, the terms of the agreement relating to financial provision on divorce would alert the court to what would have happened on divorce, for the purposes of the "divorce analogy" as explained at 5.101 to 5.106 above. Second, the additional term relating to a claim by a surviving spouse would be a matter to which the court would have regard under section 3(1)(g) of the 1975 Act.⁶⁴
- 5.122 We are not aware of marital property agreements being used in this way but it seems to us a useful way forward for couples who are concerned about the devolution of their property on death, perhaps particularly for those where one or both have children from a previous relationship. They could agree that the arrangements they have made by their wills should prevail, if at all possible, even in the context of a 1975 Act claim.
- 5.123 In the light of that we would like to encourage such terms in marital property agreements and particularly in qualifying nuptial agreements – where there are added protections. A qualifying nuptial agreement is, obviously, primarily concerned with divorce, and the requirements of disclosure and legal advice are designed to make such agreements as safe as possible. But we can envisage the addition, in some cases, of terms (which might be quite different from the provision made for divorce) relating to a 1975 Act claim by a surviving spouse, again made with legal advice and with all the formality that attends a qualifying nuptial agreement. Such terms should be given special attention by the court on a 1975 Act claim. In Chapter 7 we give an example of a couple who might want to use such a term.⁶⁵ Accordingly, to supplement the existing terms of section 3(1)(g) of the 1975 Act, we make a recommendation for the addition of a further matter to which the court is expressly directed to have regard where a claim is made by a surviving spouse.

⁶⁴ Section 3(1) of the Inheritance (Provision for Family and Dependents) Act 1975 provides, "...if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters..." and section 3(1)(g) in the subsequent list provides for regard to be had to "any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant".

⁶⁵ Chapter 7, paras 7.17 to 7.22.

- 5.124 **We recommend that the court hearing an application for reasonable financial provision by a surviving spouse under the Inheritance (Provision for Family and Dependents) Act 1975 should have regard to any provision in a qualifying nuptial agreement that relates to such a claim.**
- 5.125 The draft bill includes a provision to this effect at clause 9, which amends section 3(2) of the Inheritance (Provision for Family and Dependents) Act 1975.

CHAPTER 6

THE REQUIREMENTS FOR QUALIFYING NUPTIAL AGREEMENTS

INTRODUCTION

- 6.1 In Chapter 5 we explained our recommendation for the introduction of qualifying nuptial agreements, and we discussed how they might be used and what they could and could not achieve. We pointed out that for an agreement to be a qualifying nuptial agreement, it would have to meet certain requirements, relating to the formalities of execution as well as to practical matters such as legal advice and disclosure.
- 6.2 In this Chapter we set out in more detail the requirements for qualifying nuptial agreements.
- 6.3 We do so under the following headings:
- (1) contractual validity;
 - (2) execution;
 - (3) timing;
 - (4) disclosure; and
 - (5) independent legal advice.
- 6.4 Where an agreement is not a qualifying nuptial agreement it remains a marital property agreement. Even if it is a valid contract, it cannot oust the jurisdiction of the court to make financial orders under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004; but the court will uphold the terms of the agreement on the basis set out in *Radmacher v Granatino*.¹ So its terms will be upheld if they are not unfair. This may be to the advantage or disadvantage of either party; instead of the certainty of enforceability, together with the safeguard of proper provision for needs,² the extent to which the agreement will be upheld by the court will depend upon the court's assessment of unfairness,³ and the unknown quantity of "real need".⁴
- 6.5 The final three sections of this Chapter examine some related issues. First, should there be any other requirements as to the content of a qualifying nuptial agreement? Second, should the pre-requisites for the formation of such an agreement also be required when a qualifying nuptial agreement is varied? Finally, are any special provisions needed about property that changes over time?

¹ [2010] UKSC 42, [2011] 1 AC 534.

² Chapter 5, para 5.84.

³ Chapter 2, para 2.30.

⁴ Chapter 2, paras 2.37 to 2.40.

THE REQUIREMENTS FOR QUALIFYING NUPTIAL AGREEMENTS

(1) Contractual validity

Our consultation question

- 6.6 In our 2011 CP, we said that contractual validity would have to be an essential pre-requisite for the validity of a qualifying nuptial agreement, for the practical reason that it has to be capable of being enforced as a contract in the civil courts. We therefore provisionally proposed that a marital property agreement should not be treated as a qualifying nuptial agreement unless it was a valid contract.⁵
- 6.7 The most basic requirements for a valid contract are that there should be agreement, consideration, and an intention to create legal relations.⁶ We do not anticipate that these requirements will cause any difficulty;⁷ more significant are the safeguards built into contract law, in particular that a contract may be void for mistake or as a result of duress, or voidable because of undue influence.⁸ It may even be frustrated if circumstances change dramatically.⁹

Consultation responses

- 6.8 This proposal attracted support from the vast majority of consultees, many of whom saw contractual validity as an essential, and even self-evident, requirement. The Chartered Institute of Legal Executives, for example, described contractual validity as “an essential pre-requisite” as such agreements must “be capable of being enforced as a contract in the civil courts”. David Hodson saw the provisional proposal as “thoroughly uncontentious”.
- 6.9 The Mission and Public Affairs Council of the Church of England felt that a requirement of contractual validity would help to protect “the vulnerable, the naïve and the ignorant” from being “bound by marital agreements that they have been pressurised into or tricked into signing”.
- 6.10 Only three consultees disagreed with the proposal. Alec Samuels, who was opposed to qualifying nuptial agreements in general and thought that the courts should retain their current discretion, said that it would be preferable if “contractual validity or otherwise is simply a factor in matrimonial proceedings”. Mishcon de Reya thought that the enforceability or otherwise of a marital property agreement should always depend upon whether the agreement was fair, and they “did not consider that contractual validity *ab initio*” was relevant to this inquiry. Mrs Justice Baron was “not in favour of marital agreements being regarded as straightforward contracts with effective equality of bargaining power”. She felt that “such an approach flies in the face of reality” and cautioned that “human foibles and sensibilities should not be ignored”.

⁵ See the 2011 CP, paras 6.47 and 8.7.

⁶ H G Beale (ed), *Chitty on Contracts* (31st edition) Vol 1: General Principles, para 2-001.

⁷ Because we go on to recommend that qualifying nuptial agreements be formed by deed (below at para 6.36), the issue of consideration does not arise.

⁸ See below, paras 6.16 to 6.30.

⁹ H G Beale (ed), *Chitty on Contracts* (31st edition) Vol 1: General Principles, para 23-001.

Conclusions on contractual validity

- 6.11 Consultees by and large regarded this provisional proposal as uncontentious and we have no hesitation in making contractual validity a pre-requisite for the formation of a qualifying nuptial agreement. The objection of those consultees who opposed this seemed to be more to the binding effect of a qualifying nuptial agreement than to making contractual validity a prerequisite of that binding effect. For the reasons given in Chapter 5 of this Report, we have concluded that qualifying nuptial agreements should be binding to the extent that they leave the parties' financial needs provided for. We consider that the parties should, in addition, have the protection of the safeguards built into contract law.
- 6.12 **We recommend that a marital property agreement should not be a qualifying nuptial agreement unless it is a valid contract.**
- 6.13 This recommendation is put into effect by clauses 5 and 7 of the draft Bill, which insert provisions into the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 (as discussed in Chapter 5). The "validity requirement" means that a qualifying nuptial agreement, and any variation of such an agreement, must be a valid contract (at least so far as concerns terms that make provision for the financial consequences of divorce, dissolution, judicial separation and nullity).
- 6.14 The draft Bill also makes it clear that where the agreement in question was not made in England and Wales, nevertheless it must be a valid contract under the law of England and Wales.
- 6.15 No provision is made in the draft Bill to prevent minors from making qualifying nuptial agreements. However, a contract made by a minor is unenforceable against that minor until it is ratified once he or she reaches the age of 18, unless it is a contract for "necessaries".¹⁰ In the unlikely event that one of the parties to a pre-nuptial agreement was a minor, an important component of legal advice would be the risk of later avoidance; it is hard to imagine circumstances where the other party was not advised not to enter the agreement.

Undue influence

- 6.16 A contract made as a result of undue influence is voidable.¹¹
- 6.17 In the 2011 CP we discussed the case of *NA v MA* where a post-nuptial agreement was disregarded in the making of financial orders following a finding of undue influence.¹² Mrs Justice Baron held in that case that the ultimatum facing the wife (either to sign the agreement or face the end of the marriage) and the husband's bullying behaviour over a period of months had put the wife under "severe, undue and unacceptable pressure".¹³ That level of bullying might be relatively unusual; other forms of pressure might be more difficult to prove. We emphasised in the 2011 CP that reform of the law on marital property

¹⁰ See, on minors' contracts, H G Beale (ed), *Chitty on Contracts* (31st edition) Vol 1: General Principles, paras 8-002 to 8-068.

¹¹ H G Beale (ed), *Chitty on Contracts* (31st edition) Vol 1: General Principles, para 1-102.

¹² [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760.

¹³ Above at [128].

agreements should be aimed at upholding truly consensual agreements, and not those agreed to under pressure.

- 6.18 Undue influence is generally difficult to prove because pressure, in many contexts, may be subtle. As a result the courts have developed the doctrine of presumed undue influence, albeit outside the context of marital property agreements. If the person claiming to be the victim of undue influence can show that the two parties were in a relationship of trust and confidence, and that the transaction “calls for explanation”,¹⁴ the burden of proof shifts to the other party to demonstrate that there was no undue influence.¹⁵ This is potentially quite difficult as it involves proving a negative.
- 6.19 The law on undue influence has evolved in relation to spouses who have taken on the risk of liability for the other’s debts, and not in the context of marital property agreements. As a result, we have to ask whether introducing qualifying nuptial agreements would have any real impact in practice: is there a risk that the courts would almost always find a presumption of undue influence?
- 6.20 We expressed the view in the 2011 CP that there would not always be such a finding. For there to be a presumption of undue influence, there must be a “relationship of trust and confidence”; marriage has not been regarded as automatically falling within that category in the case law in this context. To fall within this description there must be an asymmetrical relationship involving reliance.¹⁶ Even if such a relationship was found, there would be no presumption unless the transaction “called for an explanation”. That could depend on the terms of the agreement and on whether the agreement would put one party at a disadvantage. But if qualifying nuptial agreements are made available by statute, arguably they do not in general call for explanation; and the extent to which they can cause disadvantage would be limited by the fact that they would not be able to be used to contract out of provision for financial needs and therefore should not give rise to hardship.
- 6.21 Nevertheless there is a concern that presumed undue influence might be raised every time a divorcing spouse did not wish to abide by the terms of a qualifying nuptial agreement, and that that might become a disproportionate obstacle to their enforceability.

¹⁴ In the sense of being something that is, if not manifestly disadvantageous, at least not readily explicable by the relationship itself. The old law relating to categories of relationships that always gave rise to undue influence appears to have been swept aside by the decision in *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773: see M Thompson, “Mortgages and Undue Influence” in E Cooke (ed), *Modern Studies in Property Law: Volume 2* (2003).

¹⁵ *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773; see in particular Lord Nicholls’ explanation at [14].

¹⁶ See, for instance, the judgment of Mr Justice Briggs in *Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312, [2010] 2 FLR 177 at [10], where a relationship of trust and confidence was found on the basis that the wife regarded her husband as primarily responsible for the family’s finances, although she was “not a lady who left every aspect of finance to her husband and stayed at home looking after the children”. The decision has to be regarded with some caution, however, since it was not decided on the basis of presumed undue influence.

- 6.22 In the 2011 CP we asked consultees whether special provision was needed to ensure that qualifying nuptial agreements were not unduly vulnerable to challenge on the grounds of undue influence. The reform we had in mind was the possibility of a provision that, in the context of qualifying nuptial agreements, undue influence could only be established on an actual basis. That would mean that in order to challenge an agreement, undue influence could not be presumed but would instead always need to be positively proved. Consultees were asked, in considering this possibility, to keep in mind that parties might well be required to take legal advice before signing the agreement. This, although not eradicating the risk of undue influence, could afford the parties a measure of additional protection.
- 6.23 We asked whether consultees thought that the law relating to undue influence would require reform, for qualifying nuptial agreements only, in order to ensure that they were not too readily challenged or overturned.¹⁷
- 6.24 Consultees' responses to this question were mixed, with no overall majority in favour of, or opposed to, our suggestion. The consultees who favoured reform included the Family Law Bar Association, which remarked that under the current law, "marital property agreements would be vulnerable too frequently to charges of undue influence". The Law Society thought that presumed undue influence could be difficult to apply and "could be used inappropriately to challenge an agreement". One consultee¹⁸ thought that the law on undue influence "should be excluded altogether" but this view was not shared by other consultees.
- 6.25 Some consultees wanted to ensure that qualifying nuptial agreements were not subject to lighter protections than those which would ordinarily apply to contracting parties. Mishcon de Reya thought that it would be:
- Fundamentally unfair to bind spouses (but not bind unrelated persons) to an agreement reached in circumstances where it is possible to establish undue influence on a presumed basis.
- 6.26 29 Bedford Row shared this concern, stating that it would "seem curious in principle" if those entering into qualifying nuptial agreements were to be "uniquely deprived of part of the protection afforded to all others". One consultee thought that the law on undue influence should be reformed but to make it easier, not harder, to establish undue influence in relation to qualifying nuptial agreements.¹⁹
- 6.27 Several consultees addressed the point we made in the 2011 CP on the relationship between legal advice and undue influence. The Chartered Institute of Legal Executives felt that if legal advice were required before entering into a qualifying nuptial agreement, this would significantly reduce the risk of such an agreement being overturned on the grounds of presumed undue influence. John Eekelaar, however, thought that legal advice might be an insufficient means of protection against undue influence.

¹⁷ The 2011 CP, paras 6.48 and 8.8.

¹⁸ Andrew Turek.

¹⁹ Dr Robert George.

- 6.28 Our view remains that there should be an express provision to the effect that there is no presumption of undue influence where there is a qualifying nuptial agreement. We are concerned that unless there is a provision to that effect, there will be a risk that a presumption will be found in every case or in most cases. It is important that a party seeking to enforce a qualifying nuptial agreement does not have to rebut a presumption of undue influence. It remains open to the party against whom the agreement is sought to be enforced to prove actual undue influence.
- 6.29 **We recommend that the law relating to undue influence be reformed, for qualifying nuptial agreements only, through an express provision to the effect that a presumption of undue influence will not apply to qualifying nuptial agreements.**
- 6.30 This recommendation is put into effect by clauses 5 and 7 of the draft Bill. Within clause 5, the relevant provision is paragraph 7(3) of the new Schedule A1 to the Matrimonial Causes Act 1973; within clause 7 the relevant provision is paragraph 37G(3) of the new Part 7A to Schedule 5 to the Civil Partnership Act 2004.
- 6.31 Of course, this applies only to qualifying nuptial agreements. A presumption of undue influence might still arise in relation to marital property agreements which are not qualifying nuptial agreements. The risk of that happening may encourage parties to make a qualifying nuptial agreement, with the safeguards that involves, so as to make the agreement less vulnerable to challenge.

(2) Execution

Signed writing or a deed

- 6.32 Although there is no general requirement that contracts be in writing, agreements which purport to create or transfer an interest in land, whether or not they do so conditionally, must be in writing.²⁰ We explained in the 2011 CP that, as the law stands, this was not an issue for marital property agreements because they do not take effect as contracts.²¹ But we made a provisional proposal that qualifying nuptial agreements should be made in writing, embodying all express terms, and signed by the parties, so as to ensure an appropriate level of formality.²² Almost all consultees supported this provisional proposal.
- 6.33 The Family Law Bar Association suggested that thought should be given to whether signatures should have to be witnessed. It explained that a requirement of this kind could not guard against improper pressure but it might provide additional protection to both the party seeking to enforce the agreement and the

²⁰ And they must conform to all the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. It is well-established that this section applies to conditional contracts as it does to any other: *Spiro v Glencrown Properties Ltd* [1991] Ch 537.

²¹ *Xydhias v Xydhias* [1999] 2 All ER 386, [1999] 1 FLR 963, 394 to 397.

²² The 2011 CP, paras 6.56 and 8.9. We also noted that s 34 of the Matrimonial Causes Act 1973 and Sch 5, part 13, para 67 of the Civil Partnership Act 2004 require maintenance agreements to be made in writing.

party subject to the agreement. It was suggested that witnesses could be called upon if necessary to provide evidence on the state of mind of the parties at the time of signing the agreement. In its view, this requirement would be of particular significance if parties are permitted to waive their right to legal advice. As will be seen below, we are not minded to recommend that waiver of legal advice be permitted.

6.34 We did not discuss in detail the question of whether qualifying nuptial agreements must be made by deed in the 2011 CP. On reflection, however, we are now minded to recommend that qualifying nuptial agreements must be made by deed in accordance with section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.²³

6.35 We do not see any force in the idea that witnesses to the deed would be able to give evidence as to the parties' state of mind. However, the requirement of a deed is in part for the sake of solemnity, to impress upon the parties the formal and legally binding nature of the agreement. It would also resolve any uncertainty surrounding consideration. In the 2011 CP, we explained that it was not clear that the marriage or civil partnership would be consideration for a pre-nuptial agreement; and we noted that it is difficult to regard staying married as consideration for a post-nuptial agreement. Some common law jurisdictions which, like ours, require consideration have enacted provisions as a result to the effect that consideration is not required for the validity of marital property agreements. But if the agreement has to be made by deed then that removes any issue about the presence of consideration.

6.36 **We recommend that qualifying nuptial agreements must be made by deed.**

A further requirement for the execution of the document

6.37 We want the parties to be clear that what they are signing is a qualifying nuptial agreement intended to oust the court's discretion (save as to financial needs). This is for the sake of both parties.

6.38 So far as concerns the party giving something up, it is important that he or she understands that there will be no second chance by means of an assessment of the fairness of the agreement. So far as concerns the party who wishes to protect property by means of the agreement, it is important to minimise the risk of challenge later. We know that as matters stand there are instances where lawyers advise their clients that it is safe to sign a pre-nuptial contract because it will not be binding; the introduction of qualifying nuptial agreements should go some way to prevent that sort of tactic.

6.39 This is not a point on which we consulted but it seems to us to be useful to add a further requirement as follows.

²³ Qualifying nuptial agreements would, therefore, have to be made in writing and signatures would have to be witnessed. For the full list of requirements attaching to the execution of a deed see Law of Property (Miscellaneous Provisions) Act 1989, s 1(1) to (3).

- 6.40 **We recommend that qualifying nuptial agreements must contain a statement signed by both parties (in addition to their execution of the document as a deed) stating that he or she understands that the agreement is a qualifying nuptial agreement and that it will remove the court's discretion to make financial provision orders, save in so far as the agreement leaves either party without provision for their financial needs.**
- 6.41 These two recommendations are put into effect by clauses 5 and 7 of the draft Bill; see paragraph 3 of the new Schedule A1 to the Matrimonial Causes Act 1973, and paragraph 37C of the new Part 7A to Schedule 5 to the Civil Partnership Act 2004.

(3) Timing

- 6.42 Unlike the other formalities discussed in this Chapter, timing is one which relates solely to pre-nuptial agreements which by definition are agreed before a marriage takes place. The question here is whether our recommendations on qualifying nuptial agreements ought to include a stipulation on how far in advance of marriage or civil partnership such agreements have to be made.
- 6.43 Many of the proposals made on pre-nuptial agreements in recent years have advocated time limits of 21, 28 or 42 days for signing the agreement before the wedding.²⁴ The courts have not directly commented on the issue of timing. They have, however, expressed a reluctance to uphold agreements concluded on the eve of the wedding day.²⁵ And it has recently been suggested that it is becoming common practice for the courts to expect pre-nuptial agreements to be concluded at least three weeks in advance of the ceremony.²⁶
- 6.44 We acknowledged in the 2011 CP the most obvious purpose of a timing requirement: to relieve the pressure, or the feeling of compulsion, to sign an agreement because of the impending wedding.²⁷ Parties may, for example, fail to give sufficient thought to the implications of entering a pre-nuptial agreement if they have in their minds the potential embarrassment of having to cancel the wedding. However, there are two major difficulties with relying on a timing requirement to reduce the pressure to sign a pre-nuptial agreement. First, wedding preparations commonly commence far in advance of the wedding. The

²⁴ *Supporting Families* advocated a 21 day time limit: Home Office, *Supporting Families: A Consultation Document* (1998) para 4.23. Resolution in their 2009 paper supported a 42 day time limit: Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of Pre-nuptial and Post-nuptial Agreements in England and Wales* (2009) para 5.11. The Centre for Social Justice recommended 28 days in 2009: The Centre for Social Justice, *Every Family Matters: An In-depth Review of Family Law in Britain* (2009) p 192.

²⁵ *J v J (Disclosure: Offshore Corporations)* [2003] EWHC 3110 (Fam), [2004] 1 FLR 1042; but contrast *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120, [2002] Fam Law 877.

²⁶ M Stowe, *Divorce and Splitting Up* (2013) (Kindle Edition); M Stowe suggests that this is too short a time before the wedding and increases the pressure to sign. The three week guideline was also referred to by practitioners taking part in Dr Emma Hitchings' research; see E Hitchings, *A Study of the Views and Approaches of Family Practitioners Concerning Marital Property Agreements* (2011) pp 57 to 59.

²⁷ The 2011 CP, para 6.108.

parties may, for example, have already paid the deposit on the reception venue and sent out the invitations many months before the wedding. It would therefore be difficult to find an acceptable legal time limit that was capable of dealing robustly with the possibility of pressure.

- 6.45 Secondly, it is arguable that imposing a time limit for signing the agreement in advance of the wedding would not remove the pressure to sign, but would simply divert the pressure to another day.²⁸ The pressure which may be felt by a party about to get married by being asked to sign the agreement a day before the wedding may be equally felt if confronted with the agreement a day before the deadline.
- 6.46 We pointed out in the 2011 CP that other common law jurisdictions generally do not mandate time limits for the making of pre-nuptial agreements; cases tend to turn on their own facts.²⁹ It might be the case that having to negotiate an agreement during the final stages of the engagement could amount to duress or undue influence, rendering the agreement voidable.³⁰ In other cases, it might be found that there was no pressure, despite the agreement being signed immediately before the wedding.³¹ Often the act of signature will not be particularly significant as the parties will have been discussing the contract for many months before.³²
- 6.47 We expressed the view in the 2011 CP that a timing requirement would not provide any useful protection for parties contemplating a qualifying nuptial agreement; existing contractual doctrines were sufficiently well-equipped to address the issue of pressure. We sought consultees' views on a provisional proposal that there should be no timing requirement for qualifying nuptial agreements signed before the celebration of the marriage or civil partnership.³³
- 6.48 Our provisional proposal did not, therefore, relate to post-nuptial agreements which would take effect as qualifying nuptial agreements, but we invited consultees' views on this point, as discussed below.³⁴

²⁸ B Hooker, "Prenuptial Contracts and Safeguards" (2001) 31 *Family Law* 56, 57.

²⁹ The 2011 CP para 6.110.

³⁰ See the Australian case of *Blackmore v Webber* (2009) FMCA Fam 154.

³¹ For example, *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120 where the agreement was signed one day before the wedding but the court concluded the parties had had ample time to consider its content.

³² For example, in the Floridian case of *Francavilla v Francavilla* (2007) 969 So 2d 522, the parties signed the final agreement less than one hour before the wedding ceremony. Nevertheless, the court concluded that there had been no duress, noting that the agreement had been preceded by three months of negotiation, substantial disclosure, and the appointment of independent counsel for the wife.

³³ The 2011 CP, paras 6.112 and 8.15.

³⁴ See paras 6.60 to 6.62.

Qualifying nuptial agreements concluded before the marriage or civil partnership

6.49 Thirty-three consultees responded to this provisional proposal; the majority (21 consultees) broadly supported it.

6.50 Among those who provided comments was David Hodson, who saw timing requirements as “invariably unrealistic”. In his view, a benefit of not stipulating a timing requirement was that it avoided “the artificiality of [choosing] a particular date before the wedding”. He also thought that the absence of a timing requirement would encourage couples to prepare agreements earlier. Douglas Wade warned that a timing requirement would add “to the general pre-wedding drama to no advantage”. The Family Law Bar Association agreed with our argument that existing contractual doctrines were sufficient to address the issue of pressure.

6.51 Resolution shared our view that any deadline would be arbitrary and would simply shift the pressure to a different day. In its view, the timing of the signing of the agreement should instead represent one of the factors the court would take into account when looking at whether there had been unfair influence or pressure. A similar view was presented by Charles Russell LLP. They saw a 21 day rule as beneficial but did not argue for a specific requirement. They felt that the fact that the agreement was concluded within 21 days of the marriage could be taken into account as part of, for example, an argument based on duress or undue influence.

6.52 The Family Law Society expressed support for the provisional proposal but qualified their response:

We agree with this position but suggest that parties be required to sign no less than (say) 21 days in advance of union, after which a notarized affidavit attesting to non-coercion or compulsion be recommended - both options intended to ascertain greater certainty in the eyes of the law.

6.53 Of those who opposed the provisional proposal, some disputed our argument that a timing requirement would simply shift the pressure to an earlier date. Tracey O’Dwyer felt that there was a “huge difference” between being faced with an agreement a few weeks prior to the wedding and having to consider the agreement a few days before the wedding, when guests may already have travelled and all the arrangements were in place. Professor J T Oldham saw some merit in our argument but stressed that a timing requirement would at least mean that the party faced with the agreement would be making their decision when their “faculties would not be as impacted by the impending wedding”.

6.54 Professor Oldham warned that the lack of a timing requirement in the United States had not provided adequate protection to prospective parties to agreements from “unfair bargaining tactics”. He acknowledged that rules on duress and undue influence in England and Wales could be more robust than those of the United States but said that the United States’ experience was that it was not uncommon for agreements to be presented on the eve or day of the wedding and that this did not allow sufficient time for the party faced with the agreement to consider the legal advice provided.

- 6.55 Mills & Reeve LLP expressed sympathy with some of the arguments we advanced but stressed that the function of a timing requirement was to help limit the extent to which the emotions and judgement of the parties were negatively affected by the imminence of the marriage. There was a risk, in their view, that agreements concluded under pressure close to the date of the wedding could lead to increased tension and costs, and to one party accepting a clause he or she was unhappy with.
- 6.56 Steven Jackson did not suggest a specific limit but emphasised that the agreements should be concluded as far away from the date of the wedding as possible. Other consultees who agreed with our provisional proposal put forward suggestions for possible limits. Dr Robert George was of the view that proposing a qualifying nuptial agreement immediately before the marriage would “smack of undue pressure”.
- 6.57 Mishcon de Reya advocated a 28 day time limit, emphasising that their experience was that the pressure on the party subject to the agreement increased as the date of the marriage became more proximate. Tony Roe also saw a timing requirement as an essential safeguard, and proposed a time limit of between three and six months for executing the agreement prior to the wedding.
- 6.58 The Law Society was also sympathetic to the argument that the imposition of time limits had an arbitrary flavour; and it accepted our argument about the transferral of pressure. It took the view overall, however, that the practical reality was that the proximity of the marriage hindered the parties’ capacity for “informed, considered, decision making”. It therefore proposed a 42 day “cooling off period” following the signing of the agreement before the ceremony. It felt that 42 days was appropriate as, although money would already have been invested in the wedding by this date, it was a sufficient distance from the ceremony to provide space for reflection.
- 6.59 The Chartered Institute of Legal Executives was in favour of a timing requirement but suggested that agreements concluded outside the time limit could nevertheless still stand if proof could be provided that the parties had sufficient time for consideration of the terms of the agreement and that individual circumstances dictated the agreement being signed on that day.

Qualifying nuptial agreements concluded after the marriage or civil partnership

- 6.60 Although our provisional proposal focused on qualifying nuptial agreements made before marriage or civil partnership, we also asked more informally for consultees’ views on timing requirements in relation to post-nuptial agreements.
- 6.61 The type of scenario we were envisaging in relation to post-nuptial agreements was where one party might negotiate the agreement with a view to imminent divorce or dissolution but without disclosing that motivation. We had in mind in particular post-nuptial agreements such as that in *NA v MA*³⁵ where the agreement was the price of the continuation of the marriage. It has been

³⁵ [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760.

suggested, for example, that:

If the reconciliation is fairly quickly unsuccessful this could suggest that the spouse demanding economic concessions before reconciliation was not attempting reconciliation in good faith, but was merely trying to structure a favourable divorce settlement.³⁶

- 6.62 Three consultees specifically addressed the issue of timing in relation to post-nuptial agreements. 29 Bedford Row, the Family Law Bar Association and the Law Reform Committee of the Bar Council all felt that time limits were not necessary in relation to these agreements.³⁷

Conclusions on timing following consultation

- 6.63 Following consultation we have altered our position in relation to this question of whether a timing requirement ought to attach to qualifying nuptial agreements concluded before the marriage or civil partnership. We now take the view that such a qualifying nuptial agreement should be made at least 28 days before the wedding or civil partnership.
- 6.64 Those who opposed our provisional proposal were particularly exercised by the risk of pressure increasing as the date of the marriage grew more proximate. We remain of the view that a timing requirement cannot provide total protection to parties who are contemplating entering a qualifying nuptial agreement: these parties may still experience pressure to sign an agreement, even if the agreement must be signed 28 days in advance of the ceremony. We also accept that deciding on the appropriate time limit is a relatively artificial process.³⁸ But we have been persuaded that a requirement on timing would at least help to mitigate the problems which may arise in the worse case scenario examples, such as those where agreements are presented on the eve of the wedding.
- 6.65 Our intention in recommending the introduction of qualifying nuptial agreements is that these agreements will be consensual and will not be the product of negotiations conducted under pressure which clouds the parties' judgement. We therefore hope that by requiring a gap of 28 days between the signing of the agreement and the marriage or civil partnership, the risk of pressure influencing the parties' decisions may at least be limited, even if it cannot be eradicated.
- 6.66 We do not, however, intend to make a specific recommendation on timing in relation to post-nuptial agreements which will take effect as qualifying nuptial agreements. We consider that the existing law is sufficiently robust to deal with this issue if it arises on a case-by-case basis.

³⁶ J T Oldham, *Divorce, Separation, and the Distribution of Property* (2010) § 4.06.

³⁷ All three were also of the view that such a requirement was not needed in relation to qualifying nuptial agreements concluded prior to the marriage or civil partnership.

³⁸ We note the other time limits which apply to those wishing to enter a marriage or civil partnership, including that marriage in an Anglican Church without a special licence requires publication of banns on three successive Sundays (see the Marriage Act 1949 ss 5 and 7), while notice of a civil or any other religious marriage or civil partnership must be publicly available for 15 successive days after entry in the marriage notice book (see the Marriage Act 1949, s 31; and the Civil Partnership Act 2004, ss 10 and 11).

- 6.67 **We recommend that qualifying nuptial agreements be invalid if made less than 28 days in advance of the marriage or civil partnership.**
- 6.68 This recommendation is put into effect by the “timing requirement” set out at paragraph 4 of the new Schedule A1 to the Matrimonial Causes Act 1973, and paragraph 37D of the new Part 7A to Schedule 5 to the Civil Partnership Act 2004.

(4) Disclosure

Reasons for requiring disclosure

- 6.69 A qualifying nuptial agreement will – save as regards provision for needs – take the parties to that agreement outside the reach of judicial scrutiny and the protection that the section 25 exercise affords.³⁹ It is essential, therefore, that parties to a qualifying nuptial agreement enter the agreement with knowledge of the financial consequences. We have to consider how far that requirement goes, and in particular to what extent the parties will need to have knowledge of each other’s financial circumstances before making the agreement.
- 6.70 In the 2011 CP, we noted that financial disclosure is not required by the general law of contract.⁴⁰ By contrast, disclosure requirements are familiar in family law; detailed disclosure is, for example, already an important element of financial orders proceedings.⁴¹ It forms an essential part of the making of separation agreements, and in the making of orders in cases where there are pre- and post-nuptial agreements, whether or not the order is made by consent.⁴² An order may be set aside or varied if it was made without proper disclosure having been given.⁴³
- 6.71 There are a number of arguments which weigh against imposing a disclosure requirement on the formation of qualifying nuptial agreements. Some couples

³⁹ Either wholly or with respect to a particular asset or group of assets, depending on the agreement.

⁴⁰ Outside special contexts such as contracts of utmost good faith, the main group of which are contracts of insurance: H G Beale (ed), *Chitty on Contracts* (31st edition) Vol 1: General Principles, paras 6-142 to 6-164. Failure to disclose material facts, however, may amount to misrepresentation or undue influence.

⁴¹ Parties must make “full and frank” disclosure of their financial circumstances by completing a Form E. The Pre-Application Protocol annexed to *Practice Direction (Ancillary Relief: Procedure)* [2000] 1 WLR 1480 at [3.5] makes it clear that the parties are not specifically required to use the Form E itself but it should be used as a “guide to the format of the disclosure”. For a full discussion of the practicalities of disclosure in financial orders proceedings see G Howell and J Montgomery, *Butterworths Family Law Service* (Issue 184) part 4A(6)(K). For a recent case discussing non-disclosure and materiality, see *S v S (Non-disclosure)* [2013] EWHC 991 (Fam), [2013] 2 FLR 1598.

⁴² The Court of Appeal has said that judges must now always produce a schedule of assets as part of their judgments on applications for financial provision on divorce: *Behzadi v Behzadi* [2008] EWCA Civ 1070, [2009] 2 FLR 649.

⁴³ *Jenkins v Livesey (formerly Jenkins)* [1985] FLR 813. See also *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, which provides an example of where non-disclosure did not result in the agreement being set aside. For an example of additional provision being made after non-disclosure came to light see *Kingdon v Kingdon* [2010] EWCA Civ 1251, [2011] 1 FLR 1409.

may feel that it is unnecessary and disclosure can also be expensive if assets require professional valuation.⁴⁴

- 6.72 On balance, however, we took the view in the 2011 CP that financial disclosure should be essential to the formation of qualifying nuptial agreements. We are sympathetic to the argument that, as one leading practitioner told us, negotiating a qualifying nuptial agreement without disclosure would amount to “operating blindfolded”. A party may, for example, feel differently about the possibility of forgoing any share in their partner’s pre-acquired wealth if it turns out to be £500 million rather than £5 million. We noted in the 2011 CP that we were not aware of any organisation which has put forward proposals for enforceable marital property agreements without a disclosure requirement.⁴⁵
- 6.73 So far as we are aware, continental European jurisdictions do not impose any formal disclosure requirement prior to the signing of a marital property agreement. They all permit and encourage marital property agreements as a way of choosing a marital property regime – that is, as a way of determining the division of capital rather than of spousal support. The couple’s choice may not relate to divorce and may be made as a way of protecting the financially weaker party. In particular, in some jurisdictions⁴⁶ a couple would be advised to contract into separation of property if one of them owns a business, so as to protect the other party from the community of liability that goes with community of property.
- 6.74 On the other hand, the United States’ Uniform Law Commission has recently changed its stance on the question of disclosure. Since we published the 2011 CP, the Uniform Law Commission has produced a new Uniform Premarital and Marital Agreements Act. It departs from the approach of the 1983 version in a number of respects, one of the most significant being in relation to disclosure.
- 6.75 The Uniform Premarital Agreement Act 1983 required both non-disclosure *and* unconscionability to vitiate an agreement.⁴⁷ So non-disclosure alone did not invalidate the agreement unless there was also a finding of unconscionability. By contrast, the new Uniform Premarital and Marital Agreements Act permits either

⁴⁴ One participant in Dr Hitchings’ research, for example, explained that “it is very difficult to persuade somebody to spend money on a full-blown disclosure exercise when they are trusting each other and hoping it [divorce] will never happen”: E Hitchings, *A Study of the Views and Approaches of Family Practitioners Concerning Marital Property Agreements* (2011) p 47.

⁴⁵ *Supporting Families* advocated “full disclosure” (Home Office, *Supporting Families: A Consultation Document* (1998), para 4.23) and in their 2009 paper, Resolution recommended “substantially full and frank disclosure” (Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of pre-nuptial and post-nuptial agreements in England and Wales* (2009) para 5.10).

⁴⁶ Those that operate a regime of immediate community, such as France or the Netherlands, rather than one arising only on divorce, death or bankruptcy such as the Scandinavian countries.

⁴⁷ Uniform Premarital Agreement Act, 9C ULA 43 (1983) § 6(a). And see B A Atwood and B H Bix, “A New Uniform Law for Premarital and Marital Agreements” (2012) 46(3) *Family Law Quarterly* 313, 341.

unconscionability or non-disclosure to invalidate the agreement.⁴⁸ The new Act is arguably more in line with the existing practice of many states in the United States. Around 50% of the states which had adopted the earlier Uniform Premarital Agreement Act had adapted it in order to ensure that vulnerable parties benefited from greater protection than a strict reading of the Act would allow.⁴⁹

- 6.76 Disclosure of all material facts is a pre-requisite for the validity of Binding Financial Agreements in Australia.⁵⁰ The important word there is “material”; a particular non-disclosure may be found to have been immaterial so that it would not invalidate the agreement.
- 6.77 We saw value in this model of requiring *material* disclosure. A general requirement of full disclosure would not be practicable; such an approach could penalise parties who failed to disclose minor assets or ones which could have made no difference to the agreement.⁵¹ Requiring disclosure of material information, by contrast, moves the focus to the practical effect of the agreement and provides room for an assessment of the importance of a particular omission.⁵²
- 6.78 For example, if the undisclosed asset was particularly important or valuable then non-disclosure might well be material and would mean that the agreement was not a qualifying nuptial agreement. But the court in then assessing a claim for financial orders, treating the agreement on *Radmacher v Granatino* principles, might well reach the conclusion that an appropriate response to the non-disclosure might be simply for the agreement to be disregarded in respect of an asset that has not been disclosed. So if the agreement was that the husband would forego any financial provision (save for needs) from his wife, she might nevertheless have to share her wealth to the extent that it was undisclosed at the time of the agreement. On the other hand, disclosure from the husband in those circumstances might be minimal; if he had no financial resources no disclosure would be required.
- 6.79 There might also be some cases where the failure to disclose material financial information relates not to the existence or value of property but instead to other financial information, such as pregnancy or an intention to give up work. What

⁴⁸ Uniform Premarital and Marital Agreements Act (2012) § 9(f)(1). And see B A Atwood and B H Bix, “A New Uniform Law for Premarital and Marital Agreements” (2012) 46(3) *Family Law Quarterly* 313, 335.

⁴⁹ B A Atwood and B H Bix, “A New Uniform Law for Premarital and Marital Agreements” (2012) 46(3) *Family Law Quarterly* 313, 321 to 322.

⁵⁰ Family Law Act 1975, s 90K(1)(a). See also *Blackmore v Webber* [2009] FMCA Fam 154.

⁵¹ Resolution recommended that parties should be required to provide “substantially full and frank disclosure” so that a requirement of disclosure could “not be misused so that any error or omission ... however, minor, can be relied upon in an attempt to escape its terms”: Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of Pre-nuptial and Post-nuptial Agreements in England and Wales* (2009) para 5.10.

⁵² For a recent example of a “big money” case concerning an application to reopen financial orders proceedings where non-disclosure was found but was not considered to be material see *S v S (Non-disclosure)* [2013] EWHC 991 (Fam), [2013] Fam Law 960.

precisely falls into this category will depend on the terms of the agreement; and not every instance of non-disclosure will be relevant.⁵³ If the non-disclosure is material, the whole agreement would fail to take effect as a qualifying nuptial agreement.

- 6.80 We were keen to emphasise in the 2011 CP that disclosure acted as much as protection for the party who makes the agreement as for the one to whom it is made. We also explained that the disclosure requirement would be relatively easy to satisfy where the agreement relates only to a specific item or items. For example, if an agreement states that the wife's car will remain her own property in any event, the only disclosure required would be the value of the car; further disclosure of other items would not be necessary. It is unlikely there would be other material facts that required disclosure in the context of such an agreement in the light of it concerning only a specific item of property. In other cases, however, the asset protected by the agreement might be very valuable (for example an inherited house), and it might well be material to have further disclosure.
- 6.81 We provisionally proposed that, in the event that qualifying nuptial agreements were introduced, a marital property agreement should not be treated as a qualifying nuptial agreement unless the party against whom it is sought to be enforced received, at the time of the making of the agreement, material full and frank disclosure of the other party's financial situation.⁵⁴

Consultation responses

- 6.82 The majority of consultees broadly supported this provisional proposal. Charles Russell LLP, Mills & Reeve LLP and Mishcon de Reya all made the point that disclosure was important to ensure that the parties were making an informed decision in signing the agreement. Resolution agreed with our view that the use of the word "material" had the benefit of allowing an assessment to be made of the importance of a particular non-disclosure.
- 6.83 However, other consultees supported the provisional proposal but had reservations about the word "material". Joanna Miles asked how the concept would apply to the facts of cases such as *Radmacher v Granatino*.⁵⁵ Both the Family Law Bar Association and the Law Reform Committee of the Bar Council thought that attention would need to be paid to where the burden of proof should lie. The Family Law Bar Association also asked whether the concept of "materiality" ought to be subject to an objective test. It stressed the "unenviable task" facing the courts in assessing materiality because the assessment would have to involve a "counter-factual enquiry". The Law Reform Committee of the Bar Council also had concerns about the use of the words "full" and "material",

⁵³ Pregnancy is a good example of a fact that might or might not be a material non-disclosure. If the agreement made provision for the arrival of children it would be hard to argue that failure to disclose a pregnancy was a problem; yet if the agreement was negotiated on the understanding that the parties would both be earning substantially for some years, a failure to disclose a pregnancy and the intention to give up employment could be said to be material.

⁵⁴ The 2011 CP, paras 6.74 and 8.10.

⁵⁵ [2010] UKSC 42, [2011] 1 AC 534.

expressing the view that their precise meaning should be articulated.

- 6.84 Rhys Taylor and the Family Law Society both expressed concern about the cost of disclosure. The Family Law Bar Association did not, however, share this view, arguing instead that disclosure may carry a “cost factor” but costs are likely only to be high for parties with complex assets who will be able to afford the cost of disclosure. The Law Society took a similar stance, stating that the cost of disclosure was likely to be “proportionate to the amount of significant assets the parties have”.
- 6.85 Other consultees⁵⁶ warned of the risk of a disclosure requirement potentially giving rise to unnecessary or troublesome litigation. 29 Bedford Row told us that their preferred approach to minimise this risk was to require disclosure which would be “sufficient to enable the other party to give informed consent to the agreement”. Further suggestions on alternative approaches included that of Withers LLP that parties ought to be able to set out that although they were aware of their entitlement to disclosure, they were nevertheless satisfied with the level of disclosure they had received. The Law Society supported our provisional proposal but cautioned that some might see it as disproportionate and might prefer an approach based on “sufficient understanding” or “sufficient clarity”. The Family Law Bar Association, in contrast, did not see a requirement of material disclosure as disproportionate.

Discussion

- 6.86 Consultation revealed a mixture of views, and we have to be careful in assessing the support for disclosure because those views were expressed at a point when it was not known that qualifying nuptial agreements could not be used to contract out of meeting financial needs. Arguably the reasons for requiring disclosure are less powerful as our policy now stands.
- 6.87 Nevertheless, there are strong reasons for ensuring that the parties, who are to be held to the agreement, make it with knowledge of the material facts. Without such knowledge we doubt that the parties’ decision to enter the agreement could be regarded as autonomous. The concept of “material” non-disclosure was referred to in *Radmacher v Granatino* in its discussion of the factors which could lead a court to decide that an agreement was not freely entered into.⁵⁷
- 6.88 So we remain of the view that the appropriate disclosure requirement is one of disclosure of material information. However, on reflection we did not feel that the words “full and frank” as proposed in our 2011 CP added anything of substance to the requirement and, in fact, may have clouded the concept of materiality. We think that “materiality” – that which would reasonably (that is, on an objective basis) be considered to matter to the individual in deciding to enter the agreement – is the best control available to prevent disproportionate disclosure, although we accept that disclosure may be expensive and that the assessment of what is material is a matter for the judgement of the individuals involved and of their lawyers.

⁵⁶ Andrew Turek, The Law Society and 29 Bedford Row.

⁵⁷ [2010] UKSC 42, [2011] 1 AC 534 at [69].

- 6.89 However, we have moved away from the idea that disclosure might be required to have been given only to the party against whom the agreement is being enforced. On reflection, this proved quite a difficult concept. It may be clear at the outset that an agreement will be enforced against one party and not the other; but circumstances may change. The richer party may become the poorer party. An agreement may be varied, for example where one party acquires unexpected wealth; a “unilateral” disclosure requirement may have the effect that the “wrong” party receives disclosure. So our recommendation relates to both parties.
- 6.90 In practice the bi-lateral requirement will often make no difference; where there is a clearly financially stronger and weaker party, the wealthier party will have to make disclosure to the other, but “material” disclosure by the less wealthy party is likely to be minimal and inexpensive.
- 6.91 **We recommend that a marital property agreement should not be a qualifying nuptial agreement unless both parties received, at the time of the making of the agreement, disclosure of material information about the other party’s financial situation.**
- 6.92 Accordingly, clauses 5 and 7 of the draft Bill impose a “disclosure requirement” for the validity of a qualifying nuptial agreement. The “disclosure requirement” is set out at paragraph 5 of the new Schedule A1 to the Matrimonial Causes Act 1973, and paragraph 37E of the new Part 7A to Schedule 5 to the Civil Partnership Act 2004.
- 6.93 Paragraph 5(2) of clause 5, sets out the information that must be disclosed:
- The circumstances that a party is required to disclose are such of his or her circumstances as would reasonably be considered to be material to a decision by the other party to enter into the nuptial agreement on the relevant terms contained within it.

Waiving disclosure

- 6.94 Should the parties be able to waive disclosure of material information? They might do so in order to avoid the expense of disclosure, or because they trust each other, or because one party has pressurised the other into waiving disclosure.
- 6.95 We noted in the 2011 CP that permitting waiver of disclosure may mean that one party agrees to limited financial provision without knowing the extent, perhaps not even roughly, of the other’s resources. To what extent should the law prevent people from choosing to do this? To allow waiver may invite satellite litigation about whether or not a waiver was in fact freely given. However, as things stand, where both parties are content to reach agreement on the basis of reasonable assumptions about each other’s resources, without any detailed investigation, the courts are, under the current law, slow to interfere.⁵⁸

⁵⁸ X v X [2002] 1 FLR 508, [2002] Fam Law 98 at [62].

- 6.96 We asked consultees whether parties should be able to waive their rights to disclosure.⁵⁹
- 6.97 Most consultees who responded to this question took the view that parties should not be able to waive their rights to disclosure. The Family Law Bar Association saw disclosure as a “necessary ingredient for comprehensive legal advice”. It thought that any benefits to the parties of being able to waive their right to disclosure, such as the protection of autonomy, were outweighed by the disadvantages.
- 6.98 Other consultees saw permitting a waiver of disclosure as undermining autonomy, rather than protecting it. Resolution considered the parties’ understanding of the legal and financial effects of the agreement as crucial to the protection of autonomy. The Law Reform Committee of the Bar Council agreed that agreements made without the necessary information were not autonomous. Charles Russell LLP thought that permitting waiver of disclosure was to take “the concept of autonomy too far”.
- 6.99 Some consultees⁶⁰ were also concerned by an increased risk of exploitation arising if disclosure could be waived. And a number of consultees emphasised that the work of lawyers would become far more difficult in the absence of disclosure.⁶¹
- 6.100 Of the consultees who favoured allowing waiver of disclosure, some did not provide detailed reasons. Men’s Aid thought that parties should be able to waive certain rights to disclosure; it thought the level of detail required was a matter for the parties to determine. It was, however, concerned to ensure that parties could not waive their right to disclosure if one of the parties had “significant debt liabilities”.
- 6.101 The Chartered Institute of Legal Executives suggested an alternative approach. It thought that there could be a “rebuttable presumption that full and frank disclosure should be made”. This would mean in practice that the person wishing to enforce the agreement could demonstrate that disclosure was unnecessary, for example in cases where the spouses already had knowledge of the issues which would have arisen from the disclosure. It emphasised that if this approach was adopted, legal advice explaining the implications of opting out of disclosure would be required.
- 6.102 On balance, the weight of consultation responses favoured a position where waiver of disclosure is not permitted. We understand the concerns that consultees raised about the risks associated with waiver; and we bear in mind the stress that the courts currently lay on the need for parties to have entered into an agreement with knowledge of its implications. We found particularly persuasive the argument that preventing waiver will avoid satellite litigation as to whether disclosure was freely waived.

⁵⁹ The 2011 CP, paras 6.75 and 8.11.

⁶⁰ Marilyn Young and Alec Samuels.

⁶¹ The Law Reform Committee of the Bar Council, Mills & Reeve LLP, The Law Society, Charles Russell LLP and the Family Law Bar Association.

6.103 **We recommend that parties to a qualifying nuptial agreement should not be able to waive their rights to disclosure.**

6.104 We consider that it would not be appropriate for the draft Bill to specify what form disclosure should take. That will be a decision for the parties and their advisors. However, we set out in Chapter 7, which offers practical guidance on qualifying nuptial agreements, some suggestions for how disclosure might work.

(5) Legal advice

6.105 We asked three questions on legal advice in the 2011 CP: first, whether a marital property agreement should not be classified as a qualifying nuptial agreement unless the parties had received legal advice at the time it was formed; secondly, how it could be proved that legal advice had been given; and thirdly, whether the same lawyer could advise both parties to the agreement.

Legal advice as a pre-requisite for qualifying nuptial agreements

6.106 A number of reasons weigh against making legal advice a pre-requisite for qualifying nuptial agreements. Legal advice is expensive. For some couples, the assets they wish to protect may not be extensive and the qualifying nuptial agreement might be the product of a common desire to safeguard particular property received following a previous divorce or dissolution. Should couples in these cases be obliged to pay lawyers to advise them on what they have already agreed between themselves?

6.107 On the other hand, there is much to be said for the parties having clear knowledge of the implications of entering a qualifying nuptial agreement. Legal advice may provide some safeguard against undue influence – and that works to the advantage of both parties.

6.108 In the 2011 CP, we noted that legal advice is a pre-requisite for the enforceability of marital property agreements in a number of common law jurisdictions.⁶² Most continental European jurisdictions require agreements to be notarised; a notary advises both parties in the interests of the family, so this is not a requirement of *independent* legal advice for the individuals. English law does not normally insist on anyone taking legal advice, nor on their being legally represented. The exceptions to that arise when someone is giving up a legal protection. Thus in the law of mortgages, a mortgagee's ability to enforce a security may depend upon its having ensured that someone in a close relationship to a borrower took legal advice before allowing their own property to be used as security for the other's debts;⁶³ and in employment law, legal advice must be taken in the context of a

⁶² See for example the Property (Relationships) Act 1976 (New Zealand). In Australia, section 90G of the Family Law Act 1986 requires parties to receive independent legal advice. The American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) § 7.04(3) suggests that both parties should explicitly receive advice to obtain independent legal counsel and have reasonable opportunity to do so, in order to invoke a rebuttable presumption that consent has been obtained without duress.

⁶³ *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773.

compromise agreement on redundancy.⁶⁴

- 6.109 We explained that marital property agreements can almost always be regarded as a contracting out of protection. This might be mutual, in cases where both spouses are wealthy; often, however, it is unilateral, where one spouse is, or is clearly going to be, wealthier than the other. A qualifying nuptial agreement will remove the parties' recourse to the discretionary jurisdiction of the court if their relationship breaks down, save so far as financial needs are concerned. We stressed in the 2011 CP that the repercussions of reaching such an agreement may last a lifetime.
- 6.110 The importance of parties taking legal advice, at least in part due to the power imbalances which can underpin pre-nuptial agreements, was highlighted by the majority of the national sample in the research conducted by Professor Anne Barlow and Dr Janet Smithson. Ninety-four percent of their sample thought that it was "very or fairly important for both partners making a binding pre-nuptial agreement to take legal advice". Professor Barlow and Dr Smithson therefore suggested that the approach of the Supreme Court in *Radmacher v Granatino*⁶⁵ – where the agreement was concluded in the absence of legal advice – may not accord with public perceptions on the importance of legal advice.⁶⁶
- 6.111 The major policy proposals which have advocated the introduction of binding pre-nuptial agreements in England and Wales have all recommended that some form of legal advice should be mandated. Independent legal advice for both parties was suggested by the Government in their *Supporting Families* recommendations.⁶⁷ In the 2011 CP, we set out the response of the judiciary to these proposals, which echoed the calls for separate legal advice for both parties.⁶⁸ We repeated the comments of Lord Justice Wilson, as he then was, on the benefits of independent legal advice for the party who is giving up something under the agreement:

In most cases it is necessary and in every case it is desirable that the party against whose claim a pre-nuptial contract is raised should have received independent legal advice prior to entry into it. Why so? Because proof of receipt of independent legal advice is often the only, and always the simplest, way of demonstrating that the party entered into it knowingly

⁶⁴ See for example Employment Rights Act 1996, s 203(3)(c) where to make an effective compromise agreement on redundancy the employee or worker must have received "independent legal advice from a qualified lawyer as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal".

⁶⁵ [2010] UKSC 42, [2011] 1 AC 534.

⁶⁶ A Barlow and J Smithson, "Is Modern Marriage a Bargain? Exploring Perceptions of Pre-nuptial Agreements in England and Wales" (2012) 24(3) *Child and Family Law Quarterly* 304, 308.

⁶⁷ Home Office, *Supporting Families: A Consultation Document* (1998) para 4.23.

⁶⁸ N Wilson, "Ancillary Relief Reform: Response of the Judges of the Family Division to the Government Proposals (made by way of submission to the Lord Chancellor's Ancillary Relief Advisory Group)" (1999) 29 *Family Law* 159, 162.

... It may be that ... any legislative reform of the law's treatment of nuptial agreement will include ... a requirement that independent legal advice should – in every case, irrespective of its surrounding circumstances have been received in relation to [the agreement(s)] by both parties prior to execution.⁶⁹

- 6.112 We also explained that The Centre for Social Justice saw separate legal representation as a pre-requisite for agreements to be binding, commenting that separate representation is “fundamental to the basic concepts in English culture of fairness and justice”.⁷⁰
- 6.113 We highlighted that the proposal of Resolution, advocating that the parties should have a “reasonable opportunity to obtain legal advice”, stood in contrast to the approaches which mandated the receipt of legal advice. Resolution cautioned that a requirement of legal advice could permit “mischievous” parties to fail to obtain legal advice deliberately in order to vitiate the agreement. It accepted, however, that the legal advice point was a “finely balanced” one.⁷¹
- 6.114 We said in the 2011 CP that we were not at all convinced that a “reasonable opportunity” to take legal advice would provide any protection to prospective parties to a qualifying nuptial agreement. There is no guarantee that legal advice will be taken. The parties may decide that their money is better invested in the wedding; much existing research also stresses the likelihood that parties to a marriage will suffer from “defective risk evaluation”, where they consider their relationship to be “above average” and unlikely to end in divorce.⁷²
- 6.115 We did not think that prospective parties to a qualifying nuptial agreement would unacceptably exploit the legal advice requirement. Individuals have a choice whether or not to take advice, and whether or not to enter a qualifying nuptial agreement; if either party chooses not to meet the pre-requisites, and so not to exclude the jurisdiction of the court, they should have that option. We also noted that the ambiguity of the word “opportunity” could be problematic in practice as parties attempted to challenge the validity of the agreement.
- 6.116 We therefore provisionally proposed in the 2011 CP that an agreement should not be treated as a qualifying nuptial agreement against a party who did not

⁶⁹ *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [137] and [140]. Many other judges have emphasised the presence of competent legal advice as adding weight to the agreement, for example, Ormrod LJ in *Edgar v Edgar* [1980] 1 WLR 1410, Munby J in *X v X (Y and Z intervening)* [2002] 1 FLR 508.

⁷⁰ The Centre for Social Justice, *Every Family Matters: An In-depth Review of Family Law in Britain* (2009) p 196.

⁷¹ Resolution, *Family Agreements – Seeking Certainty to Reduce Disputes: the Recognition and Enforcement of Pre-nuptial and Post-nuptial Agreements in England and Wales* (2009) para 5.9.

⁷² See further M A Eisenberg, “The Limits of Cognition and the Limits of Contract” (1995) 47 *Stanford Law Review* 211, 224 to 225; and L Baker and R Emery, “When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage” (1993) 17 *Law and Human Behaviour* 439. We are grateful to Professor Lorna Fox O'Mahony for suggesting particular sources of interest on this point.

receive legal advice at the time when it was formed.⁷³

- 6.117 Twenty of the 34 consultees who responded to this proposal expressed support for it. The Family Law Bar Association, for example, was keen to emphasise that nuptial agreements were different from commercial agreements, particularly as their “repercussions may last a lifetime”; it saw legal advice as “vitally important” to ensuring that parties make informed decisions.
- 6.118 That legal advice was important to ensuring that the parties to the agreement understand its implications and enter the agreement freely was a view also shared by Dr Robert George and Mishcon de Reya. Dr George saw legal advice as important for both the party wishing to enforce the agreement and the party subject to the agreement; if legal advice is lacking, the conduct of the stronger party may be questioned.
- 6.119 Some consultees expressed their dissatisfaction with reliance on requiring merely an “opportunity” to take legal advice. Steven Jackson, Charles Russell LLP, 29 Bedford Row and David Hodson all agreed that an “opportunity” to seek legal advice was inadequate.⁷⁴ David Hodson said he would “support hugely” an approach which stipulated that advice must be independent, and must include an explanation of how the legal rights of the party may be changed by the agreement and information on the advantages and disadvantages of the agreement.
- 6.120 Dr Jens M Scherpe took the view that legal advice was important but warned that it could never act as a guarantee that the parties will act in their best interests. He suggested that legal advice could be “a safeguard, but never the safeguard”.
- 6.121 Some consultees considered the consequences of the parties failing to take legal advice. The Law Society thought that agreements made without legal advice should not be binding but could be considered as part of financial orders proceedings. Marilyn Young saw it as “imperative” that legal advice was sought by the parties to an agreement. However, she argued that if the party was encouraged on numerous occasions to take legal advice but failed to do so, then “on their own heads be it”.
- 6.122 A common argument made against the provisional proposal was that a legal advice requirement would be too expensive. Some consultees did not think, for example, that couples with limited assets should have to pay for legal advice or that all couples needed legal advice.⁷⁵ 29 Bedford Row expressed concern that a failure to take legal advice could be used as a “Get Out of Jail Free card”.
- 6.123 Some consultees put forward alternative approaches to our provisional proposal.

⁷³ The 2011 CP, paras 6.98 and 8.12.

⁷⁴ This view was also shared by 29 Bedford Row but they did not directly support our provisional proposal.

⁷⁵ Andrew Turek, the Family Law Society, Men’s Aid and a member of the public.

- (1) 29 Bedford Row suggested modifying it to include a “proviso” that legal advice would be required “unless that party has expressly waived the right to obtain legal advice”. It was accepted that this approach was not perfect, but was the “least bad”.
- (2) Joanna Miles considered our provisional proposal to be “unduly paternalistic”. She thought that a legal advice requirement would not overcome issues such as “imbalance in the quality or expertise/experience of the two advisers”. Her preferred approach was to stipulate that parties needed a “reasonable opportunity to take independent legal advice”; it would then be up to each party to the agreement to decide whether such advice was necessary.
- (3) The Unquoted Companies Group thought that the requirement should be that the parties had an “opportunity to access appropriate legal advice and the agreement meets the appropriate standards”.
- (4) Resolution remained of the view that the parties should have a “reasonable opportunity to receive independent legal advice about the terms and effect of the agreement”. It was keen to avoid a situation where a party could refuse to take legal advice to enable them to argue later that they should not be held to the terms of the agreement. It was also concerned that a strict requirement of legal advice would be costly and would restrict the ability of parties to reach decisions. It thought that a safeguard of the agreement not being binding if there was “unfair pressure or unfair influence” or if the agreement would cause “substantial hardship” would be sufficient to protect against advantage being taken of one party by another.

6.124 We continue to see the receipt of legal advice as an essential requirement for qualifying nuptial agreements. As we emphasised in the 2011 CP, and as subsequently highlighted by many consultees, entering a qualifying nuptial agreement is a major undertaking which could have life-long consequences. Parties need to make informed decisions about whether to enter such agreements. Requiring the parties to take legal advice is an important step towards ensuring they have the necessary information to make their decision.

6.125 **We recommend that a marital property agreement should not be a qualifying nuptial agreement unless both parties received legal advice at the time that the agreement was formed.**

6.126 Accordingly, clauses 5 and 7 of the draft Bill impose a “legal advice requirement” for the validity of a qualifying nuptial agreement. This requirement is set out at paragraph 6 of the new Schedule A1 to the Matrimonial Causes Act 1973, and paragraph 37F of the new Part 7A to Schedule 5 to the Civil Partnership Act 2004.

The content and proof of legal advice

6.127 Although legal advice may go some way towards countering the possibility of pressure, it cannot eradicate it. Lawyers cannot advise their clients on whether or not the agreement will deliver them a satisfactory outcome in the event of divorce or dissolution at a much later date.

- 6.128 We noted in the 2011 CP the problems which had emerged in Australia following the introduction of a demanding legal advice requirement. As initially enacted, the legislation on Binding Financial Agreements required lawyers to give advice not only on the legal effect of any agreement but also on whether the agreement was financially advantageous and one that was prudent for that party to make.⁷⁶ Many family lawyers refused to give such advice, considering that they were neither qualified nor insured to offer financial recommendations.⁷⁷ As a result the law has been amended, so as to require lawyers to certify only that they have advised on the “effect of the agreement on the rights of [the party] and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement”.⁷⁸
- 6.129 We said in the 2011 CP that we considered this to be the right approach. It did not expose lawyers to unacceptable risk. The approach would require the legal adviser to explain the effect of the agreement. Formalistic advice would not suffice; the advice would have to involve an element of evaluation. In addition to explaining the terms of the agreement, lawyers would have to explain the nature of financial provision, including the protection it affords and the uncertainties it involves. It should be made clear to the parties if the agreement involves one party sacrificing entitlement, or taking a risk. Lawyers would not, however, be expected to advise clients whether or not to sign.
- 6.130 We also addressed the issue of one party paying for the other to have legal advice. We saw this as inevitable in some cases. But we acknowledged that on occasions it leads to abuse, referring in particular to the tactics brought to our attention by a number of practitioners. Timed to feed into our consultation, Dr Emma Hitchings carried out a study into the views and approaches of family practitioners who advised on marital property agreements. This research revealed instances where one party would ensure that the other received inadequate legal advice by funding only a limited time with a solicitor.⁷⁹
- 6.131 Our view in the 2011 CP was that such tactics under the current law are self-defeating, because they are likely to lead to the court finding that there has been pressure, or that the party who had only limited advice did not enter freely into the agreement. If legal advice were a formal requirement, we acknowledged that it would have to be clear to all concerned that the advice given must be adequate. We saw this issue as covered in a requirement that the legal adviser certifies that advice has been given; he or she will owe a duty of care to the client and will not be able to certify that the advice has been given unless an adequate explanation of the agreement and its effect has been provided.

⁷⁶ Family Law Act 1975, s 90G(1)(b) (later amended by the Family Law Amendment Act 2003 and further amended by the Federal Justice System Amendment (Efficiency Measures) Act 2009).

⁷⁷ B Fehlberg and B Smyth, “Binding Pre-Nuptial Agreements in Australia: The First Year” (2002) 16 *International Journal of Law, Policy and the Family* 127, 135 to 136.

⁷⁸ Family Law Act 1975, s 90G(1) (as amended by the Federal Justice System Amendment (Efficiency Measures) Act 2009).

⁷⁹ E Hitchings, *A Study of the Views and Approaches of Family Practitioners Concerning Marital Property Agreements* (2011) p 49.

6.132 We provisionally proposed that in order to prove that legal advice has been given it should be necessary to show that the lawyer had advised the party against whom the agreement is sought to be enforced about:

- (1) the effect of the agreement on the rights of that party; and
- (2) the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement.⁸⁰

6.133 This provisional proposal attracted support from the majority of consultees.⁸¹ The Law Society emphasised that although legal advice cannot be relied upon to ensure the parties to an agreement have a complete understanding of its implications, it was nevertheless important in making the parties as aware as possible of the effect of the agreement and its likely advantages and disadvantages. One consultee⁸² supported the provisional proposal but added that independent financial advice would also be a useful requirement.

6.134 Some consultees warned of the practical difficulties which are likely to arise in stipulating the content of legal advice. Resolution supported the provisional proposal but thought that it would be a “huge task” to implement in practice, particularly as, since *Radmacher v Granatino*,⁸³ the age, maturity and experience of the parties had to be considered. Charles Russell LLP agreed with the provisional proposal but cautioned that on a “purely practical level”, the risk of professional negligence could act as a deterrent to those who would otherwise take on marital property agreement work. It made clear that it was not arguing that this was a reason not to introduce primary legislation; it was instead an important point to note for understanding the “context within which legislation would be introduced”.

6.135 Much of the opposition to the provisional proposal stemmed from an opposition to a legal advice requirement more generally.⁸⁴ 29 Bedford Row voiced concern about the possibility of increased “nitpicking arguments about the exact extent of the duty to advise” and the status of agreements concluded abroad. It suggested an alternative approach, namely that in order to avoid the status of qualifying nuptial agreement:

... a party to an agreement should have to show that the advice which they had received was such that they were not in a position to give informed consent to the agreement.

6.136 Other consultees also put forward modified or alternative approaches. The Family Law Bar Association agreed with the provisional proposal but suggested its qualification with a clause to make clear that the advantages and disadvantages of the agreement had to be explained “so far as practicable given the information

⁸⁰ The 2011 CP, paras 6.99 and 8.13.

⁸¹ Twenty-seven consultees responded and 19 expressed support for the provisional proposal.

⁸² Dr Robert George.

⁸³ [2010] UKSC 42, [2011] 1 AC 534.

⁸⁴ Andrew Turek, the Unquoted Companies Group and one member of the public.

available". The Law Reform Committee of the Bar Council similarly thought that the provisional proposal needed qualification. It suggested that a term such as "at the time that the advice was provided and on the information available" be added to the requirement that the advantages and disadvantages of the agreement be explained. It warned that without this qualification there would be a "risk of placing an impossible burden on legal advisers".

- 6.137 Professor Chris Barton thought that the content of legal advice should be left to lawyers. He suggested that a lawyer should have to "take his chances in a negligence suit if he was foolish enough not to give such advice".
- 6.138 Dr Thérèse Callus was concerned about the risk of increased litigation. In particular, she saw the requirement that a lawyer explain the advantages and disadvantages of an agreement as too vague and of "limited practical use". She questioned, for example, whether these would be personal, health-related, emotional, legal or financial advantages and disadvantages. She also thought that as agreements would be made at a point when the future is still unknown, it might be the case that "subsequent occurrences" could result in the court having to set aside the agreement.
- 6.139 Some consultees addressed the issue of how it might be proved that the legal advice had been given. The Family Law Bar Association suggested it should be presumed that the requirements had been met if the legal adviser had so certified within the agreement. The Chartered Institute of Legal Executives argued that the provisional proposal would not be difficult to comply with in practice if all that was required was that a copy of the file note is taken after the meeting or a copy of a follow up letter which documents the advice provided. The Family Law Society agreed with the provisional proposal and added that lawyers must provide evidence that the client received independent legal advice from a qualified lawyer.
- 6.140 We are sympathetic to the concerns of consultees about the challenges involved in putting in place a requirement for the content of legal advice without imposing an unreasonable burden on legal advisers. We are also conscious, however, of the need to ensure that parties to qualifying agreements receive sufficient information to enable them to make an informed decision. Like disclosure, legal advice works to the advantage of both parties because receipt of advice should reduce the likelihood of challenge.
- 6.141 With that in mind, we stand by our provisional proposal but we recommend a modified version. We think that it should be made clear to the client that the agreement is a qualifying nuptial agreement, so reinforcing the safeguard we recommended at paragraph 6.125 above. It is not in the interests of the party seeking to enforce the agreement to have the other party claim, at the time of enforcement, that he or she did not appreciate that the agreement would oust the jurisdiction of the court.

6.142 **We recommend that legal advice should include advice on the following matters.**⁸⁵

(1) **That the agreement is a qualifying nuptial agreement that will prevent the court from making financial orders inconsistent with the agreement, save so far as financial needs are concerned.**

(2) **The effect of the agreement on the rights of the party being advised.**

6.143 This is as far as we think statutory provision should go; it is for the lawyer to determine the detail. We think that the requirements above will prompt lawyers to advise their clients on the alternative outcome in financial provision proceedings had the case not involved a qualifying nuptial agreement. We would also expect lawyers to warn their clients that what they think they have signed away, at the time of signing the agreement, may not be the same as what they will actually lose at the time of the divorce or dissolution. It may be, for example, that one of the parties later unexpectedly receives a large inheritance; the party placed at a disadvantage by the agreement will not be able to contest it on the basis that the other party is now more wealthy than was the case at the time of the making of the agreement.

6.144 We also considered the issue of proof of legal advice. This is something that lawyers drafting agreements will in practice advise about; it is not something that should be left until the time when the agreement is to be enforced. We recommend a provision that raises a presumption that legal advice has been given once a statement has been signed to that effect. In practice, this will have the effect of shifting the burden of proof to the party disputing that the advice has been given to show that it has not in fact been given. It will be in the interests of the financially stronger party to ensure that such a statement is signed, although signature need not be a pre-requisite to the validity of the qualifying nuptial agreement.

6.145 **We recommend that a statement signed by both lawyer and client to the effect that the client has been advised on the matters set out at paragraph 6.142 above will raise an evidential presumption that the advice has been given.**

6.146 The above two requirements are set out at paragraphs 3 and 6 of the new Schedule A1 to the Matrimonial Causes Act 1973, and paragraphs 37C and 37F of the new Part 7A to Schedule 5 to the Civil Partnership Act 2004.

Joint legal advice?

6.147 We explained in the 2011 CP that most continental European jurisdictions require marital property agreements to be notarised. The two parties see a notary together; the notary gives advice for the benefit of the couple and their family, draws up the agreement, and presides over its execution.⁸⁶ The making of a marital property agreement is not seen as one that generally involves a conflict of

⁸⁵ This statement should be appended to the agreement.

⁸⁶ *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181 at [104] to [113].

interest, not least because the reasons for the making of the agreement may have nothing to do with divorce.⁸⁷

- 6.148 Marital property agreements made in this country, by contrast, may well involve a conflict of interest between the parties, even when they are of one mind. We also noted that many common law jurisdictions require the parties to take independent legal advice.
- 6.149 We saw two main scenarios which could arise in the absence of a requirement that the parties receive independent legal advice. First, that the couple would consult the same solicitor at the same time. We stated in the 2011 CP that we did not consider this to be appropriate. It may be very important for a prospective party to a marital property agreement to speak to an independent third party without the other present, and this may be a useful protection against undue influence. Secondly, the parties may wish to see the same lawyer separately in order to save costs by not duplicating the cost of the solicitor's preparation.⁸⁸ We noted that this would be extremely unusual in our legal tradition.⁸⁹
- 6.150 We considered that there was a strong argument, at least in theory, to suggest that the legal advice arrangement in this second example should be permissible. The legal advice requirement set out above relates to explanation and information rather than representation or negotiation. The lawyer's role in relation to the qualifying nuptial agreement may therefore be considered to be more akin to that of a notary in continental Europe, rather than a lawyer in financial provision proceedings. The cost of legal advice is also likely to be a major factor in the availability of qualifying nuptial agreements; permitting separate legal advice to be taken from the same solicitor could provide an opportunity to minimise unnecessary cost. We therefore asked consultees an open question.
- 6.151 We asked consultees if they believed that there were any circumstances where the statutory requirement for legal advice could be met by having the same lawyer advise the two parties.⁹⁰
- 6.152 The majority (22 consultees) of the 32 consultees who responded to this question did not think that the parties should be advised by the same lawyer. Only six saw it as acceptable for the same lawyer to advise both parties.⁹¹

⁸⁷ See the guide produced by Notaires de France, *Choisir son contrat de mariage*, available at <http://www.notaires.fr/notaires/memos-thematiques>, of which a translation can be found at <http://www.reading.ac.uk/nmsruntime/saveasdialog.aspx?IID=7017&sID=34870> (last visited 7 February 2014).

⁸⁸ It would not be acceptable to have legal advice given to both parties by a lawyer who had a close connection with one of them, so that he or she was unable to advise impartially; see Australian case of *Fitzpatrick v Griffin* [2008] FMCA Fam 55.

⁸⁹ The only obvious parallel is where a wife (or other closely connected person) allows her interest in the family home to be used to secure her husband's business loan; the same solicitor may act for her, her husband and the lender: *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 at [69] to [74] by Lord Nicholls.

⁹⁰ The 2011 CP, paras 6.104 and 8.14.

⁹¹ Four consultees did not expressly align themselves to being in favour or opposed to joint legal advice.

- 6.153 A number of consultees⁹² did not favour joint legal advice because they did not think that conflicts of interest could ever be avoided. The Law Society noted that permitting the parties to receive advice from the same lawyer would contravene Rule 3 of the Solicitors' Code of Conduct 2007 (conflict of interest) (the Solicitors' Code of Conduct 2007 was replaced on 6 October 2011 by the Solicitors Regulation Authority (SRA) Code of Conduct 2011).⁹³ It also thought that it could make it harder to prevent undue influence and spot signs of domestic abuse. In its view, separate legal advice was "essential" as a result of the "emotional and personal nature of qualifying nuptial agreements".
- 6.154 The Chartered Institute of Legal Executives stated that it supported the view of the Centre for Social Justice that representation by different lawyers was "fundamental to the basic concepts in English culture of fairness and justice".
- 6.155 Further reasons advanced against permitting the same lawyer to advise both parties included the argument of the Family Law Bar Association that joint legal advice could cause one or both of the parties and the lawyer to feel "inhibited", particularly as the advice could have a different impact on each of the parties. The Law Reform Committee of the Bar Council argued that "frank exchanges between lawyer and client" could be curtailed if the same lawyer advised both parties. It also questioned whether a lawyer would provide "truly independent and objective advice to both parties".
- 6.156 Some of the consultees who were in favour of allowing the same lawyer to advise both parties were motivated by the possible cost savings for the parties. Men's Aid and the Family Law Society, for example, suggested that couples with a low net worth could sign a document to confirm that they had read and understood the consequences of joint legal advice.
- 6.157 The Unquoted Companies Group said that, in mediation and collaborative law, the advice is open and "non-positional" and it supported joint legal advice as a result. A member of the public offered a similar view, emphasising that joint legal advice would support "openness and honesty".
- 6.158 We take the view that it should not be possible for the same lawyer to advise both parties. Legal advice is expensive, but this consideration has to be balanced against the risks involved in permitting joint legal advice. We are persuaded by the arguments voiced by consultees on the difficulty of avoiding conflicts of interest and the negative impact joint legal advice may have on the financially weaker party to the agreement, such as making it more difficult to counter undue influence or the risk of open discussion between lawyer and client being undermined. We accept the argument endorsed by some consultees that some of

⁹² Elizabeth Morrison, Dr Robert George, Tony Roe, Marilyn Young, the Family Law Bar Association and The Law Society.

⁹³ SRA Code of Conduct 2011: "The SRA Code of Conduct (the Code) sets out our outcomes-focused conduct requirements so that you can consider how best to achieve the right outcomes for your *clients* taking into account the way that your *firm* works and its *client* base. The Code is underpinned by effective, risk-based supervision and enforcement", available at <http://www.sra.org.uk/solicitors/handbook/code/content.page>. Rule 3 can be accessed from <http://sra.org.uk/rule3/> (last visited 7 February 2014).

these concerns may be less pronounced if the legal advice requirement relates more to information provision than negotiation or representation but note that each lawyer may also be negotiating, to their client's best advantage, the terms of the qualifying nuptial agreement. We nevertheless see a prohibition on joint legal advice as a further important safeguard in ensuring that qualifying nuptial agreements are the product of informed and open decision-making.

- 6.159 **We recommend that the requirement for legal advice cannot be met by having the same lawyer advise the two parties.**

FURTHER REQUIREMENTS FOR THE FORMATION AND CONTENT OF QUALIFYING NUPTIAL AGREEMENTS?

- 6.160 We asked in the 2011 CP whether any further safeguards were required beyond those on contractual validity, signed writing, disclosure, legal advice and timing. We considered two possibilities: first, whether a more general requirement, as found in a number of jurisdictions, of fairness in the process of the making of the agreement ought to be adopted here; and secondly whether restrictions should be imposed on the content of the agreement.

A requirement of fair process

- 6.161 Agreements in Australia can be set aside if “in respect of the making of a financial agreement – a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable”.⁹⁴ In New Zealand, the court retains the right to set aside agreements on the basis that they were “unfair or unreasonable in the light of all the circumstances at the time it was made”.⁹⁵
- 6.162 We saw one particular reason why such a provision might be required here, namely to provide protection from pressure emanating not from the other party but from the family, friends or culture of either party. This type of pressure can be considerable. We explained in the 2011 CP, for example, that one practitioner had informed us about a prospective spouse who was compelled to sign a pre-nuptial agreement, against the explicit advice of her lawyers, by her relatives who had spent over £100,000 on the wedding and who would not tolerate cancellation.
- 6.163 In many cases, the other party will also be involved in the pressure, particularly when the pressure comes from a family or community. In these cases, the law of contract will provide protection from duress or undue influence. The question is therefore whether additional protection is needed to provide assistance in cases where the law of contract is unable to provide that protection. It might be the case, for example, that the other party was unaware of the pressure, or was also under pressure to make the agreement or to get married.⁹⁶
- 6.164 Some states in the United States deal with these cases by recognising that coercion sufficient to constitute duress can come from outside the relationship.

⁹⁴ Family Law Act 1975, s 90K(1)(e) (as amended).

⁹⁵ Property (Relationships) Act 1976, s 21J(4)(c).

⁹⁶ See *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 FLR 120, 131.

For example, when a young unmarried and pregnant woman signed an unfavourable pre-nuptial agreement, a court in Alabama refused to give summary judgment upholding the agreement, noting that the conservative atmosphere of the town in which the woman lived and the lack of acceptance of unmarried mothers might have created a coercive atmosphere which compelled her to sign.⁹⁷

- 6.165 We said in the 2011 CP that a requirement of fairness in the formation of the agreement could provide protection in this kind of case. We also emphasised the disadvantage of that approach: that it could be far too open to challenges made in bad faith. We noted that there may be too much scope for collusion. A husband claiming to have been pressurised by his mother to enter the agreement could escape the consequences of the agreement if the mother was willing to provide evidence to support his claim. It may also be vulnerable to criticism for being unduly protective and affording too little weight to the ability of adults to make decisions.

The content of the agreement

- 6.166 Our view in the 2011 CP was that it was unnecessary to create a specific restriction of the content of the agreement, beyond what is imposed by the general law of contract. Terms that are contrary to public policy will not be enforced by the courts; and such terms, unless they were clearly severable, could invalidate the agreement. We thought that the general law of contract could be relied upon to provide the relevant “policing” of such terms. We asked for consultees’ views.

Consultation responses

- 6.167 We sought consultees’ views as to whether, if qualifying nuptial agreements were introduced, there should be any further provision, beyond what we had already proposed, about either:

- (1) the formation; or
- (2) the content

of the agreement.⁹⁸

- 6.168 A number of consultees did not think that any further provision was needed about either the formation or the content of qualifying nuptial agreements. 29 Bedford Row, the Family Law Bar Association and the Law Reform Committee of the Bar Council, for example, all agreed that there was no need for a requirement of fair process. Both 29 Bedford Row and the Law Reform Committee of the Bar Council felt that the doctrine of undue influence already provided adequate protection. Men’s Aid explained that although it saw the benefit of “fairness” as a condition, it had reservations about such a condition providing too much discretion to the courts.

⁹⁷ *Ex parte Williams* (1992) 617 So 2d 1032.

⁹⁸ The 2011 CP, paras 6.125 and 8.16.

- 6.169 The Law Society did not think that the content of qualifying nuptial agreements should be restricted. It thought that the safeguards, such as legal advice, would prevent the need for limits on content; it argued that solicitors will be sufficiently experienced and knowledgeable to “ensure that the content of any such agreement remains within the limits of financial provision”. The Family Law Bar Association also stated that, subject to restrictions imposed by public policy considerations and the general law of contract, parties should be able to include whatever they wish in the agreement. Public policy considerations would prevent, for example, couples being able to contract out of their child support responsibilities.
- 6.170 Other consultees also offered comments, and in some cases made suggestions for potential additional factors for consideration in relation to both the formation and the content of the agreement. All of these suggestions have been taken into account as part of our considerations but not all have been summarised here.⁹⁹
- 6.171 Both Dr Thérèse Callus and Dr Jens M Scherpe argued that the need for further safeguards diminished if the court retained a discretionary jurisdiction to vary or set aside agreements. Dr Thérèse Callus thought that safeguarding against third party abuse could in practice create too much protection and be open to abuse. She also explained her view that there was no need to limit what could be included in the agreement if the court retained the discretion to review it.
- 6.172 The Law Society recommended that an agreement should be set aside if it was unfair at the time it was made but that the question of what was “unfair” should have a high threshold, saying, “the bar of any such test should be set high up to prevent its use in bad faith”.
- 6.173 29 Bedford Row argued that, subject to protecting children and preventing dependency on public funds, parties to a marriage should be able to agree between themselves jurisdiction and forum; they should be able to “commit themselves” to mediation or other forms of alternative dispute resolution. It did not envisage, however, that this would exclude the courts. A similar point on forum was made by the Family Law Bar Association. It stated that, subject to restrictions imposed by public policy considerations and the general law of contract, parties should be able to include whatever they wish in the agreement. It took the view that content should not be restricted to financial consequences of divorce or dissolution, parties should be encouraged to commit to dispute resolution and, where possible, parties should be able to agree the jurisdiction in which their claims on financial divorce will be resolved.
- 6.174 The Family Law Society suggested that marital property agreements should apply to issues such as spousal support and child support provisions. It also felt that parties should be able to commit to conditional shared parenting. This view was shared by Men’s Aid which argued for agreements which can incorporate provisions on spousal and child support. It envisaged that non-financial provisions could be included as a separate but linked agreement. Marilyn Young argued that couples should be able to include arrangements about contact for

⁹⁹ The responses to both the 2011 CP and the 2012 SCP are published alongside this Report on the Law Commission website.

children but provisions should not be permitted which are “unenforceable or unnecessary”.

6.175 Some consultees went beyond the scope of the question to make additional points on what they would like to see as part of a package of reform. Men’s Aid argued in favour of “non-binding guidance notes” being available. The Family Law Society suggested that a “library of templates” should be available and that provisions which were “non-financial” ought to be kept in separate agreements in order to avoid “unnecessary judicial discretion”.

6.176 One member of the public asked whether it ought to be a requirement for the qualifying nuptial agreement to be translated into the first language of any party to an agreement whose first language was not English, even if that party could speak and read English.

Conclusions on the form and content of the agreement

6.177 Some consultees thought that further requirements were not needed if the court retained a jurisdiction to assess the fairness of the agreement. Clearly we are not envisaging that the court will have such a jurisdiction. So we have given careful thought to whether or not additional safeguards are needed.

6.178 We do not think it is necessary to add anything else, because we have already imposed comprehensive requirements about disclosure and legal advice, as well as providing that qualifying nuptial agreements cannot be used to contract out of financial needs. Any further protection would seem, overall, rather too maternalistic. Issues such as translation will be amply covered in the requirement for legal advice.

6.179 As to alternative dispute resolution, this is something about which the parties will be free to make agreements, and there may well be legal mechanisms for their enforceability. But qualifying nuptial agreements oust the court’s discretion to make financial provision orders; they are not designed as a way to make agreements about alternative dispute resolution enforceable and that is not something on which we consulted. Very different requirements might be appropriate if the concept were extended to become a way to control dispute resolution, and we do not have the information or the consultation mandate to include such provisions.¹⁰⁰

6.180 We are therefore not minded to recommend any further requirements as to the formation and content of qualifying nuptial agreements.

VARIATION OF QUALIFYING NUPTIAL AGREEMENTS

6.181 We accepted in the 2011 CP that qualifying nuptial agreements may be updated or re-negotiated before or after the wedding or civil partnership ceremony, or perhaps even years later.¹⁰¹ We anticipated that that process could result in a fresh agreement or the variation of the existing agreement.

¹⁰⁰ Chapter 7, para 7.43.

¹⁰¹ See *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298.

- 6.182 Our view in the 2011 CP was that, in either case, the pre-requisites which attached to the qualifying nuptial agreement when it was first created would again have to be complied with if the agreement were to be varied. The parties' understanding of the implications of the agreement, and their receipt of material disclosure, must be as important at the time of variation as they are at the time of original formation. That said, the process of meeting the requirements is likely to be quicker for a variation than for the making of an initial agreement; what would count as "material" in relation to disclosure may well, for example, be less than was the case at the time of original formation.
- 6.183 We provisionally proposed that any variation of a qualifying nuptial agreement must comply with all the pre-requisites for the formation of a qualifying nuptial agreement.¹⁰²
- 6.184 This provisional proposal was uncontroversial among consultees. Of the 26 consultees who responded to the proposal, almost all (24 consultees) broadly supported it. Very few consultees made additional comments. The Law Society emphasised that "the same pressures still apply [to the variation of the agreement] and the need to ensure that the parties understand the effect of the variation is just as significant as when the first agreement was made".
- 6.185 We remain of the view following consultation that any variation of a qualifying nuptial agreement should comply with the requirements necessary for its formation. As noted above, some of these requirements, such as disclosure, may be simpler and quicker to comply with on variation than formation; but their continued application in relation to variation remains essential, particularly in the light of the continued risk of pressure and the continued importance of the parties being fully aware of the potential consequences of the agreement.
- 6.186 **We recommend that any variation of a qualifying nuptial agreement must comply with all the pre-requisites for the formation of a qualifying nuptial agreement.**
- 6.187 This recommendation is put into effect by clauses 5 and 7 of the draft Bill, the "variation requirement" means that where a qualifying nuptial agreement has been varied, the variation itself must meet the requirements as to formation, timing, validity, legal advice and disclosure.¹⁰³

REVOCATION OF QUALIFYING NUPTIAL AGREEMENTS

- 6.188 There may be situations where both parties to a qualifying nuptial agreement decide that the agreement should be terminated. This may be because they no longer wish to have any such agreement or because a change in circumstances requires a new qualifying nuptial agreement to be drawn up, differing so much from the terms of the parties' existing agreement that variation is not a viable option.

¹⁰² The 2011 CP, paras 6.128 and 8.17.

¹⁰³ See inserted Schedule A1 to the Matrimonial Causes Act 1973, paragraph 8; inserted Part 7A to Schedule 5 to the Civil Partnership Act 1973, paragraph 37H.

- 6.189 In order to avoid the evidential difficulties associated with proving that a qualifying nuptial agreement is no longer in force between the parties and to ensure that the parties are not bound by the terms of an old qualifying nuptial agreement that they had intended to replace, we think that it would be helpful to require parties to terminate their qualifying nuptial agreements by signed writing.
- 6.190 **We therefore recommend that a qualifying nuptial agreement may only be revoked by an agreement, made in writing and signed by, or on behalf of, both parties.**
- 6.191 This recommendation is given effect to by clause 10 of the draft Bill.

IDENTIFYING PROPERTY OVER TIME

- 6.192 We are not recommending the limitation of qualifying nuptial agreements to the protection of pre-acquired, gifted and inherited property. Some couples, however, may choose to identify specific property. These agreements may or may not give rise to a practical problem of identification. The property might never change. An agreement might state, for example, that a particular house was to remain the wife's property. If the house remains unsold, this agreement is unlikely to give rise to confusion at a later date.
- 6.193 More complex, however, are cases where the property has been sold or replaced, or has appreciated in value due to the efforts of both spouses. In these cases there may be a need to identify the property or conduct a tracing-like exercise. Suppose that an agreement excepted a shareholding, let us say the wife's 25% stake in her family company, from financial orders claims. The shareholding might be identified in the agreement as a certain number of shares or, perhaps more likely, as a proportion of the ownership of a company. By the time of divorce, it may be that both husband and wife have invested in the company, thus making the shareholding much more valuable. Or it might have been sold, and the proceeds used to buy a substitute property or investment, or perhaps mixed with the husband's money.
- 6.194 We emphasised in the 2011 CP that numerous possibilities of this kind could be imagined; and the more complex the property, the more difficult the possibilities will be. We said that regardless of the simplicity or complexity of the problem, some provision would have to be made for the identification of property that has changed.

- 6.195 There is some overlap here with the issues we discuss in Chapter 8 on non-matrimonial property. The problems in identifying non-matrimonial property are compounded by the lack of clear rules on when development or investment in a property during marriage may result in a change in its status. We highlighted in the 2011 CP that there was little authority on this point to date;¹⁰⁴ the only safeguard available for the protection of property seems to be to leave it lying fallow.¹⁰⁵
- 6.196 We pointed out that continental European jurisdictions that operate a regime of community of acquests have addressed this problem by specific provision.¹⁰⁶ We acknowledged that without this specific provision, the system would be unworkable, since it is essential to be able to identify pre-acquired or inherited property much later on at the point of divorce. Our view in the 2011 CP was that something of this nature would be essential if binding marital property agreements were introduced.

Consultation questions and views expressed by consultees

- 6.197 We provisionally proposed that there should be rules that enable property to be identified over time, for the purpose of a marital property agreement, and that they should set out the consequences of investment in that property by the other party or of the mixing of that property with property of the other party.¹⁰⁷
- 6.198 This provisional proposal received support from the majority of consultees. The Family Law Bar Association described a number of scenarios where the identification, mixing or investment in property may be an issue. It agreed that rules were needed to enable the identification of property over time; it thought that allowing the agreement to become the subject of litigation would undermine the certainty the parties had intended by entering the agreement. The Law Society saw rules on this issue as being essential to providing “flexibility over time and ... a means of retaining clarity over the distribution of assets as the parties’ circumstances change”.
- 6.199 The Society of Trust and Estate Practitioners described rules on this issue as “most helpful”. It recommended that there should also be a rule to direct that changes to the agreement or choice of law cannot operate retrospectively unless specified by the parties. Withers LLP also supported the provisional proposal. It suggested that “an approach akin to an equity calculation in co-owned property” might be appropriate, as would recognition of a right to reimbursement of investment.
- 6.200 Dr Thérèse Callus recommended that:

¹⁰⁴ The 2011 CP, para 7.72. We referred to *S v S (Non-matrimonial property: conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496 and *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790.

¹⁰⁵ Chapter 8, para 8.61.

¹⁰⁶ Articles 1433 to 1437 of the French *Code Civil*, for example. Similarly, there are clear rules in number of American states: the Californian Family Code, s 2640, for example.

¹⁰⁷ The 2011 CP, paras 7.75 and 8.20.

The onus of proof of valuation would fall on the spouse claiming the benefit for the marital pot. However, if reimbursement is allowed in this direction, it must also be allowed to go from the marital pot to an individual's own personal property.

- 6.201 A number of consultees, however, expressed concern about the difficulty in practice of devising rules which enable property to be identified over time and which set out the consequences of investment in that property or of the mixing of that property. Some of the consultees who voiced this concern nevertheless supported the provisional proposal.¹⁰⁸ 29 Bedford Row explained that while it agreed rules were needed to enable tracing-like exercises to take place, formulating the rules would be “a major challenge”; knowledge would be needed of how the issue is dealt with in other jurisdictions before specific suggestions could be considered.
- 6.202 Other consultees did not see the need for rules. Alec Samuels, for example, suggested that rules would be “unnecessary, too detailed, too prescriptive”. Charles Russell LLP similarly took the view that rules were unnecessary; it felt that the identification and definition of property was already dealt with adequately by commercial drafting. Professor Chris Barton agreed that this issue was one which should be dealt with by lawyers.
- 6.203 Resolution commented that common practice was already that agreements should address the identification of property over time. It expressed concern about what the status of the rules would be, and highlighted the likelihood of satellite litigation accompanying the introduction of the rules. It also warned that rules were likely to be “too prescriptive” as a result of the number of issues which would have to be addressed. Resolution therefore favoured “flexible guidance”.
- 6.204 We asked consultees to tell us whether they thought that investment or mixing such as that described in paragraph 6.193 above should give rise to shared ownership, or to a right to reimbursement.¹⁰⁹
- 6.205 Most consultees thought that investment or mixing should give rise to shared ownership or a right to reimbursement. Some of these consultees specified whether the right should be to shared ownership or reimbursement.
- 6.206 A number of consultees favoured shared ownership over a right to reimbursement. Dr Robert George opted for shared ownership, considering this to be “more in keeping with the meaning of marriage”. 29 Bedford Row thought that in principle this issue should be determined by the parties’ intentions; most couples, in its view, saw the sharing of finances as a joint investment. It warned against permitting the “minute historical enquiries which bedevil disputes between unmarried couples about property ownership” to enter into this area of law. It suggested that there should be a “rebuttable presumption in favour of shared ownership”. Mishcon de Reya thought that ownership ought to be shared “in proportion to the investment or mixing as a factor of the value of the asset”.

¹⁰⁸ Including Tony Roe and the Law Reform Committee of the Bar Council.

¹⁰⁹ The 2011 CP, paras 7.76 and 8.21.

- 6.207 The Family Law Bar Association recognised that the parties are free to vary the original agreement in the light of changes in circumstances regarding the nature or character of property. The uncertainty on the consequences of investment or mixing arose, in its view, only when variation had not occurred. Its preference was for investment or mixing to give rise to shared ownership whereby:

... the agreement would cease to be valid in respect of that previously identified asset. That is not to say that the new or improved asset would then be shared equally as the court would no doubt take into account in the discretionary exercise the contributions that each of the parties had made and the intention that lay behind the previous qualifying agreement.

However, the investment or mixing (with no new varied agreement) would itself be evidence of a change of the previous intention to keep that asset separate from the matrimonial acquest.

It cautioned against proceeding with a model based on a right to reimbursement as it felt that this could lead to “complex and detailed litigation on who had contributed what over a number of years to the investment or asset”. It thought that such litigation could be “disproportionate and [run] counter to the broader approach currently taken in assessing contributions under s.25 MCA”. A right to shared ownership was also preferred by the Law Reform Committee of the Bar Council.

- 6.208 Other consultees, however, thought that provision for a right to reimbursement was the appropriate response. These included Dr Thérèse Callus and Tony Roe. Tony Roe said he did not have any objections to investment or mixing giving rise to shared ownership but he saw reimbursement as offering a potentially more practical solution. A right to reimbursement was also supported by the Society of Trust and Estate Practitioners who pointed out that this was the approach taken by most jurisdictions within the European Union.

- 6.209 Some consultees envisaged more of a hybrid approach. The Chartered Institute of Legal Executives did not see shared ownership and reimbursement as being mutually exclusive:

It would be appropriate that such investment or mixing should give a right to reimbursement, and then shared ownership over and above the initial investment amount.

This point was also made by The Law Society which commented that shared ownership and a right to reimbursement could work in tandem. It explained that “the investment or mixing of monies may give rise to sharing under the law of trusts or reimbursement after sale and the preferable method will depend on circumstances”. It commented that couples could agree the method in advance, and if they could not agree, the options of arbitration or resolution by the court would be open to them.

Conclusion

- 6.210 In the light of our decision not to recommend reform of the law on non-matrimonial property, we anticipate that couples may turn to qualifying nuptial agreements to protect specific items of property. As we noted above, it is in relation to these agreements – rather than those which limit all support to the provision of needs – that issues on investment or mixing are likely to arise. And while the majority of consultees thought that investment or mixing should give rise to a shared ownership or a right to reimbursement, there was a lack of consensus on which of the two options was the right approach.
- 6.211 We do not think that a generic default position from which parties have to contract out is appropriate in the context of contractual provision; we would prefer to encourage the parties to make arrangements that they regard as appropriate by including specific provisions in their qualifying nuptial agreement. We would expect the effect of such provisions to be covered in the legal advice given to the parties when the agreement is made or varied.

CHAPTER 7

QUALIFYING NUPTIAL AGREEMENTS IN PRACTICE

INTRODUCTION

- 7.1 Qualifying nuptial agreements are likely to be negotiated and drafted in much the same way as pre- and post-nuptial agreements are currently. Qualifying nuptial agreements would, however, be a new legal tool and would mark a development beyond current practice both in terms of the requirements for their formation and their legal effect. In this Chapter we provide some practical guidance on qualifying nuptial agreements, their formation and their consequences. In doing so we are providing a commentary on the statutory provisions we have recommended. If our recommendations are implemented then there will, of course, be decisions to be made by the courts, and the courts will not be bound by what we say here.
- 7.2 We set out below our thinking under the following headings:
- (1) The uses of qualifying nuptial agreements.
 - (2) Qualifying nuptial agreements, alternative dispute resolution and family law arbitration.
 - (3) How is a qualifying nuptial agreement formed?
 - (4) What happens at the end of the marriage or civil partnership?
- 7.3 Qualifying nuptial agreements will be particularly useful for couples who wish to plan ahead and have control over the financial consequences of separation and divorce, and in particular to ensure that their individual wealth will not be shared. They may also be relevant for people embarking on a second marriage who wish to protect assets for their children from a previous relationship. The varied situations in which qualifying nuptial agreements may be used are considered in greater detail below with the help of four examples of couples who are about to enter into a marriage or civil partnership:

Example 1: protecting anticipated family gifts and inheritances

- 7.4 Lucy and Ian are in their early thirties and are high-earning professionals. Both sets of parents will help out with the cost of the purchase of the couple's first home. Lucy and Ian both expect to receive substantial gifts and, ultimately, to inherit large sums from their families. Lucy and Ian intend to continue working after their marriage and to have children; Ian will be the primary carer.

Example 2: protection of a specific asset

- 7.5 Shobna is 62. She owns a house, free of mortgage, which was the matrimonial home during her first marriage and in which her two children grew up. She has substantial savings and ample pension arrangements. Her fiancé Laurent, with whom she has been in a relationship for three years, is 58. He owns a London flat with significant equity and has a share portfolio and a generous pension.

Laurent has no children. Both work full-time. They plan to buy a house to live in together, selling Laurent's flat, with Shobna making an equal contribution to the purchase from her savings.

Example 3: providing for a clean break between wealthy parties

- 7.6 Lesley and Phil, 40 and 42, are both successful fund managers. They have been cohabiting for 10 years. Each earns a seven-figure sum and has accrued substantial assets; Lesley of £5 million and Phil of £13 million. After their marriage, both will continue working and to live in Phil's Notting Hill house, worth £7 million. They do not intend to have any children. Neither expects to receive a significant inheritance.

Example 4: excluding sharing, and managing provision for needs

- 7.7 Lucas, 36, is the primary beneficiary of family trusts which contain assets of £20 million and owns a large Knightsbridge apartment. Rohan, 31, earns a salary of £40,000, and has no significant assets or inheritance prospects. They would like to start a family, by adoption or surrogacy.

THE USES OF QUALIFYING NUPTIAL AGREEMENTS

- 7.8 On divorce, the family courts of England and Wales have very wide-ranging powers to redistribute property and to order financial support;¹ where the property available exceeds what is required to meet the parties' financial needs, the court is likely to make an order based on the "sharing principle".² In the circumstances described above, and others, that might well mean the sharing of property that one party would wish to protect.
- 7.9 The parties might agree, in advance of divorce and perhaps before they got married or entered into civil partnership, that certain property would not be shared and would be left out of account on divorce or dissolution. Under the current law, the court might or might not make orders that reflected the terms of a marital property agreement to that effect, depending upon whether the terms of the agreement were regarded as unfair.
- 7.10 A qualifying nuptial agreement, however, will provide certainty; property can be protected, and the court will not have discretion to override that protection, subject always to provision being made for both parties' financial needs.
- 7.11 We will explore this in a little more detail for each of the above examples; we then look at two further over-arching issues that practitioners may wish to consider when drafting agreements, namely jurisdiction clauses, and alternative dispute resolution.

¹ Chapter 2, paras 2.2 to 2.5 and Chapter 8, paras 8.1 to 8.10.

² Chapter 2, paras 2.10 to 2.18.

Lucy and Ian - protecting anticipated family gifts and inheritances and dealing with periodical payments

- 7.12 Lucy and Ian are both likely to receive gifts from their families in the future, and to inherit from their parents. As the law stands, such property is regarded as non-matrimonial and is unlikely to be shared if it is not required to meet either party's needs.³ But this is a matter of discretion.⁴ This couple may wish to eliminate the uncertainty by making a qualifying nuptial agreement, to the effect that inherited property is to be left out of account on divorce.
- 7.13 Lucy and Ian should be advised that the qualifying nuptial agreement cannot remove or reduce their responsibilities to their children, nor for each other's financial needs – including their needs as a parent.⁵ To that extent, the qualifying nuptial agreement is not “cast-iron” and cannot provide a perfect guarantee that their inherited property will not have to be shared. But subject to those areas of uncertainty – which are of course particularly uncertain in the case of a couple who intend to have children - the protection of the qualifying nuptial agreement is absolute.
- 7.14 A couple like Lucy and Ian may also have pre-acquired property which each wishes to retain, and again they can use a qualifying nuptial agreement to protect it, with the same certainty but subject to the same limitations.
- 7.15 So for Lucy and Ian, the qualifying nuptial agreement firms up the protection that the law already gives to non-matrimonial property.
- 7.16 It is not essential that Lucy and Ian make specific provision for financial needs in their qualifying nuptial agreement. They may choose not to do so, perhaps because they do not think that either will require provision for their needs, or because they accept that financial needs cannot be predicted in advance, or because they know that any provision they make will not bind the court – although the court will make orders in accordance with their agreement provided that it is not unfair to do so.

Shobna and Laurent - protecting specific property

- 7.17 Shobna and Laurent intend to buy a house together, pooling their resources. They are content to share their property on divorce, with the significant exception of the house Shobna already owns. She would want to retain this on divorce and pass on the property, or its value, to her children. Laurent agrees that this is fair, and they can make a qualifying nuptial agreement to that effect.
- 7.18 So again the qualifying nuptial agreement has firmed up the existing protection that the case law gives to non-matrimonial property; this is likely to be a significant matter for people who have retained property after a previous relationship, or more generally for individuals who bring to the marriage or civil partnership a specific property which has its origins outside the new relationship. It might be a significant investment, for example shares or a commercial property, or it might be a family heirloom.

³ Chapter 2, para 2.26, Chapter 8, paras 8.1 to 8.10.

⁴ Chapter 8, paras 8.1 to 8.10.

⁵ Chapter 2, para 2.33.

- 7.19 This example differs from that of Lucy and Ian in that specific property is contemplated. And in an example like this it may be useful to use the qualifying nuptial agreement to resolve issues that have not yet been resolved in the case law. Shobna and Laurent can make provision, for example, for what is to happen if Shobna's house is sold and replaced with a similar property, or sold and replaced with something they both use (such as a holiday property). They can use the qualifying nuptial agreement to say what is to happen to the rent, and if they so choose they can use the qualifying nuptial agreement to preserve for Shobna any increase in the value of the property arising from her active management or investment in it.⁶
- 7.20 Shobna and Laurent may not be a wealthy couple. In our example we mentioned savings and pension provision; the importance of these is that the qualifying nuptial agreement will be inviolable only if the parties' financial needs are catered for. An elderly couple might wish to provide that none of their assets will be shared on divorce, on the basis that each has pension provision sufficient to keep them comfortably and at a level not dissimilar to the standard of living during the marriage; on that basis their financial needs are met and there is no obstacle to the enforcement of the qualifying nuptial agreement.
- 7.21 That said, the needs that might arise in old age are unpredictable. This couple is still some years away from retirement, and more importantly neither can know the needs that will arise from their physical and mental health in, say, 20 years' time. Shobna and Laurent might want the qualifying nuptial agreement to state what is to happen if Laurent's financial needs cannot be met without recourse to the "ringfenced" property – for example, by providing for it to be used temporarily and then revert to Shobna, if that is practicable. A couple in a similar position but with more than one property to protect might want to provide for the order in which recourse is to be had to solely owned properties in order to meet financial needs.
- 7.22 Shobna and Laurent, like all the couples in our examples, should be advised to make their wills, and Shobna will want to leave her house to her children. This is a case where it may be useful for the qualifying nuptial agreement to reinforce testamentary provision.⁷ It could provide that, in the event that Shobna dies before Laurent, absent any separation or divorce, any claim by Laurent as a surviving spouse under the Inheritance (Provision for Family and Dependents) Act 1975 should be met without recourse to Shobna's solely-owned property. Such provision will not bind the court, but will be a factor to which the court must have regard in the event that Laurent makes a claim, by virtue of the amendment that the Bill makes to section 3(2) of the Inheritance (Provision for Family and Dependents) Act 1975.⁸

Phil and Lesley - providing for a clean break between wealthy parties

- 7.23 Phil and Lesley see themselves as completely independent of each other financially. They take the view that they can each look after themselves should they divorce and wish to avoid any question of making financial provision for each other, so far as that is possible.

⁶ Chapter 8, paras 8.57 to 8.61.

⁷ Chapter 5, paras 5.121 to 5.124.

⁸ See clause 9 of the draft Nuptial Agreements Bill.

- 7.24 Phil and Lesley appear to have accrued the majority of their assets during the time that they have been cohabiting. This means that there is the real possibility that these assets would be regarded as matrimonial property and that the court would decide that such assets should be shared equally.⁹ Phil might have to pay a lump sum to Lesley on divorce to equalise the assets that they own. A qualifying nuptial agreement would allow them, after their marriage, to maintain their strict financial independence, avoiding the possibility that divorce would involve a lengthy and costly examination of their finances and a re-distribution of their property. Given that Lesley has been living with Phil during the time in which they have made their money, they will want to exclude any sharing based on accrual during the relationship. Phil may be particularly concerned to ensure that Lesley releases any claim to or interest in his Notting Hill property.
- 7.25 In view of the levels of wealth involved in this example, it seems unthinkable that either party would not be financially independent after divorce, even if Lesley had substantially less wealth than Phil at that time. Accordingly the qualifying nuptial agreement in this case might make no provision for needs; but it might usefully set out the couple's agreement that no provision for financial needs will be required. Lesley might otherwise claim later that, because she has lived with Phil in his (undoubtedly more expensive) home, her needs have increased by reference to the higher standard of living during the marriage.
- 7.26 While an agreement regarding needs in a qualifying nuptial agreement is still subject to the court's scrutiny and must not be unfair, such an agreement between the parties might at least provide the court with a starting point from which it might be reluctant to depart. In addition, the inclusion of terms stating either that no provision is necessary for the parties' needs or making specific provision may well discourage litigation between the parties.

Lucas and Rohan - providing certainty and excluding sharing

- 7.27 By contrast with the previous example, there is a huge disparity in wealth between Lucas and Rohan. Both appreciate that, if they were to split up, Rohan would require financial support from Lucas; but Lucas is anxious both to protect his own wealth and to ensure that in the event of dissolution he will not have to fund a lavish lifestyle for Rohan, perhaps for a long period.
- 7.28 This example differs from Phil and Lesley in that the disparity in wealth means that some provision will eventually have to be made for needs; it can be specified now in the agreement, or left for negotiation or adjudication later. Any provision made for needs in the qualifying nuptial agreement now will not, in any event, bind the court, but the court will follow it if it is not unfair. Subject to any provision for needs, the qualifying nuptial agreement can then be used to protect Lucas' wealth in the same way that it could be used in the preceding examples. The main concern here will be Lucas' Knightsbridge flat, which might otherwise be particularly vulnerable to redistribution on dissolution on the basis that it will be the family home or the home of any children.¹⁰ Again, it will be important for this couple to think about what is to happen to the property if it appreciates in value, or is sold and replaced during the civil partnership.

⁹ Chapter 2, paras 2.13 to 2.17.

¹⁰ Chapter 8, para 8.6.

- 7.29 If Rohan and Lucas do decide to make provision for Rohan's financial needs now, they may find it useful to discuss and agree on the sort of level of provision that might be made, and for how long, while recognising that these terms would not bind the court on a financial application on dissolution of the partnership.¹¹ They could specify the current value of a home that they would see as suitable or, less prescriptively, specify the type of property they consider appropriate – bearing in mind that the court would expect it to bear some resemblance to the parties' lifestyle during marriage.
- 7.30 Rohan and Lucas are hoping to have children; that of course introduces uncertainty and they may not wish or be able to make comprehensive arrangements. But if Rohan is to be the children's primary carer then they may wish to specify the overall level of provision they would consider would meet his needs and the children's. They may also wish to agree a view about the duration of support that Rohan might expect from Lucas, in the event that this couple either does or does not have children.¹²
- 7.31 It may be that a "tariff" arrangement is adopted, where specified financial provision is provided, increasing in relation to the length of the relationship or civil partnership. Such an arrangement would usually be made on a clean break basis, that is, without continuing spousal support in the form of periodical payments. However, the paying party may feel that to provide all provision for the other's needs by way of a capital lump sum would unfairly remove the possibility, afforded by periodical payments, of ending payments on the payee's remarriage. The paying party might prefer to leave open this possibility of an earlier end to payments.
- 7.32 A tariff arrangement may require an overriding provision that payments need not be made if a party has accrued his or her own resources, say from a business venture, with which to meet his or her needs without support from the former partner.
- 7.33 A further option for any couple is to vary the qualifying nuptial agreement later, after the arrival of children or on a change of circumstances, if it becomes clear that the qualifying nuptial agreement, as originally drafted, will not meet a party's needs. That said, it is notoriously difficult to attend to such things once a baby is born, so there is some risk in not addressing the issue at the outset.¹³

Jurisdiction and applicable law clauses

- 7.34 Parties to a qualifying nuptial agreement may wish to include clauses specifying both the jurisdiction in which any dispute on separation and divorce will occur, and the law applicable to that dispute. Under current EU law such clauses will not determine which country's courts will have jurisdiction on divorce in Europe¹⁴ but

¹¹ Chapter 5, para 5.854.

¹² See Chapter 3, paras 3.97 to 3.104.

¹³ See the case of *AH v PH* [2013] EWHC 3873 (Fam) where the parties intended to revise their nuptial agreement but never did so, due to the birth of their children.

¹⁴ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

may determine which courts can award maintenance,¹⁵ as it is defined under EU law, provided there is a sufficient connection with the jurisdiction chosen by the parties.¹⁶

- 7.35 The purpose of a qualifying nuptial agreement is to manage (usually by excluding) the sharing of property under the law of England and Wales. A French couple living in London might agree that any future dispute as to maintenance (what we understand as “needs”) is heard in a French court, applying French law, and could so provide in a marital property agreement, whether or not it is a qualifying nuptial agreement.
- 7.36 However, the UK has not adopted the relevant provisions that enable a couple to opt for maintenance to be decided in accordance with the law of a particular country.¹⁷ So the English and Welsh courts will continue to apply local law to maintenance disputes and any statement in a qualifying nuptial agreement about applicable law would be of no effect in the courts in England and Wales.

Review Clauses

- 7.37 Couples may currently include, in their nuptial agreements, clauses that specify that the agreement should be reviewed on certain events occurring (such as the birth of children) or after a certain period of time. Such clauses may specify that the agreement will lapse if the review does not occur, or will continue. Such review clauses are not without their pitfalls, because the lack of a review will endanger the agreement; but some parties may wish to include them in a qualifying nuptial agreement.

QUALIFYING NUPTIAL AGREEMENTS, ADR AND FAMILY LAW ARBITRATION

Arbitration agreements

- 7.38 In December 2012 the Institute of Family Law Arbitrators (“the IFLA”) submitted a response to our 2012 SCP. Although it came to us within the consultation period for that consultation paper, it was in fact a late response to our 2011 CP, because in 2011 the IFLA did not exist and family law arbitration had not yet been introduced. Essentially, the IFLA wanted us to extend our policy so as to enable qualifying nuptial agreements to be used as a way of committing the parties to resolving future disputes about their financial arrangements by family law arbitration.

What is family law arbitration?

- 7.39 In 2012, the IFLA launched a scheme designed to make it easier for family law

¹⁵ Maintenance is distinguished in EU jurisprudence from property rights arising out of a matrimonial relationship, but a lump sum could be characterised as maintenance if it was for the purpose of maintenance, see *Van den Boogaard v Laumen* [1997] QB 759, [1997] 2 FLR 399, [1997] 3 W.L.R. 284 and *Moore v Moore* [2007] EWCA Civ 361, [2007] 2 F.C.R. 353.

¹⁶ Council Regulation (EC) No.4/2009. of 18 December 2008.

¹⁷ The relevant provisions in Council Regulation (EC) No. 4/2009 refer to the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations, which the European Community has adopted, but with the exception of the UK (and Denmark).

disputes to be resolved by arbitration and developed a set of family arbitration rules referred to as the “scheme rules”.¹⁸ The IFLA say that they:

... developed the arbitration scheme to enable parties to resolve financial disputes more quickly, cheaply and in a more flexible and less formal setting than a court room. It is also expected to save court resources and reduce pressure on the already stretched family courts.¹⁹

- 7.40 The full scheme rules can be found at www.ifla.org.uk and need to be read alongside the mandatory provisions for arbitration contained in the Arbitration Act 1996. The advantages of arbitration over court proceedings are privacy and the ability of the parties to control the proceedings by deciding what the arbitrator is to adjudicate upon. Mr Justice Mostyn recently referred to “the much-to-be-welcomed scheme promoted by the Institute of Family Law Arbitrators”.²⁰

Qualifying nuptial agreements as arbitration agreements

- 7.41 The IFLA submission asked the Law Commission to consider the potential for arbitration agreements – that is, agreements to submit to arbitration – to be enforceable as qualifying nuptial agreements. They did not seek to enable the enforceability of the arbitrator’s eventual award in this way. The IFLA argued that it would be “illogical” to give statutory footing to qualifying nuptial agreements dealing with substantive issues but not give the same status to agreements attempting to regulate procedural issues. They argued that an agreement made between a divorcing couple to enter into arbitration to resolve their dispute ought properly to be enforced.
- 7.42 This logic has a degree of force behind it. We are proposing to allow couples to regulate their financial affairs to a great extent in qualifying nuptial agreements, why would we not also let them regulate the means by which they wish to resolve disputes about their financial affairs? It is also in keeping with the general ethos of our law reform proposals, keeping couples away from traditional court processes and allowing them to determine their own affairs with a flexible and bespoke approach.
- 7.43 However, there are considerable difficulties in the way of regarding arbitration agreements as qualifying nuptial agreements – whether the arbitration agreement is within a pre-nuptial contract (“if we ever divorce we will submit our dispute to arbitration”) or is made at the point of separation (“we are divorcing now and we will go to arbitration not to court”). In short, qualifying nuptial agreements are not designed to be ways of enforcing arbitration agreements; arguably there is no need to use them in that way since the Arbitration Act 1996 achieves this through its provision, in section 9, for a mandatory stay of legal proceedings where

¹⁸ The scheme was launched in association with City University’s Centre for Child and Family Law Reform. See P Singer, “Arbitration in family financial proceedings: the IFLA Scheme: Part 1” (2012) 42(Nov) *Family Law* 1353 and P Singer, “Arbitration in family financial proceedings: the IFLA Scheme: Part 2” (2012) 42(Dec) *Family Law* 1496 and *AI v MT* [2013] EWHC 100 (Fam).

¹⁹ Available at <http://ifla.org.uk/what-is-arbitration/> (last visited 7 February 2014).

²⁰ *W v M (TOLATA Proceedings; Anonymity)* [2012] EWHC 1679 (Fam), [2013] 1 FLR 1513 at [70].

arbitration has been agreed. It is not known, of course, whether section 9 applies to family law cases; but it appears that the family judiciary look favourably upon family law arbitration.²¹ We would in any event be reluctant to make a recommendation on one particular form of dispute resolution, on which we have not consulted.

Inclusion of ADR provisions in a qualifying nuptial agreement

- 7.44 A qualifying nuptial agreement may contain provisions about arbitration or indeed, mediation, collaborative law or any other method outside the court system and indeed their inclusion fits comfortably with one of the aims of qualifying nuptial agreements, that is, to reduce the scope, and incidence, of litigation.²² But, it will be for the court, in the event of dispute, to decide whether or not section 9 of the Arbitration Act 1996 applies. A nuptial agreement's status as a qualifying nuptial agreement cannot make an agreement to enter into arbitration (or, indeed, mediation or collaborative law) contained within it binding on the court or the parties, where this does not independently exist (for example, potentially, by operation of section 9).²³

HOW IS A QUALIFYING NUPTIAL AGREEMENT MADE?

The requirements for qualifying nuptial agreements

- 7.45 We set out in detail in Chapter 6 the requirements for a qualifying nuptial agreement. Below, we give some examples of practical points which arise from those requirements.

Contractual validity and execution

- 7.46 We do not foresee that these requirements are likely to cause significant issues for those who use qualifying nuptial agreements.²⁴
- 7.47 The draft Bill provides that there can be no presumption of undue influence between the parties to a qualifying nuptial agreement.²⁵ There will be cases where actual undue influence or misrepresentation, or even duress, are raised to challenge qualifying nuptial agreements. A simple refusal to enter into a marriage or civil partnership without a qualifying nuptial agreement constitutes neither undue influence nor duress: it is simply a choice.

²¹ See *AI v MT* [2013] EWHC 100 (Fam), [2013] 2 FLR 371. See also *S v S* ([2014] EWHC 7 (Fam)) where Munby P states that there is no conceptual difference between agreements between the parties and agreements to arbitrate, or an arbitral award, in the context of family proceedings. All can be a "single magnetic factor of determinative importance" (para 19 of the judgment).

²² We explain in Chapter 6, at paras 6.177 to 6.180, why we have not recommended any restriction on the terms that a qualifying nuptial agreement can contain.

²³ Because, again, the effect of an agreement being a qualifying nuptial agreement is as set out in Chapter 5, at paras 5.84 to 5.88: the court's discretion to make financial orders is restricted so that it cannot make orders inconsistent with the qualifying nuptial agreement, save where it is invoked to make provision for needs.

²⁴ Chapter 6, paras 6.6 to 6.15 and 6.32 to 6.36.

²⁵ See paragraph 7(3) of the new Schedule A1 at clause 5 and paragraph 37G(3) of the new Part 7A at clause 7 of the draft Nuptial Agreements Bill.

Timing

- 7.48 Sufficient time should be allowed for the provision of disclosure and legal advice and for the conduct of any negotiations, and parties' expectations should be managed carefully. This will be particularly important for pre-nuptial agreements, given that the consequence of failing to adhere to the 28-day requirement will be that the agreement is not a qualifying nuptial agreement. This could be a potential negligence trap for practitioners, given that the 21-day period currently cited by family law practitioners is not a statutory requirement²⁶ and is sometimes not observed, without either practitioners or the parties necessarily believing that this will significantly impair the agreement's effect.²⁷
- 7.49 Realistically, some qualifying nuptial agreements – as is the case for many pre-nuptial agreements under the current law - will take months to negotiate and will require the assistance of lawyers from other jurisdictions.

Disclosure

- 7.50 It is not possible to set out exactly what disclosure will mean in all situations. But the draft Bill specifies that disclosure must be made by a party of circumstances that, objectively, would be considered *material* to the other party's decision as to whether to enter into the qualifying nuptial agreement.²⁸ The requirement of materiality will help avoid spurious challenges to a qualifying nuptial agreement based on the omission of disclosure of assets which are insignificant in the context of the case.
- 7.51 In practice, the approach currently taken to documentary disclosure for nuptial agreements varies widely, from a simple schedule of assets with no supporting evidence to a Form E financial statement, as used in financial relief proceedings on divorce, supported by full documentary evidence.²⁹ In rare cases, no disclosure at all is provided. The majority approach among practitioners appears to be to provide disclosure by way of a schedule of assets, with a variable amount of supporting documents.³⁰ Valuations of property will not always be required; for an asset of modest value, whether absolutely or in the context of other assets, it may well be enough for a reasonable estimate of value to be given. Practitioners will have to exercise their judgement.
- 7.52 We do not think that a Form E will always be necessary. It is not adapted to the particular situation of a qualifying nuptial agreement. The level of disclosure dictated by Form E may be too extensive or disproportionate, for example, the requirement for provision of a year's bank statements. Or it may be too limited, for example, the provision of trust documents is not required by Form E but may be very relevant for some qualifying nuptial agreements. However, as a

²⁶ It was recommended in the Home Office publication, *Supporting Families: A Consultation Document* (1998) at paragraph 4.23.

²⁷ E Hitchings, *A Study of the Views and Approaches of Family Practitioners Concerning Marital Property Agreements* (2011) pp 56 to 59.

²⁸ Chapter 6, paras 6.86 to 6.93 and see paragraph 5 of the new Schedule A1 at clause 5 and paragraph 37E of the new Part 7A at clause 7 of the draft Nuptial Agreements Bill.

²⁹ E Hitchings, *A Study of the Views and Approaches of Family Practitioners Concerning Marital Property Agreements* (2011) pp 45 to 50.

³⁰ Above, p 46.

minimum, a schedule of assets will be required to enable practitioners to provide legal advice and a couple to make decisions on the terms of an agreement. What is provided beyond that will depend on the particular situation of the parties.

- 7.53 A qualifying nuptial agreement that is limited in scope may only require limited disclosure. For example, Shobna may only need to make disclosure regarding the value of the house that she wishes to protect, obtaining an up to date valuation if she does not have one. It need not be a surveyor's valuation, like an expert report on divorce, so an agent's valuation might suffice.
- 7.54 Conversely, Lucas will need to make disclosure of all his assets. While full Form E disclosure would not be necessary, or even helpful, we might expect in such a case for a valuation to be provided or obtained for real property and for evidence to be given of the balance of bank accounts, and portfolios. Because Lucas is seeking to "ringfence" his trust assets, disclosure should be provided of the trust deed and recent trust accounts. Rohan's disclosure may only need to be very limited, given the comparatively small scale of his assets.
- 7.55 Disclosure is in the interests of the payee, for whom the qualifying nuptial agreement may provide significant sums, as much as the payer. The payee may wish to check that the payments that have been promised can and will be made. For example, it may be a cause for concern regarding enforcement of payments, if the wealthy party does not have sufficient assets in the English jurisdiction to make the payments promised in the qualifying nuptial agreement.
- 7.56 For some parties a schedule may be enough. Lesley and Phil, as sophisticated professionals, wealthy in their own right and entering into a "clean break" agreement, may not need detailed documentary disclosure, if any. It is very likely that they can meet their own needs, post divorce, and they are excluding sharing of their assets, which we would suggest reduces the need for anything more than a minimum level of disclosure.
- 7.57 Any schedule of assets provided should, we think, be attached to the qualifying nuptial agreement, with a list of any documents disclosed, so that it can be demonstrated that disclosure of material information was provided.³¹
- 7.58 The disclosure of expectation of inheritances can be a sensitive issue for some parties. Indeed, the parties may not know what they will inherit but they may be sure enough to feel the need for protection from a qualifying nuptial agreement. Again, material disclosure relates to the information relevant to the other party's decision; and this is likely to include some indication of the value expected.

³¹ See paragraph 5(5) of the new Schedule A1 at clause 5 and paragraph 37E(5) of the new Part 7A at clause 7 of the draft Nuptial Agreements Bill.

Legal Advice

7.59 In Chapter 6 we set out the points that such legal advice *must* cover.³² We also think that advice might usefully cover:

- (1) The advantages and disadvantages, at the time that the advice is provided, to that party of making the agreement, including what he or she might receive on a divorce without a qualifying nuptial agreement.
- (2) Provision for the party's needs, out of which the parties cannot contract by using a qualifying nuptial agreement (including any uncertainty as to the form, level and duration of such provision).
- (3) The need for disclosure from the other party.
- (4) The need, if any, to make provision in the agreement about the effect of sale and replacement of any assets specifically mentioned in it, and about the consequences of one party investing in or contributing to property during the marriage or civil partnership.
- (5) That the agreement will hold regardless of changes over time, such as the birth of children.
- (6) If the couple, or one of them, is a foreign national or is domiciled overseas, or has property outside England and Wales, whether it would be advisable to obtain advice from a foreign lawyer with appropriate expertise. If such foreign advice has been obtained, advice should be given about its effect on, and interrelationship with, the English advice.

7.60 This list is not, of course, exhaustive and lawyers will need to ensure that they advise fully on the client's specific situation, rather than only providing generic information on qualifying nuptial agreements.

7.61 Lesley, for example, would need to understand that she is potentially giving up significant benefit on divorce by entering into a qualifying nuptial agreement. If there were no qualifying nuptial agreement, Lesley could potentially claim an equal share of the assets. So, in crude terms, she may, by giving up an equal share of the total assets of £18 million (therefore £9 million) and instead opting to simply retain her £5 million, be incurring a potential "loss" of £4 million.

7.62 We take the view that, in cases where one party's legal costs are being paid by the other, the lawyer for the first party must be satisfied that they can resolve any tension between the need to provide full advice and costs constraints placed on them. A "ceiling" being placed on the other party's costs by the paying party may mean that advice is not as full as is necessary. Lawyers should not sign the statement that legal advice has been given unless they are satisfied that they have provided sufficient advice, which will be a matter for their judgement and compliance with their regulatory body's code of conduct.³³

7.63 An agreement that is no longer a qualifying nuptial agreement nor valid as a

³² Chapter 6, para 6.142.

³³ Chapter 6, para 6.145.

contract is still a marital property agreement capable of being taken into account under *Radmacher v Granatino*,³⁴ although its effect may be limited, depending on the reason why it does not meet the requirements for a qualifying nuptial agreement.

WHAT HAPPENS AT THE END OF THE MARRIAGE?

- 7.64 A qualifying nuptial agreement is an enforceable contract and the starting point is that no further provision will be necessary; the qualifying nuptial agreement takes effect on divorce or dissolution, sums provided by it can be claimed as debts, and so on. However, in many cases the parties will wish to have the terms of the qualifying nuptial agreement expressed as a consent order, so as to preclude any later challenge to the validity of the agreement or to the arrangements they have made for financial needs.³⁵
- 7.65 Where the issue of financial needs is not agreed then that is a matter for negotiation, mediation, and possibly litigation.³⁶

Tax considerations

- 7.66 Qualifying nuptial agreements, like other forms of nuptial agreements currently, raise the issue of tax arising from the transfer or sale of the couple's property pursuant to the agreement. The tax in question will usually be capital gains tax, inheritance tax, stamp duty or stamp duty land tax, although income tax may also be relevant.³⁷ On a divorce or dissolution there are usually reliefs available that mean that any such tax liability can be legitimately prevented. However, the availability of such reliefs may be dependent on a court order (in respect of financial arrangements) being in place or on whether the agreement which provides for the sale or transfer can be regarded as being in contemplation of divorce. With regard to the latter our view is that qualifying nuptial agreements made before marriage, or a long time before a couple divorce, are made in contemplation of divorce, although we recognise that ultimately that decision will be a matter for interpretation by HMRC and the courts.
- 7.67 We do not consider that any special provision needs to be made for qualifying nuptial agreements, as we believe that their tax treatment should not differ from nuptial agreements that are not qualifying nuptial agreements, given this is simply a matter of form. Any tax disadvantage arising from the use of qualifying nuptial agreements or other nuptial agreements may be soluble through drafting, or, if not, by obtaining a court order by consent embodying the agreement's relevant terms. HMRC or the Treasury may wish, if the draft Bill becomes law, to clarify further the position both for qualifying nuptial agreements and other nuptial agreements, but we leave that as a matter for them.

³⁴ [2010] UKSC 42, [2011] 1 AC 534.

³⁵ Subject to the possibility of later variation on the basis of a change of circumstances, relating only to need; s 31 of the Matrimonial Causes Act 1973 and Sch 5, part 11, para 50 of the Civil Partnership Act 2004.

³⁶ See the case of *AH v PH* [2013] EWHC 3873 (Fam), where the presence of an overseas marriage settlement meant that the court made orders relating only to financial needs.

³⁷ For example, in connection with the transfer of life insurance policies.

CHAPTER 8

NON-MATRIMONIAL PROPERTY

INTRODUCTION

8.1 In this final Chapter we look at the third ingredient in our project: the law relating to non-matrimonial property.

8.2 Non-matrimonial property is a term used to describe property which, under the current law, is less likely to be shared on divorce or dissolution. The law on non-matrimonial property has developed over the last 13 years since the House of Lords' decision in *White v White*.¹ Until then, the concept of non-matrimonial property had no place in the law relating to financial provision orders because capital was not shared beyond what was needed to meet "reasonable requirements", even in the very wealthy cases.² The concept is a non-statutory one, entirely developed by the judiciary.

8.3 In *White v White*, Lord Nicholls explained the arguments in favour of designating non-matrimonial property as follows:

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.³

8.4 Lord Nicholls acknowledged that in certain circumstances the concept of non-matrimonial property would be a relevant consideration for the judge:

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.⁴

8.5 Indeed in *White v White* itself the financial award in favour of the husband was partly justified on the basis of the non-matrimonial property concept; the fact that the husband's parents had made a contribution to the original acquisition of the couple's home was used by the House of Lords as a justification for upholding

¹ *White v White* [2000] UKHL 54, [2001] 1 AC 596.

² See discussion in Chapter 2 at paras 2.6 to 2.9.

³ *White v White* [2000] UKHL 54, [2001] 1 AC 596 at [42].

⁴ Above at [43].

the Court of Appeal's award to Mrs White, amounting to around 38% of the family's assets. Mrs White's needs could be met without recourse to the non-matrimonial element and therefore it was appropriate to separate such property from the assets to be divided.

- 8.6 Lord Nicholls had an opportunity to develop the new concept in his judgment in *Miller v Miller, McFarlane v McFarlane* when he discussed non-matrimonial property explicitly, referring to "property ... the parties bring with them into the marriage or acquire by inheritance or gift during the marriage".⁵ He appeared to refine the concept further by highlighting an apparent exception for the matrimonial home. He said:

The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose.⁶

- 8.7 In a number of cases since then, property acquired or generated before the marriage,⁷ or inherited by either party,⁸ has not been shared, save where it has been required to meet needs.⁹
- 8.8 A further suggestion was made in *Miller v Miller, McFarlane v McFarlane* that the presence of business property that is owned by one party and entirely that party's concern, and has not been used to support the family, may justify a departure from equal division (subject to the length of the marriage).¹⁰ It does not appear that this suggestion has been followed in the subsequent case law.
- 8.9 Perhaps unsurprisingly, given that the concept of non-matrimonial property was entirely developed and refined through case law, areas of ambiguity remain. We outlined those unanswered questions at paragraph 6.10 in our 2012 SCP.

- (1) The range of property within the term "non-matrimonial property" is unclear.
- (2) The law is *not* that non-matrimonial property is exempt from sharing. All property is subject to the sharing principle¹¹ but in short marriages the

⁵ [2006] UKHL 24, [2006] 2 AC 618 at [23].

⁶ Above at [22]. Of course this does not mean that a sale will invariably be ordered or that any sale proceeds will always be shared equally.

⁷ See for example *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508; *F v F* (Pre-marital Wealth) [2012] EWHC 438 (Fam), [2012] 2 FLR 1212.

⁸ See for example *B v B (Ancillary Relief)* [2008] EWCA Civ 284, [2008] 1 WLR 2362; *L v L* [2008] EWHC 3328 (Fam), [2008] 1 FLR 142; *K v L* [2010] EWHC 1234 (Fam), [2010] 2 FLR 1467.

⁹ As it was in *Y v Y* (Financial Orders: Inherited Wealth) [2012] EWHC 2063 (Fam), [2013] 2 FLR 924.

¹⁰ See Lady Hale's discussion of "non-business-partnership, non-family asset cases" in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [150], and generally at [149] to [153]; compare Lord Mance at [170]: "where both parties are and remain financially active, and independently so".

¹¹ *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [66] by Sir Mark Potter P.

non-matrimonial property is less likely to be shared.¹² It is not known how long it takes for non-matrimonial property to become matrimonial.

- (3) There has been some discussion as to whether the existence of non-matrimonial property can lead the court to adjust (if it sees fit) the proportions in which property is shared, or whether the non-matrimonial property should simply be excluded from the sharing exercise and the rest shared equally. In *Jones v Jones*¹³ the Court of Appeal favoured the latter approach, in *Robson v Robson*¹⁴ the former.¹⁵
- (4) There are no rules as to what happens when property changes over time. It is not clear what happens when non-matrimonial property is sold and replacement property bought with the proceeds, nor when the owner or the other spouse invests in the property during marriage.

8.10 In this Chapter we outline the case we made in the 2012 SCP for the reform of the law relating to non-matrimonial property and explain our conclusion that we should not recommend reform. We amplify that explanation by discussing the provisional proposals we made in the 2012 SCP and setting out consultees' responses; we look first at our provisional proposals about the definition of non-matrimonial property, and then at the questions we asked about property that changes over time. Finally we express some views about how the courts might develop this topic in the future.

THE CASE FOR REFORM RELATING TO NON-MATRIMONIAL PROPERTY

8.11 In the 2012 SCP we argued that reform was important for two reasons.¹⁶

8.12 The development of the concept of non-matrimonial property in the case law has opened up issues which will, in due course, have to be resolved; in particular, the courts will eventually have to decide what is to happen to non-matrimonial property that is sold and replaced, and how to address increases in value over time. We expressed the view that those issues would be better considered together rather than in isolation, in response to consultation and with a view to consistency. The alternative is to continue to have the courts resolve issues, one by one, in response to the case that happens to raise a particular issue, and without the ability to consult or to consider the issues in the round.¹⁷

8.13 The second reason why these issues are important is that they are also relevant

¹² See *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [24] to [25] by Lord Nicholls, and at [147] and [152] by Lady Hale: "The source of the assets may be taken into account but its importance will diminish over time".

¹³ [2011] EWCA Civ 41, [2012] Fam 1.

¹⁴ [2010] EWCA Civ 1171, [2011] 1 FLR 751.

¹⁵ See A Chandler, "The Law is Now Reasonably Clear: The Courts' Approach to Non-matrimonial Assets" (2012) 42(Feb) *Family Law* 163; and see S Harris-Short and J Miles, *Family Law: Text, Cases and Materials* (2nd edition, 2011) pp 463 to 467.

¹⁶ The 2012 SCP, paras 6.2 and 6.3.

¹⁷ In *X v X* [2012] EWHC 538 (Fam), [2012] Fam Law 804 at [30] Charles J pointed out that our law of financial provision is not designed to meet the issues that arise when there are questions of whether or not property is to be shared; some of those issues are described at [31].

to qualifying nuptial agreements. If it becomes possible to contract out of sharing identified items of property, agreements should specify what is to happen if the property is sold and replaced, or if the other spouse invests in it, and so on; but default rules are needed in case the parties do not make provision for this.

- 8.14 These arguments for reform remain valid. However, we are not recommending reform. Consultation has shown us that it will be impossible to reach a satisfactory consensus on the right direction for the development of non-matrimonial property. This is an issue that affects only a minority – those whose assets exceed their financial needs. The introduction of qualifying nuptial agreements will enable that relatively small population to achieve reliable protection for their non-matrimonial property by contract. In the light of that, rather than recommend inevitably very controversial provisions, the better option is to enable legal self-help by leaving those who wish to make arrangements for pre-acquired and inherited property to do so by making a qualifying nuptial agreement.

THE DEFINITION OF NON-MATRIMONIAL PROPERTY

- 8.15 Our first provisional proposal was 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.¹⁸ This proposal generally met with a favourable response, in that many consultees were content with this as a description of non-matrimonial property. But many were uncomfortable about treating it as a definition and introducing rules in this area. There was concern and disagreement about the status of the matrimonial home, and about property acquired before marriage or civil partnership but during the couple's cohabitation. In the discussion that follows we look at consultation responses to our proposed definition, and then at the two difficult areas surrounding the family home and property acquired during cohabitation.

Consultation responses to our proposed definition

- 8.16 The majority of consultees did agree that non-matrimonial property should not be subject to the sharing principle on divorce and dissolution. This was not a surprising outcome given that this statement reflects the current case law. As Mr Justice Mostyn noted in *S v AG (Financial Orders: Lottery Prize)* “we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs”.¹⁹
- 8.17 John Eekelaar disagreed, saying:

¹⁸ The 2012 SCP, paras 6.41 and 7.11.

¹⁹ Also pointed out by Wilson LJ in *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2011] 2 FLR 980 at [12], discussed in M Welstead, “The Sharing of Pre-matrimonial Property on Divorce: *K v L*” (2012) 42(Feb) *Family Law* 185.

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.

- 8.18 Only the Judges of the Chancery Division took issue with defining non-matrimonial property as property received as a gift or inheritance or acquired pre-marriage. They felt that "the consultation paper places too exclusive an emphasis on the source of the property. The reasons for the gift or bequest and the involvement of the other party to the marriage in the acquisition may be important factors".
- 8.19 The vast majority of consultees accepted that non-matrimonial property should be accessed when it was required to meet needs. Only a few consultees, who were members of the public, instead felt that non-matrimonial property should not be required to meet the other party's needs. The availability of non-matrimonial property to meet needs was clearly envisaged from the inception of the concept,²⁰ and has continued to be applied by the courts.
- 8.20 However, consultees were not in agreement that it was right to embody the principle that non-matrimonial property should not be shared except to meet needs in an absolute rule, as the provisional proposal envisaged. Some consultees saw a rules-based approach as being a positive step. Nicholas Way, on behalf of the Historical Houses Association, told us that "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". Robert Whiston on behalf of Men's Aid agreed with the proposal for an absolute rule, saying "Oh wonderful. Yes, yes, we agree". But others expressed concerns about the implications of reforming the law by the provision of rules on non-matrimonial property. These concerns covered a wide range of issues.

Overlap with marital property agreements

- 8.21 One concern was that any proposed rule on non-matrimonial property would heavily overlap with reform of the law relating to marital property agreements. It was felt that providing two systems to protect assets of the very wealthy created unnecessary complexity. As Professor Chris Barton said,

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 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.

²⁰ See Lord Nicholls' judgment in *White v White* [2000] UKHL 54, [2001] 1 AC 596 at [43], quoted above at para 8.4.

Potential for incorrect application of the law

- 8.22 A smaller group was concerned that, although the rule would only operate if the couple had assets in excess of needs, in fact the implication of a rule would filter down and be misapplied in lower value cases. As His Honour Judge Million explained “the effect [of introducing a rule on non-matrimonial property] 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 misapplied by many people in this range of cases. This will fuel disputes, rather than ease them”.

Concerns about historical issues

- 8.23 There was concern that the rules would encourage parties to focus on historical issues, rather than working towards settlement. Alec Samuels thought that “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”.

Concerns about hardship

- 8.24 Another concern was that abandoning judicial discretion in favour of prescribed rules could lead to harsh outcomes. The majority response from the Family Law Bar Association highlighted that “the existing position ... has the flexibility to prevent hardship in individual cases”. Peter G Harris agreed, saying “the prospect of more certainty about the treatment of matrimonial property would carry the risk of unfairness and hard cases”.

Implications for other issues

- 8.25 Another concern was that creating rules relating to non-matrimonial property would have implications for other, non-statutory concepts in financial cases. Joanna Miles thought that the introduction of rules on non-matrimonial property “will inevitably involve giving the sharing principle some express statutory recognition”.
- 8.26 Broadly then, consultees were unperturbed by the suggested definition; one consultee said it was “about as good a definition as we are likely to get”.²¹ Consultees were similarly strongly in favour of the concept of non-matrimonial property existing in English law. But they disagreed as to whether defining the concept in a set of rules would be harmful or beneficial.

The family home as an exception?

- 8.27 Our proposed definition ran into difficulties when two further elements were suggested. Under the current law the family home is often treated differently to other forms of non-matrimonial property, even though legal professionals argue about whether there is any real basis for this difference. When we asked whether the family home should be excluded from the definition of non-matrimonial

²¹ Response from Tony Roe who did qualify this observation with the comment that he would prefer the definition to also include protection for property acquired before any “prior and seamless cohabitation occurred”.

property,²² consultees' views were polarised.

- 8.28 Some consultees felt strongly that, since needs had to be met before any property could be considered non-matrimonial, there was no rationale for treating the matrimonial home differently from other types of property. Joanna Miles said "No. Emphatically. ... 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." Some members of the public, who had written to us to share their own experiences, agreed; one told us "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".
- 8.29 Mr Justice Charles also felt that the home should not be excluded from the definition. He noted that "in many cases this [the home] will represent a significant non-matrimonial contribution by one party or his/her family and, if this is so, it should not be subject to the sharing principle".
- 8.30 Nicholas Way, on behalf of the Historic Houses Association, felt that historic homes should not be excluded from any definition of non-matrimonial property, explaining that such homes are commonly "regarded by successive generations of owners as an inherited asset of which the current incumbent is the steward rather than the outright owner". Although keen to see an exclusion for the historic home, the organisation did concede that "it may be that the court's discretion would ensure ... 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".
- 8.31 Dr Robert George gave the concept of maintaining property ownership short shrift, saying "as to people who regard it as important to be able to bequeath things to their children, my sympathy is rather more 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". Dr George pointed out that the operation of the sharing principle did not mean that the property would necessarily be lost, saying "the law on "sharing" is not so blind as to try and divide every asset. What we look to is the value of the assets, and then share out that value in a fair way".
- 8.32 The majority of consultees, particularly those in practice, felt that the home ought properly to be excluded from the definition of non-matrimonial property. An exception was Resolution who were in favour of including the former matrimonial home in the definition. The Association of Her Majesty's District Judges said "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". The Family Law Bar Association agreed. Alec Samuels told us that "the family home should always be considered as family or matrimonial property. Anything else is inconceivable and would be absurd".
- 8.33 His Honour Judge Million gave us a list of reasons why the home ought to be excluded from any statutory rules on non-matrimonial property:

²² The 2012 SCP, paras 6.50 and 7.12.

- (1) the purpose of the family home is for the parties (plural) and any children;
 - (2) treating it as “non-matrimonial property” would undermine this purpose;
 - (3) it will be discriminatory against women (who more often have fewer financial assets); and
 - (4) classification of it as “non-matrimonial property” would be a contradiction in terms, and would not be understood.
- 8.34 The majority response from the Judges of the Family Division was also not in favour of an absolute rule, noting that “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”.
- 8.35 Others felt that any additional discretionary criteria could be applied by the court. Rhys Taylor told us that the “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’”. The Judges of the Chancery Division thought that the matter ought to be left to “(guided) discretion on a case by case basis” but also queried whether “alternatively there could be a presumption that the matrimonial home is included with a power to exclude if it is in the interests of justice to do so”.
- 8.36 It was clear that this was a subject about which consultees felt very strongly; it was equally clear that no consensus on how to treat the matrimonial home within a definition of non-matrimonial property could be derived from their responses.

Property acquired during cohabitation

- 8.37 Consultees were similarly polarised when we asked for their views on whether property acquired by one party during cohabitation with the other party should be excluded from the definition proposed above.²³
- 8.38 If the definition suggested in the 2012 SCP were to be adopted, then property acquired during cohabitation would be non-matrimonial. We noted that this may be different to the current situation in practice.²⁴ In *Miller v Miller, McFarlane v McFarlane*, Lady Hale suggested that the acquisition of matrimonial property “should probably include periods of pre-marital cohabitation and engagement”.²⁵ This approach appears to have been applied in at least one recent High Court judgment.²⁶ There is no clear authority that property acquired by one party during

²³ The 2012 SCP, paras 6.59 and 7.13.

²⁴ The 2012 SCP, paras 6.52 to 6.56.

²⁵ *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [149].

²⁶ *B v B* [2012] EWHC 314 (Fam), [2012] Fam Law 516. The parties began cohabiting in 1993, married in 1997 and separated in 2008. Mr David Salter (sitting as a Deputy High Court Judge) treated the duration of the marriage as 15 years (at [3]) and calculated the husband’s pre-marital wealth (principally shares in a private company) by reference to their value in 1993. See also *CC v RC* [2007] EWHC 2033 (Fam), [2009] 1 FLR 8, where Moylan J justified a departure from equal sharing on the basis that the husband owned significant assets before the marriage and the pre-marital cohabitation.

cohabitation, in his or her sole name, is therefore matrimonial;²⁷ one recent case, however, did make it clear that the pre-acquired assets were excluded from sharing because they were acquired before the parties' cohabitation.²⁸

8.39 We further commented that treating periods of cohabitation in this way would be particularly significant for civil partners whose relationships began before the commencement of the Civil Partnership Act 2004.²⁹ Such couples were previously unable to formalise their relationship in such a way as to be entitled to financial orders at the end of the relationship. It may be seen as particularly invidious to disregard any earlier period of cohabitation when making an order for financial provision on dissolution of their civil partnership, since there can be no suggestion in cases of pre-2005 cohabitation that it was the parties' choice not to formalise their relationship.

8.40 Consultees were almost equally divided (in numerical terms) between those who thought that property acquired during a period of cohabitation was matrimonial property, and thus excluded from a definition of non-matrimonial property, and those who thought that it ought to be regarded as non-matrimonial property.

8.41 The majority response from the Judges of the Family Division said:

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.

8.42 This reflected the viewpoint of those who were in favour of the concept of matrimonial property extending into a pre-matrimonial period. The Judges of the Chancery Division echoed these sentiments. Resolution agreed that property acquired during cohabitation should be shared.

8.43 The Family Bar Law Association did not think it was 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".

8.44 Manches LLP noted that non-matrimonial property would yield to any requirement of "need" and said that, if not required to meet need, "property acquired by one

²⁷ Contrast the earlier decision in *CO v CO (Ancillary Relief: Pre Marriage Cohabitation)* [2004] EWHC 287 (Fam), [2004] 1 FLR 1095, where Coleridge J took account of eight years' cohabitation prior to a four-year marriage but made an award which gave the claimant only one third of the available assets. As in *GW v RW* ([2003] EWHC 611 (Fam), [2003] 2 FLR 108) it is hard to see how the wife benefited from the cohabitation being taken into account, save that the length of the relationship may have countered the argument that the short marriage should mean that there was no sharing beyond what was required to meet the wife's needs.

²⁸ *AC v DC* [2012] EWHC 2420 (Fam), [2013] 2 FLR 1499 at [107]. See also *N v F* [2011] EWHC 586 (Fam), [2011] 2 FLR 533 at [44].

²⁹ See the 2012 SCP, para 6.57.

party during cohabitation should be covered by the definition of non-matrimonial property”.

8.45 Joanna Miles provided a detailed analysis. She considered that:

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 the couple were not fully committed to their 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

8.46 Ms Miles felt that “it may be cleaner simply to set the clock running from the date of the marriage”. The date of the marriage does provide a certifiable date to work from, but it has the disadvantage of ignoring the social realities of cohabitation preceding marriage. The question of how cohabitation fits within our definition appears as intractable as the question of how to treat a previously acquired or inherited matrimonial home.

NON-MATRIMONIAL PROPERTY THAT CHANGES OVER TIME

Can non-matrimonial property become matrimonial?

8.47 We asked consultees to consider the question of whether non-matrimonial property can ever become matrimonial, whether solely by the passage of time or because of its use by the family. We noted in the 2012 SCP that it can certainly do so under the current law.³⁰ Lord Nicholls put it this way in *Miller v Miller, McFarlane v McFarlane*:

After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom retained in specie.³¹

8.48 As Lady Hale put it in the same case: “the importance of the source of the [pre-matrimonial] assets will diminish over time”.³² The point is not that the status of the assets changes by virtue of time alone, but that as time goes on the lives of the two people become more intermingled, and it may cease to matter to them (at least while the relationship continues) who first owned (say) the shares or the piano.

8.49 We also find a narrower approach in the current law. As Lord Justice Wilson said in *K v L*:

³⁰ See the 2012 SCP, paras 6.61 and 6.62.

³¹ [2006] UKHL 24, [2006] 2 AC 618 at [25].

³² Above at [148].

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

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

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

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

The situations described in (a) and (b) above were both present in *White*. By contrast, there is nothing in the facts of the present case which logically justifies a conclusion that, as the long marriage proceeded, there was a diminution in the importance of the source of the parties' entire wealth, at all times ring-fenced by share certificates in the wife's sole name which to a large extent were just kept safely and left to reproduce themselves and to grow in value.³³

8.50 Thus in *K v L*,³⁴ the wife's capital, primarily in shares she had inherited long before she met her husband and which were largely untouched during the marriage, was not shared. Time alone made no difference; nor did the fact that the income from the shares had been used to support the family and that parts of the shareholding had from time to time been sold for that purpose. Lord Justice Wilson's comments seem to describe three processes: (a) dilution of the non-matrimonial property because it has become a very small part of the parties' wealth; (b) deliberate mixing of the property in a way that makes it clear that its owner regards it as matrimonial; and (c) the use of the non-matrimonial property to invest in the family home. We regarded these as useful starting points in considering how the law might be clarified.

8.51 The first point of consideration in the 2012 SCP was the question of whether non-matrimonial property can ever become matrimonial property, a question we described as "much more difficult" than the topics which had preceded it. Consultees broadly agreed with our provisional proposal that non-matrimonial property should not lose its status as such merely by virtue of having been used by the family.³⁵ As Joanna Miles explained "it would be unrealistic and potentially undermining of relationships to set up rules which require owner-spouses

³³ [2011] EWCA Civ 550, [2012] 1 WLR 306 at [18].

³⁴ [2011] EWCA Civ 550, [2012] 1 WLR 306.

artificially to shelter some of their assets from family enjoyment as the means of protecting them from sharing”. A member of the public felt that if non-matrimonial property became matrimonial it would be a “gold digger’s charter”.

- 8.52 The Chancery Bar Association felt that “evidential questions will abound” if use alone was sufficient to alter the nature of non-matrimonial property to matrimonial property. They asked “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’?”
- 8.53 The Judges of the Chancery Division also felt that “there was an obvious problem in defining what is meant by ‘use’”. They felt that the issue raised fact-sensitive scenarios: “it is not considered that there is any benefit in creating formal rules to deal with them”.
- 8.54 The Family Bar Law Association said, “it is difficult to form an absolute view about these issues”; they did not feel that a binary system would be fair. The Association of Her Majesty’s District Judges offered a qualified response; they “did not necessarily disagree, provided a fair result can still be achieved” but felt that “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”.
- 8.55 The Law Society was in the small minority of consultees who did disagree outright. They felt that “it would create a disincentive for people to treat their marriage as [a] partnership and would reward those who are financially manipulative”. Mary Welstead also disagreed. She was “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”.
- 8.56 We were therefore left, again, with no clear answer. Our question as to whether non-matrimonial property can ever become matrimonial property reflected the view found in some cases that the longer the marriage, the less the origin of non-matrimonial property will matter. Our question was necessarily more limited – because if non-matrimonial property is defined then the length of marriage ceases to be relevant. We simply asked whether property could “change” merely through use. The majority of consultees thought not, but there was no unanimity and a significant minority of consultees favoured retaining discretion.

Property that changes

- 8.57 The final section of our Part on non-matrimonial property dealt with the difficult question of whether definitive rules could be applied to non-matrimonial property which alters in some way. In our 2012 SCP we noted that a number of different questions can be asked in relation to non-matrimonial property which changes over time. We said:

We can ask if non-matrimonial property becomes matrimonial if it is sold and replaced during marriage; if it is sold and the proceeds

³⁵ As to the provisional proposal, see the 2012 SCP, paras 6.77 and 7.14.

spent; if it remains unsold and is used by the family during marriage (as a holiday property naturally would be); if it is sold and the proceeds used to buy the family home during marriage.

More difficult are the situations where the property changes, particularly if it grows due to investment by either the owner or the non-owning spouse. “Investment” can mean money, for example funds introduced from another source, or indeed from the non-matrimonial property itself as where the income from the family farm is used to buy another barn. But investment may also be time, where one or both parties have worked in the family business.³⁶

- 8.58 The latter is the more difficult issue. It covers a variety of possible situations. At one end of the spectrum the owner manages the property, as he or she did before the marriage or civil partnership, albeit not as a full-time activity – for example, a portfolio of properties is managed, perhaps by the owner on a spare-time basis, perhaps by paying managing agents. At the other end, the non-matrimonial property represents the owner’s career and full-time occupation, as would naturally happen in the case of the family business. A further variation occurs when the other spouse joins in, perhaps by investing money, or by working full-time or part-time in the business but not formally as a partner.
- 8.59 Clearly where the spouses become business partners in the formal sense it is easy to see a justification for regarding the property as matrimonial; and as a starting point we suggested that that should be the rule. If that formal step of partnership has been taken, one would expect the parties to have been advised of the possibility of making a qualifying nuptial agreement about the status of the property if the default position is not acceptable to them.
- 8.60 Beyond that, the current law is unclear and it is, again, difficult to know where to draw a line. In *S v S*,³⁷ the husband was a property developer. He argued that certain properties he had brought into the marriage remained non-matrimonial; and he succeeded because he had not done anything to enhance their value during the marriage. The implication of this is that keeping property separate and untouched, growing passively if at all, will insulate it from the transition from non-matrimonial property status to matrimonial status as discussed above.
- 8.61 The thinking in *S v S*³⁸ seems directly to contradict the comments in *Miller v Miller*, *McFarlane v McFarlane* about “non-business-partnership, non-family assets”.³⁹ It seems both harsh and discouraging of sensible economic activity to provide that any act of involvement in the property by its owner – any small management activity – during the marriage would give rise to the loss of non-matrimonial status. Such a provision would seem to run counter to the purpose of affording a different treatment to non-matrimonial property, namely to respect its

³⁶ The 2012 SCP, paras 6.66 to 6.67.

³⁷ *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496. See also *Rossi v Rossi* [2006] EWHC 1482 (Fam), [2007] 1 FLR 790 and *S v S (Ancillary Relief after Lengthy Separation)* [2006] EWHC 2339 (Fam), [2007] 1 FLR 2120.

³⁸ [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496.

³⁹ [2006] UKHL 24, [2006] 2 AC 618 at [150].

source.⁴⁰ In *Jones v Jones*⁴¹ Lady Justice Arden expressed concern about this decision on the basis that it seems to discourage investment and productive activity. She said:

If only passive growth is taken into account, the law rewards the spouse who buries her non-matrimonial assets in the ground rather than the spouse who actively manages them. The correct analysis in my judgment, in circumstances such as the present, is that, where a spouse has a non-matrimonial asset of the present kind, he is entitled to that element of the company at the end of the day which can fairly be taken to represent the fruits of the non-matrimonial assets that accrue during the marriage, even if the fruits are the product of activity by him or on his behalf.⁴²

8.62 This is an area where general rules are very difficult to devise. Other jurisdictions have done so. Our understanding is that in a number of continental European jurisdictions rules provide that investment in non-matrimonial property by the other spouse gives rise to a right of reimbursement, while the owner spouse's investment has no consequences for the status of the property.⁴³ The New Zealand statute takes a different line (as do some European countries): any increase in value of separate property, or income or gains derived from it, arising from the investment of relationship property or from the efforts of the other spouse, becomes relationship property.⁴⁴ We are not aware of any provision in another jurisdiction providing that the owner spouse's own efforts or investment in the non-matrimonial property during marriage have an effect on its status.

8.63 The devising of statutory rules requires difficult policy choices, but may well give rise to far greater consistency than can the accumulation of individual court decisions on particular points that happen to have arisen in litigation.

8.64 We made two provisional proposals to consultees:

- (1) 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;⁴⁵ and
- (2) that where non-matrimonial property has been sold and the proceeds invested in matrimonial property, the property (following that investment) should be matrimonial property.⁴⁶

8.65 Consultees were again divided. The Family Team at Farrer & Co told us that they

⁴⁰ The 2012 SCP, paras 6.15 to 6.23.

⁴¹ [2011] EWCA Civ 41, [2011] 1 FLR 1723.

⁴² Above, at [60].

⁴³ K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action: Volume IV: Property Relations Between Spouses* (2009) pp 521 to 532.

⁴⁴ Property (Relationships) Act 1976, s 9A(1) and (2).

⁴⁵ The 2012 SCP, paras 6.87 and 7.15.

⁴⁶ The 2012 SCP, paras 6.88 and 7.16.

had “found it impossible to complete the response form on behalf of their firm” because of the divergence of opinion. Alec Samuels told us we had asked “another impossible question”.

8.66 The Judges of the Family Division said “we have very significant concerns about this degree of categorisation. What is “same kind” of property? ... Is this in the broader economic interests of the State?” The Association of Her Majesty’s District Judges were concerned that the term “use of the family” is open to different interpretations. Rhys Taylor asked “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’?”

8.67 Joanna Miles similarly feared “ghastly arguments about what ‘type’ means” and was not persuaded that reorganisation of an asset portfolio should ever change the status of property:

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.

8.68 His Honour Judge Million provided three reasons why he did not support the provisional proposals, saying:

- (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; and
- (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.

8.69 In our final question we asked consultees to tell us whether they thought it was 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. If so, we asked what values should be expressed in those rules.⁴⁷

8.70 Valentine Le Grice QC told us that “this is probably an impossible task”. His Honour Judge Million felt that “such rules and guided discretion will simply add to complexity and technicality”. Rhys Taylor simply replied “very difficult”.

8.71 Most consultees did not answer this question; the 23 that did were numerically split between taking a discretionary approach to dividing the property, or awarding an increased share in proportion to the investment.

8.72 John Eekelaar suggested that those who make a more than insubstantial contribution should be awarded with a half share in the assets or increase in

⁴⁷ The 2012 SCP, paras 6.100 and 7.17.

value. Mr Justice Charles thought that a formula could provide a possible solution:

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.

MOVING FORWARD

8.73 The Family Bar Law Association summed up the problem as follows:

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.

8.74 Clearly, consultees are not in agreement as to how the law on non-matrimonial property ought to be reformed, and even a significant majority view cannot be isolated. We do not think that the controversy that would surround any recommendation is worth arousing, given the relatively small population affected and the fact that most of that population will be well supplied with legal advice and well able to resolve uncertainties within the current law by making qualifying nuptial agreements.

8.75 Qualifying nuptial agreements and non-matrimonial property both deal with the same constituency of litigants: those who have assets in excess of needs. Litigants with assets in excess of needs will have the means to obtain legal advice. The option of trying to make a qualifying nuptial agreement will be open to them. And a qualifying nuptial agreement will come with safeguards and disclosure requirements which a set of rules on non-matrimonial property could not provide.

8.76 In Chapter 7 we discussed how qualifying nuptial agreements will deal with

property which changes over time.⁴⁸ In essence we think that couples will have a choice between leaving the question to the courts' discretion or reaching their own agreement as to what should happen to property covered by their qualifying nuptial agreement which changes over time. Leaving couples to develop bespoke agreements also has the advantage that contentious issues like the treatment of the matrimonial home or periods of cohabitation can be agreed on a case-by-case basis.

- 8.77 Qualifying nuptial agreements will not necessarily be an option in all situations where rules on non-matrimonial property would have applied. Some wealthy individuals might prefer to have an agreement in place but find that their prospective spouse will not agree one. Others may inherit property unexpectedly during the course of their marriage and find themselves with assets in excess of needs, having previously not been wealthy enough to consider a qualifying nuptial agreement. For these individuals, and for the many couples who choose not to reach qualifying nuptial agreements, the law of non-matrimonial property will continue to apply at the courts' discretion, just as it does today. The courts will have choices to make about points on which different judges have expressed differing views.
- 8.78 One such point relates to property that increases in value; the courts' prevailing approach seems to be that the growth in value of non-matrimonial property during marriage and civil partnership, other than "passive growth", should be shared. We have noted Lady Justice Arden's concern about this, because it appears to penalise spouses who maintain and develop their property during marriage.⁴⁹ We share that concern. Ideally, of course, this would be dealt with by agreement, but we think that where the point falls to be decided by the courts there is scope for a change in approach to the increased value of non-matrimonial property – particularly in cases involving a longer relationship where the parties did not have the opportunity to enter into a qualifying pre-nuptial agreement.
- 8.79 A point of more overt judicial disagreement is over the approach to be taken to sharing once it is established that some but not all the property is non-matrimonial. Assuming the case involves a wealthy couple where there is no concern about financial needs, is the court to share the whole, but in proportions, other than 50:50, that feel right in the circumstances, as it did in *Robson v Robson*?⁵⁰ Or is it to disregard the non-matrimonial property and share the rest equally, as it did in *Jones v Jones*?⁵¹
- 8.80 As one commentator has explained, "the first is more conventional, exercising a broad discretion and adjusting away from equality to take in account non-matrimonial assets. The second aims to be more rigorous, applying an apt value

⁴⁸ Chapter 7, paras 7.17 to 7.22.

⁴⁹ See para 8.61 above. See also *F v F* (Pre-marital Wealth) [2012] EWHC 438 (Fam), [2012] 2 FLR 1212 where this approach was taken.

⁵⁰ [2010] EWCA Civ 1171, [2011] 1 FLR 751.

⁵¹ [2011] EWCA Civ 41, [2011] 1 FLR 1723.

to non-matrimonial property, which should only be distributed if needs require.”⁵²

- 8.81 We take the view that the *Jones v Jones*⁵³ approach (simply to exclude the non-matrimonial property from the calculation) is preferable, for the sake of clarity and because it may encourage settlement because it obviates the need to guess what proportions a judge would apply to the property once its nature as non-matrimonial has been established.
- 8.82 Beyond these observations we express no view as to how the case law relating to non-matrimonial property should develop. As discussed, the better solution – as in so many areas of family law – is for them to be resolved by agreement.

⁵² See A Chandler, “‘The Law is Now Reasonably Clear’: The Courts’ Approach to Non-matrimonial Assets” (2012) 42(Feb) *Family Law* 163, 168; and see J M Scherpe, “Non-Matrimonial Assets, Indexation and Value Increases – The Pillarisation of Ancillary Relief?” [2013] *Child and Family Law Quarterly* 61.

⁵³ [2011] EWCA Civ 41, [2011] 1 FLR 1723.

CHAPTER 9

SUMMARY OF RECOMMENDATIONS

CHAPTER 3: FINANCIAL NEEDS

- 9.1 We recommend that the Family Justice Council prepare guidance as to the meaning of financial needs, encouraging the courts to make orders that will enable the parties to make a transition to independence, to the extent that that is possible in the light of choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and their continuing shared responsibilities.

[paragraph 3.88]

- 9.2 We recommend that the guidance prepared by the Family Justice Council be addressed primarily to the courts, but that it should be produced additionally in a plain English format and made widely available to the public, in printed form and electronically.

[paragraph 3.89]

- 9.3 We recommend that the guidance be kept under review by the Family Justice Council and updated regularly.

[paragraph 3.90]

- 9.4 We recommend that Government support the formation of a working group, to be convened once suitable empirical data become available, to work on the possible development of a formula to generate ranges of outcomes for spousal support. The group would be composed of academics from law, the social sciences and economics, and of family law practitioners and judges. Government support should extend at least to the provision of meeting space, travel expenses and a secretariat; ideally it would also involve the funding of research assistance for the duration of the project (which we envisage could last some five years).

[paragraph 3.159]

CHAPTER 4: MARITAL PROPERTY AGREEMENTS AND THE PUBLIC POLICY RULES

- 9.5 We recommend that for the future an agreement made between spouses, before or after marriage or civil partnership, shall not be regarded as void, or contrary to public policy, by virtue of the fact that it provides for the financial consequences of a future separation, divorce or dissolution.

[paragraph 4.29]

- 9.6 We recommend that sections 34 to 36 of the Matrimonial Causes Act 1973 and section 17 of the Inheritance (Provision for Family and Dependents) Act 1975 be amended to cover pre-nuptial agreements.

[paragraph 4.43]

CHAPTER 5: QUALIFYING NUPTIAL AGREEMENTS

- 9.7 We recommend that qualifying nuptial agreements should be introduced by legislation.

[paragraph 5.40]

- 9.8 We recommend that it shall not be possible to use a qualifying nuptial agreement to contract out of provision for financial needs. We make that recommendation without making any separate recommendation that statute should specify a level of needs for this purpose, but instead recommend that it should rely on the meaning of “financial needs” in the existing law.

[paragraph 5.84]

- 9.9 We recommend that any dispute concerning a qualifying nuptial agreement should be heard by a family judge.

[paragraph 5.91]

- 9.10 We recommend that the court hearing an application for reasonable financial provision by a surviving spouse under the Inheritance (Provision for Family and Dependents) Act 1975 should have regard to any provision in a qualifying nuptial agreement that relates to such a claim.

[paragraph 5.124]

CHAPTER 6: THE REQUIREMENTS FOR QUALIFYING NUPTIAL AGREEMENTS

- 9.11 We recommend that a marital property agreement should not be a qualifying nuptial agreement unless it is a valid contract.

[paragraph 6.12]

- 9.12 We recommend that the law relating to undue influence be reformed, for qualifying nuptial agreements only, through an express provision to the effect that a presumption of undue influence will not apply to qualifying nuptial agreements.

[paragraph 6.29]

- 9.13 We recommend that qualifying nuptial agreements must be made by deed.

[paragraph 6.36]

- 9.14 We recommend that qualifying nuptial agreements must contain a statement signed by both parties (in addition to their execution of the document as a deed) stating that he or she understands that the agreement is a qualifying nuptial agreement and that it will remove the court's discretion to make financial provision orders, save in so far as the agreement leaves either party without provision for their financial needs.

[paragraph 6.40]

- 9.15 We recommend that qualifying nuptial agreements be invalid if made less than 28 days in advance of the marriage or civil partnership.

[paragraph 6.67]

- 9.16 We recommend that a marital property agreement should not be a qualifying nuptial agreement unless both parties received, at the time of the making of the agreement, disclosure of material information about the other party's financial situation.

[paragraph 6.91]

- 9.17 We recommend that parties to a qualifying nuptial agreement should not be able to waive their rights to disclosure.

[paragraph 6.103]

- 9.18 We recommend that a marital property agreement should not be a qualifying nuptial agreement unless both parties received legal advice at the time that the agreement was formed.

[paragraph 6.125]

- 9.19 We recommend that legal advice should include advice on the following matters.

- (1) That the agreement is a qualifying nuptial agreement that will prevent the court from making financial orders inconsistent with the agreement, save so far as financial needs are concerned.
- (2) The effect of the agreement on the rights of the party being advised.

[paragraph 6.142]

- 9.20 We recommend that a statement signed by both lawyer and client to the effect that the client has been advised on the matters set out at paragraph 9.19 above will raise an evidential presumption that the advice has been given.

[paragraph 6.145]

- 9.21 We recommend that the requirement for legal advice cannot be met by having the same lawyer advise the two parties.

[paragraph 6.159]

- 9.22 We recommend that any variation of a qualifying nuptial agreement must comply with all the pre-requisites for the formation of a qualifying nuptial agreement.

[paragraph 6.186]

- 9.23 We recommend that a qualifying nuptial agreement may only be revoked by an agreement, made in writing and signed by, or on behalf of, both parties.

[paragraph 6.190]

(Signed) DAVID LLOYD JONES, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*
5 February 2014

APPENDIX A
DRAFT NUPTIAL AGREEMENTS BILL

Nuptial Agreements Bill

CONTENTS

Abolition of rule against pre-nuptial agreements etc

- 1 Abolition of public policy rule

Extension of provisions relating to maintenance agreements

- 2 Maintenance agreements: marriage
- 3 Maintenance agreements: civil partnerships
- 4 Maintenance agreements: death

Qualifying nuptial agreements

- 5 Qualifying nuptial agreements: marriage
- 6 Qualifying nuptial agreements: overseas divorce etc
- 7 Qualifying nuptial agreements: civil partnerships
- 8 Qualifying nuptial agreements: overseas dissolution etc of civil partnership
- 9 Qualifying nuptial agreements: claims under the Inheritance (Provision for Family and Dependants) Act 1975
- 10 Termination of qualifying nuptial agreements

General

- 11 Short title, commencement, application and extent

A
B I L L

TO

Make provision about agreements that deal with the financial consequences of separation or breakdown of a marriage or civil partnership, and for connected purposes.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Abolition of rule against pre-nuptial agreements etc

1 Abolition of public policy rule

- (1) This section applies to agreements between parties to a marriage or civil partnership (whether made before or after the marriage or civil partnership is entered into) that include provision for the financial consequences of separation.
- (2) The common law rule (if it still exists) that provision of that sort is void if it concerns the financial consequences of a future separation is abolished.
- (3) But subsection (2) does not affect the court’s powers to make orders for financial relief in the event that separation occurs, and any term agreed between the parties that purports to limit those powers (or the right of either party to apply for an order) remains void.
- (4) References in this section to “separation” also include dissolution or annulment of the marriage or civil partnership in question.

Extension of provisions relating to maintenance agreements

2 Maintenance agreements: marriage

- (1) Section 34 of the Matrimonial Causes Act 1973 (validity of maintenance agreements) is amended as follows.
- (2) In subsection (1), for “a maintenance agreement” substitute “an agreement to which this section applies”.

- (3) For subsection (2) substitute –
- “(2) This section applies to an agreement if –
- (a) it is an agreement in writing between the parties to a marriage (whether made before or during the marriage or after any dissolution or annulment of it), and
 - (b) either –
 - (i) it contains financial arrangements, or
 - (ii) it does not contain financial arrangements, but it is a separation agreement and there is no other agreement in writing between the parties that contains financial arrangements.
- (3) In this section and section 35, “financial arrangements” means any provision for the financial consequences of separation (and “separation” here also includes dissolution or annulment of the marriage).
- (4) An agreement to which this section applies is referred to in sections 35 and 36 as a “section 34 agreement”.”
- (4) The following amendments are made to the Matrimonial Causes Act 1973 in consequence of the amendments made by subsections (2) and (3).
- (5) In the italic heading preceding section 34, for “*Maintenance agreements*” substitute “*Section 34 agreements*”.
- (6) For the heading of section 34 substitute “**Effect of provisions restricting right to apply to court**”.
- (7) In section 35 (alteration of agreements by court during lives of parties) –
- (a) in subsection (1), for “maintenance agreement” substitute “section 34 agreement”, and
 - (b) in subsection (6), for “maintenance agreement” substitute “section 34 agreement”.
- (8) In section 36 (alteration of agreements by court after death of one party) –
- (a) in subsection (1), for “maintenance agreement within the meaning of section 34 above” substitute “section 34 agreement”, and
 - (b) in subsection (4), for “maintenance agreement” substitute “section 34 agreement”.
- (9) In section 47 (matrimonial relief and declarations of validity in respect of polygamous marriages), in subsection (2)(c), for “maintenance agreement” substitute “section 34 agreement”.
- (10) The following amendments are made in consequence of the preceding provisions of this section –
- (a) in section 18 of the Inheritance (Provision for Family and Dependants) Act 1975 (availability of court’s powers in applications under sections 31 and 36 of the Matrimonial Causes Act 1973), in subsection (1)(b), for “a maintenance agreement within the meaning of section 34 of that Act” substitute “an agreement to which section 34 of that Act applies”,
 - (b) in section 3 of the Forfeiture Act 1982 (application for financial provision not affected by the forfeiture rule), in subsection (2)(b), for “maintenance agreements in respect of marriages” substitute “section 34 agreements”, and

- (c) in section 49C of the Child Support Act 1991 (meaning of “family proceedings”), in subsection (1)(c)(ii), for “maintenance agreements” substitute “section 34 agreements”.

3 Maintenance agreements: civil partnerships

- (1) Part 13 of Schedule 5 to the Civil Partnership Act 2004 (financial relief - consent orders and maintenance agreements) is amended as follows.
- (2) For paragraph 67 substitute –
 - “67 (1) In this Part, “paragraph 67 agreement” means an agreement in writing that meets the following conditions –
 - (a) it is between two people who are civil partners of each other (whether it was made before their civil partnership was formed, during its continuance or after any dissolution or annulment of it), and
 - (b) either –
 - (i) it contains financial arrangements, or
 - (ii) it does not contain financial arrangements, but it is a separation agreement and there is no other agreement in writing between the civil partners that contains financial arrangements.
 - (2) In this Part, “financial arrangements” mean any provision for the financial consequences of separation (and “separation” here also includes dissolution or annulment of the civil partnership).”
- (3) In paragraph 68 (validity of maintenance agreements), for “maintenance agreement” substitute “paragraph 67 agreement”.
- (4) Accordingly, in the italic headings preceding each of paragraphs 67 and 68, for “*maintenance*” substitute “*paragraph 67*”.
- (5) In paragraph 69 (alteration of agreements by court during lives of parties), in sub-paragraph (1), for “maintenance agreement”, in each place it occurs, substitute “paragraph 67 agreement”.
- (6) In paragraph 72 (saving), for “maintenance agreement” substitute “paragraph 67 agreement”.
- (7) In paragraph 73 (alteration of agreements by court after death of one party), in each of subsections (1) and (4), for “maintenance agreement” substitute “paragraph 67 agreement”.
- (8) The following amendments are made in consequence of the preceding provisions of this section –
 - (a) in section 18A of the Inheritance (Provision for Family and Dependants) Act 1975 (availability of court’s powers in applications under paragraphs 60 and 73 of Schedule 5 to the Civil Partnership Act 2004), in subsection (1)(b), for “maintenance agreement” substitute “paragraph 67 agreement”,
 - (b) in section 3 of the Forfeiture Act 1982 (application for financial provision not affected by the forfeiture rule), in subsection (2)(c), for “maintenance agreements in respect of civil partnerships” substitute “paragraph 67 agreements”, and

- (c) in section 49C of the Child Support Act 1991 (meaning of “family proceedings”), in subsection (1)(j)(iii), for “maintenance agreements” substitute “paragraph 67 agreements”.

4 Maintenance agreements: death

- (1) Section 17 of the Inheritance (Provision for Family and Dependants) Act 1975 (variation and revocation of maintenance agreements) is amended as follows.
- (2) In subsection (1), for “maintenance agreement” substitute “relevant agreement”.
- (3) In subsection (3), for “a maintenance agreement” substitute “an agreement”.
- (4) For subsection (4) substitute—
 - “(4) For the purposes of this section, an agreement is a “relevant agreement” with respect to a deceased person if—
 - (a) it was made by the deceased person with someone with whom the deceased person formed a marriage or civil partnership (whether it was made before formation of the marriage or civil partnership, during its continuance or after any dissolution or annulment of it), and
 - (b) it contained any provision for the financial consequences of separation (and “separation” here also includes dissolution or annulment of the marriage or civil partnership).”
- (5) Accordingly, in the heading of section 17 of that Act, for “**maintenance agreements**” substitute “**agreements dealing with financial consequences of separation**”.

Qualifying nuptial agreements

5 Qualifying nuptial agreements: marriage

- (1) Part 2 of the Matrimonial Causes Act 1973 (financial relief for parties to marriage and children of family) is amended as follows.
- (2) After section 25G insert—

“25H Qualifying nuptial agreements

Schedule A1 (which contains provisions limiting the powers of the court to make certain orders under this Part) has effect.”
- (3) In section 31 (variation, discharge etc of certain orders for financial relief), after subsection (7) insert—
 - “(7ZA) Subsection (7ZB) applies to the exercise of a power conferred by this section if a qualifying nuptial agreement is in force (within the meaning of Schedule A1) with respect to the marriage when the court is deciding whether and, if so, how to exercise the power.
 - (7ZB) The court may only exercise the power such that the overall effect, following exercise of the power, remains consistent with paragraph 1(2) of Schedule A1.”
- (4) In section 35 (alteration of agreements by court during lives of parties)—

- (a) in subsection (2) –
 - (i) for the words “If the court” substitute “If, in the case of an agreement other than a qualifying nuptial agreement, the court”, and
 - (ii) omit the words from “; and the agreement” to the end,
- (b) after subsection (2) insert –
 - “(2A) In the case of a qualifying nuptial agreement, the court may, subject to subsections (4) and (5), by order make permitted alterations in the agreement –
 - (a) by varying or revoking any financial arrangements contained in it, or
 - (b) by inserting in it financial arrangements for the benefit of one of the parties to the agreement or of a child of the family.
 - (2B) For the purposes of subsection (2A), an alteration is “permitted” if it is made –
 - (a) to meet the needs of a party to the agreement, or
 - (b) in the interests of a child of the family,
 and “needs” has the same meaning in this subsection as it has in Schedule A1.
 - (2C) Where an agreement is altered by order under this section, the agreement is to have effect thereafter as if any alteration made by the order had been made by legally binding agreement between the parties.”, and
- (c) after subsection (6) insert –
 - “(6A) In this section, “qualifying nuptial agreement” has the meaning given in Schedule A1.”
- (5) In section 36 (alteration of agreements by court after death of one party), in subsection (4), for the words from “agreement between the parties” to the end substitute “legally binding agreement between the parties”.
- (6) Before Schedule 1 insert –

“SCHEDULE A1

QUALIFYING NUPTIAL AGREEMENTS

The rule

- 1 (1) This paragraph applies if a qualifying nuptial agreement is in force with respect to the marriage when the court is deciding whether and, if so, how to exercise a power under section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E in relation to a party to the marriage.
- (2) The court must not exercise the power in a way that is inconsistent with the qualifying nuptial agreement unless it is doing so –
 - (a) to meet the needs of a party to the marriage, or
 - (b) in the interests of a child of the family.
- (3) What counts for the purposes of sub-paragraph (2)(a) as the needs of a party is to be determined having regard to all the circumstances of

the case, giving first consideration as required by subsection (1) of section 25 and having regard in particular to the matters mentioned in subsection (2) of that section.

- (4) See below for the meaning of “qualifying nuptial agreement”.

Qualifying nuptial agreements

- 2 (1) A “qualifying nuptial agreement” is a nuptial agreement that meets—
- (a) the formation requirement,
 - (b) the timing requirement,
 - (c) the disclosure requirement,
 - (d) the advice requirement,
 - (e) the validity requirement, and
 - (f) the variation requirement.
- (2) A qualifying nuptial agreement is “in force” at any given time if all of those requirements are met with respect to the agreement at that time.
- (3) In this Schedule, “nuptial agreement” means an agreement between the parties to a marriage (whether made before or during the marriage or after any dissolution or annulment of it) that includes any provision for the financial consequences of—
- (a) judicial separation,
 - (b) dissolution of the marriage, or
 - (c) annulment of the marriage.

The formation requirement

- 3 (1) A nuptial agreement meets the formation requirement if—
- (a) it is made by deed validly executed by each party (or by persons authorised to execute it in the name or on behalf of each party), and
 - (b) it contains a relevant statement made by each party.
- (2) A “relevant statement” is a statement that the party understands—
- (a) that the agreement is a qualifying nuptial agreement, and
 - (b) that, under the law of England and Wales, it will have the effect described in paragraph 1 of this Schedule.
- (3) In this paragraph—
- (a) “party” means a party to the agreement, and
 - (b) the expression “validly executed” is to be construed in accordance with section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.
- (4) This paragraph applies to an agreement whose formation is governed by the law of a territory other than England and Wales as it applies to an agreement whose formation is governed by the law of England and Wales.

The timing requirement

- 4 A nuptial agreement meets the timing requirement if it is made at any time other than during the period of 28 days ending with the day on which the marriage is entered into.

The disclosure requirement

- 5 (1) A nuptial agreement meets the disclosure requirement if, before the agreement is entered into, each party discloses to the other such circumstances (if there are any) as he or she is required to disclose under this paragraph.
- (2) The circumstances that a party is required to disclose are such of his or her circumstances as would reasonably be considered to be material to a decision by the other party to enter into the nuptial agreement on the relevant terms contained within it.
- (3) “The relevant terms” are those terms that make provision for the financial consequences of judicial separation or dissolution or annulment of the marriage.
- (4) But the circumstances that a party is “required to disclose” does not include circumstances of which the other party is already aware when entering into the nuptial agreement.
- (5) If it is alleged that a party did not disclose circumstances that he or she was required to disclose under this paragraph, it is for that party to show that he or she did disclose those circumstances and, if that party cannot do so, the agreement does not meet the disclosure requirement.

The advice requirement

- 6 (1) A nuptial agreement meets the advice requirement if each party receives relevant legal advice from a qualified lawyer before the agreement is entered into.
- (2) “Relevant legal advice” means legal advice as to the terms and effect of the proposed agreement under the law of England and Wales.
- (3) “Qualified lawyer” means a person who, under the Legal Services Act 2007 –
- (a) is authorised by the Law Society or the General Council of the Bar to exercise a right of audience or conduct litigation, or
 - (b) is authorised by the Institute of Legal Executives to exercise a right of audience.
- (4) A written statement signed by a party and a qualified lawyer to the effect that the party received relevant legal advice from the qualified lawyer before the agreement was entered into creates a presumption that the party received relevant legal advice from a qualified lawyer at that time (and it is then for anyone alleging the contrary to show that relevant legal advice was not so received).

The validity requirement

- 7 (1) A nuptial agreement meets the validity requirement if, at least so far as the relevant terms are concerned, it is valid and enforceable as a contract.
- (2) “The relevant terms” has the meaning given in paragraph 5.
- (3) In determining for the purposes of this Schedule (but not otherwise) whether an agreement is valid and enforceable as a contract, any presumption of undue influence that exists in law (whatever the circumstances giving rise to the presumption) is to be disregarded.
- (4) In the case of an agreement governed by the law of a territory other than England and Wales –
- (a) the agreement meets the validity requirement if, at least so far as the relevant terms are concerned, it would be valid and enforceable as a contract under the law of England and Wales (as modified by sub-paragraph (3)) if it were governed by the law of England and Wales, and
 - (b) whether the agreement is valid and enforceable as a contract under the law of the other territory is irrelevant in deciding whether the agreement is a qualifying nuptial agreement.

The variation requirement

- 8 (1) A nuptial agreement meets the variation requirement if any agreement that is made by the parties to vary the nuptial agreement meets –
- (a) the formation requirement,
 - (b) the timing requirement,
 - (c) the disclosure requirement,
 - (d) the advice requirement, and
 - (e) the validity requirement.
- (2) Paragraphs 3 to 7 apply for the purposes of this paragraph, reading references there to a nuptial agreement as references to an agreement to vary a nuptial agreement.”
- (7) In section 17 of the Inheritance (Provision for Family and Dependants) Act 1975 (variation and revocation of maintenance agreements), in subsection (3), for the words from “agreement between the parties” to the end substitute “legally binding agreement between the parties”.

6 Qualifying nuptial agreements: overseas divorce etc

- (1) Part 3 of the Matrimonial and Family Proceedings Act 1984 (financial relief in England and Wales after overseas divorce etc) is amended as follows.
- (2) After section 18 insert –

“18A Qualifying nuptial agreements

Schedule A1 to the Matrimonial Causes Act 1973 (qualifying nuptial agreements) applies to the exercise of a power under section 17 of this

Act as to the exercise of a power mentioned in paragraph 1(1) of that Schedule.”

- (3) In section 19 (consent orders for financial provision or property adjustment), in subsection (1), after “section 18” insert “or 18A”.

7 Qualifying nuptial agreements: civil partnerships

- (1) Schedule 5 to the Civil Partnership Act 2004 (financial relief in the High Court or a county court etc) is amended as follows.
- (2) After Part 7 insert –

“PART 7A

QUALIFYING NUPTIAL AGREEMENTS

The rule

- 37A (1) This paragraph applies if a qualifying nuptial agreement is in force with respect to the civil partnership when the court is deciding whether and, if so, how to exercise a power in relation to a civil partner in the civil partnership under –
- (a) Part 1 (financial provision on dissolution etc) by virtue of paragraph 2(1)(a), (b) or (c),
 - (b) Part 2 (property adjustment orders),
 - (c) Part 3 (sale of property orders),
 - (d) Part 4 (pension sharing orders), or
 - (e) Part 4A (pension compensation sharing orders).
- (2) The court must not exercise the power in a way that is inconsistent with the qualifying nuptial agreement unless it is doing so –
- (a) to meet the needs of either civil partner, or
 - (b) in the interests of a child of the family.
- (3) What counts for the purposes of sub-paragraph (2)(a) as the needs of a civil partner is to be determined having regard to all the circumstances of the case, giving first consideration as required by paragraph 20 and having regard in particular to the matters mentioned in paragraph 21(2).
- (4) See below for the meaning of “qualifying nuptial agreement”.

Qualifying nuptial agreements

- 37B (1) A “qualifying nuptial agreement” is a nuptial agreement that meets –
- (a) the formation requirement,
 - (b) the timing requirement,
 - (c) the disclosure requirement,
 - (d) the advice requirement,
 - (e) the validity requirement, and
 - (f) the variation requirement.

- (2) A qualifying nuptial agreement is “in force” at any given time if all of those requirements are met with respect to the agreement at that time.
- (3) In this Schedule, “nuptial agreement” means an agreement between the civil partners in a civil partnership (whether made before the civil partnership was formed, during its continuance or after any dissolution or annulment of it) that includes any provision for the financial consequences of—
 - (a) the making of a separation order,
 - (b) dissolution of the civil partnership, or
 - (c) annulment of the civil partnership.

The formation requirement

- 37C (1) A nuptial agreement meets the formation requirement if—
- (a) it is made by deed validly executed by each party (or by persons authorised to execute it in the name or on behalf of each party), and
 - (b) it contains a relevant statement made by each party.
- (2) A “relevant statement” is a statement that the party understands—
- (a) that the agreement is a qualifying nuptial agreement, and
 - (b) that, under the law of England and Wales, it will have the effect described in paragraph 37A.
- (3) In this paragraph—
- (a) “party” means a party to the agreement, and
 - (b) the expression “validly executed” is to be construed in accordance with section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.
- (4) This paragraph applies to an agreement whose formation is governed by the law of a territory other than England and Wales as it applies to an agreement whose formation is governed by the law of England and Wales.

The timing requirement

- 37D A nuptial agreement meets the timing requirement if it is made at any time other than during the period of 28 days ending with the day on which the civil partnership is formed.

The disclosure requirement

- 37E (1) A nuptial agreement meets the disclosure requirement if, before the agreement is entered into, each party discloses to the other such circumstances (if there are any) as he or she is required to disclose under this paragraph.
- (2) The circumstances that a party is required to disclose are such of his or her circumstances as would reasonably be considered to be material to a decision by the other party to enter into the nuptial agreement on the relevant terms contained within it.

- (3) “The relevant terms” are those terms that make provision for the financial consequences of the making of a separation order or the dissolution or annulment of the civil partnership.
- (4) But the circumstances that a party is “required to disclose” does not include circumstances of which the other party is already aware when entering into the nuptial agreement.
- (5) If it is alleged that a party did not disclose circumstances that he or she was required to disclose under this paragraph, it is for that party to show that he or she did disclose those circumstances and, if that party cannot do so, the agreement does not meet the disclosure requirement.

The advice requirement

- 37F (1) A nuptial agreement meets the advice requirement if each party receives relevant legal advice from a qualified lawyer before the agreement is entered into.
- (2) “Relevant legal advice” means legal advice as to the terms and effect of the proposed agreement under the law of England and Wales.
 - (3) “Qualified lawyer” means a person who, under the Legal Services Act 2007 –
 - (a) is authorised by the Law Society or the General Council of the Bar to exercise a right of audience or conduct litigation, or
 - (b) is authorised by the Institute of Legal Executives to exercise a right of audience.
 - (4) A written statement signed by a party and a qualified lawyer to the effect that the party received relevant legal advice from the qualified lawyer before the agreement was entered into creates a presumption that that party received relevant legal advice from a qualified lawyer at that time (and it is then for anyone alleging the contrary to show that relevant legal advice was not so received).”

The validity requirement

- 37G (1) A nuptial agreement meets the validity requirement if, at least so far as the relevant terms are concerned, it is valid and enforceable as a contract.
- (2) “The relevant terms” has the meaning given in paragraph 37E.
 - (3) In determining for the purposes of this Part (but not otherwise) whether an agreement is valid and enforceable as a contract, any presumption of undue influence that exists in law (whatever the circumstances giving rise to the presumption) is to be disregarded.
 - (4) In the case of an agreement governed by the law of a territory other than England and Wales –
 - (a) the agreement meets the validity requirement if, at least so far as the relevant terms are concerned, it would be valid and enforceable as a contract under the law of England and Wales (as modified by sub-paragraph (3)) if it were governed by the law of England and Wales, and

- (b) whether the agreement is valid and enforceable as a contract under the law of the other territory is irrelevant in deciding whether the agreement is a qualifying nuptial agreement.

The variation requirement

- 37H (1) A nuptial agreement meets the variation requirement if any agreement that is made by the civil partners to vary the nuptial agreement meets –
- (a) the formation requirement,
 - (b) the timing requirement,
 - (c) the disclosure requirement,
 - (d) the advice requirement, and
 - (e) the validity requirement.
- (2) Paragraphs 37C to 37G apply for the purposes of this paragraph, reading references there to a nuptial agreement as references to an agreement to vary a nuptial agreement.”
- (3) In Part 11 (variation, discharge etc of certain orders for financial relief), after paragraph 59 insert –
- “59A(1) Sub-paragraph (2) applies to the exercise of a power conferred by this Part if a qualifying nuptial agreement is in force (within the meaning of paragraph 37B)) with respect to the civil partnership when the court is deciding whether and, if so, how to exercise the power.
- (2) The court may only exercise the power such that the overall effect, following exercise of the power, remains consistent with paragraph 37A(2).”
- (4) In Part 13 (consent orders and maintenance agreements), paragraph 69 (alteration of agreements by court during lives of parties) is amended as follows –
- (a) in sub-paragraph (2), for “The court” substitute “In the case of an agreement other than a qualifying nuptial agreement, the court”,
 - (b) in sub-paragraph (4), for “this paragraph” substitute “sub-paragraph (2)”,
 - (c) after sub-paragraph (4) insert –
- “(4A) In the case of a qualifying nuptial agreement, the court may by order make permitted alterations in the agreement –
- (a) by varying or revoking any financial arrangements contained in it, or
 - (b) by inserting in it financial arrangements for the benefit of one of the parties to the agreement or of a child of the family.
- (4B) For the purposes of sub-paragraph (4A), an alteration is “permitted” if it is made –
- (a) to meet the needs of a party to the agreement, or
 - (b) in the interests of a child of the family,
- and “needs” has the same meaning in this sub-paragraph as it has in Part 7A of this Schedule.”

- (d) for sub-paragraph (5) substitute –

“(5) The effect of an order under this paragraph is that the agreement is to be treated as if any alteration made by the order had been made by legally binding agreement between the partners.”, and

- (e) after sub-paragraph (7) insert –

“(8) In this paragraph, “qualifying nuptial agreement” has the meaning given in paragraph 37B.”

- (5) In that Part, in paragraph 73 (alteration of agreements by court after death of one party), in sub-paragraph (3), for the words from “agreement between the parties” to the end substitute “legally binding agreement between the parties”.

8 Qualifying nuptial agreements: overseas dissolution etc of civil partnership

- (1) Schedule 7 to the Civil Partnership Act 2004 (financial relief in England and Wales after overseas dissolution etc of a civil partnership) is amended as follows.

- (2) After paragraph 10 insert –

“Qualifying Nuptial Agreements

10A Part 7A of Schedule 5 (qualifying nuptial agreements) applies to the exercise of a power under paragraph 9 of this Schedule as to the exercise of a power mentioned in paragraph 37A(1) of that Schedule.”

- (3) In paragraph 12 (consent orders under paragraph 9), in sub-paragraph (4), for “paragraph 10” substitute “paragraphs 10 and 10A”.

9 Qualifying nuptial agreements: claims under the Inheritance (Provision for Family and Dependants) Act 1975

- (1) Section 3(2) of the Inheritance (Provision for Family and Dependants) Act 1975 (matters to which court is to have regard when exercising powers under section 2) is amended as follows.

- (2) In the third sentence (applications by surviving spouse) –

- (a) after “regard to” insert “(a)”;

- (b) for “; but” substitute “; and

- (b) any provision which –

- (i) is contained in a qualifying nuptial agreement that was in force with respect to the marriage (within the meaning of Schedule A1 to the Matrimonial Causes Act 1973) at the date of death, and

- (ii) states the intentions of the parties as to the financial consequences of the death of the deceased so far as relating to any possible claim by the surviving spouse under this Act;

but”; and

- (c) for “such provision” substitute “provision mentioned in paragraph (a)”.

- (3) In the fourth sentence (applications by surviving civil partner) –
- (a) after “regard to” insert “(a)”;
 - (b) for “; but” substitute “; and
 - (b) any provision which –
 - (i) is contained in a qualifying nuptial agreement that was in force with respect to the civil partnership (within the meaning of Part 7A of Schedule 5 to the Civil Partnerships Act 2004) at the date of death, and
 - (ii) states the intentions of the parties as to the financial consequences of the death of the deceased so far as relating to any possible claim by the surviving civil partner under this Act;
 - but”; and
 - (c) for “such provision” substitute “provision mentioned in paragraph (a)”.

10 Termination of qualifying nuptial agreements

- (1) In Part 2 of the Matrimonial Causes Act 1973 (financial relief for parties to marriage and children of family), after section 36 insert –

“36A Termination of qualifying nuptial agreements by parties

- (1) This section applies to any agreement between the parties to a qualifying nuptial agreement that would (but for this section) have the effect of terminating the qualifying nuptial agreement.
 - (2) The agreement between the parties is void unless it is –
 - (a) made in writing, and
 - (b) signed by or on behalf of both parties.
 - (3) “Qualifying nuptial agreement” has the meaning given in Schedule A1.”
- (2) In Part 13 of Schedule 5 to the Civil Partnership Act 2004 (financial relief - consent orders and maintenance agreements), after paragraph 73 insert –
- “73A(1) This paragraph applies to any agreement between the parties to a qualifying nuptial agreement that would (but for this paragraph) have the effect of terminating the qualifying nuptial agreement.
- (2) The agreement between the parties is void unless it is –
 - (a) made in writing, and
 - (b) signed by or on behalf of both parties.
 - (3) “Qualifying nuptial agreement” has the meaning given in paragraph 37B.”

General

11 Short title, commencement, application and extent

- (1) This Act may be cited as the Nuptial Agreements Act 2014.

-
- (2) This Act comes into force on such day or days as the Secretary of State may by order appoint.
 - (3) Different days may be appointed for different purposes.
 - (4) An order under subsection (2) is to be made by statutory instrument.
 - (5) Provisions of this Act do not apply if the principal agreement was made by the parties at any time before the day on which the provision of this Act in question comes into force.
 - (6) “The principal agreement” means the agreement that contains provision for the financial consequences of separation or dissolution or annulment of the marriage or civil partnership in question.
 - (7) This Act extends to England and Wales only.

DRAFT NUPTIAL AGREEMENTS BILL

EXPLANATORY NOTES

INTRODUCTION

- A.1 The draft Nuptial Agreements Bill is intended to give effect to recommendations made by the Law Commission in its Report, *Matrimonial Property, Needs and Agreements* (2014) Law Com No 343.
- A.2 This Report was the culmination of an extended project concerned with discrete topics within the law relating to the financial consequences of divorce and dissolution. The draft Bill relates only to one of those topics, namely nuptial (also called marital) property agreements; these are agreements made between married couples and civil partners, whether before or after the marriage or civil partnership is celebrated, in order to provide for the financial arrangements that are to follow the breakdown of the relationship.

THE DRAFT NUPTIAL AGREEMENTS BILL

- A.3 The draft Nuptial Agreements Bill confirms the abolition of the common law rule that nuptial property agreements are void if they make provision for the financial consequences of a future separation. It then develops the law by introducing a new form of nuptial property agreement: the qualifying nuptial agreement. It enables couples who wish to make their own arrangements for financial provision following divorce or dissolution to remove the discretion of the court to make orders inconsistent with the provisions of the agreement, except in relation to orders necessary to meet the financial needs of the parties. The term “needs”, as used in the Bill, is to be contrasted with, and distinguished from, the other two principles informing the court’s exercise of its discretion in financial relief cases, identified in the House of Lords’ decision of *Miller v Miller, MacFarlane v MacFarlane*,¹ the others being sharing and compensation.
- A.4 The Bill implements the Law Commission’s recommendations by amending existing legislation, principally the Matrimonial Causes Act 1973 and the Civil Partnerships Act 2004. It also makes consequential amendments to the Inheritance (Provision for Family and Dependents) Act 1975, the Forfeiture Act 1982, the Child Support Act 1991 and the Matrimonial and Family Proceedings Act 1984.

¹ [2006] UKHL 24, [2006] 2 AC 618.

COMMENTARY ON THE CLAUSES

Clause 1: abolition of public policy rule

- A.5 The courts in the 19th century developed a rule that agreements between the parties to a marriage about the financial consequences of a future and hypothetical separation were void for public policy reasons. The rule was consistent with the then current law relating to marriage and the enforceable duty of a husband and wife to live together. It never applied to agreements known as “separation agreements”, made at a point when a separation had happened or was about to happen. It was held in *MacLeod v MacLeod*² that the rule also did not apply to post-nuptial agreements in general, even where they contemplate a hypothetical divorce.
- A.6 In *Radmacher v Granatino*³ the Supreme Court held that the common law rule was “obsolete and should be swept away”. That statement may have abolished the rule, but it was not part of the issue to be decided in the case and so it is not clear that it had that effect. Accordingly, clause 1 abolishes the rule “if it still exists”, for both pre-nuptial and post-nuptial agreements.
- A.7 This abolition does not affect any further law as to the status of nuptial agreements in common law; in particular it has no effect on the weight that the courts may give to a nuptial agreement in making financial orders. The significance of an agreement in those circumstances is governed by the decision of the Supreme Court in *Radmacher v Granatino*.⁴
- A.8 Clause 1 concerns agreements that make provision for the “financial consequences” of future separation. “Financial” is not defined but it is intended to be read broadly to include, as a minimum, all the kinds of things for which orders for “financial relief” can be made, including, for example, occupation of the family home. Clause 1 does not affect terms of an agreement that deal with non-financial matters, such as terms dealing with the living arrangements for the children of the family.
- A.9 Clause 1(3) makes it clear that the abolition of the common law rule under subsection (2) does not affect the common law rule that terms within nuptial agreements purporting to limit or remove the court’s powers to make orders for financial relief upon separation are void; nor does it affect the court’s powers to make orders for financial relief at the end of a marriage or civil partnership. By contrast, qualifying nuptial agreements, defined in Schedule A1 to the Matrimonial Causes Act 1973 and Part 7A of Schedule 5 to the Civil Partnership Act 2004, do affect those powers.

² [2008] UKPC 64, [2010] 1 AC 98.

³ [2010] UKSC 42, [2011] 1 AC 534.

⁴ Above.

Clause 2: Maintenance agreements: marriage

- A.10 Section 34 of the Matrimonial Causes Act 1973 is concerned with “maintenance agreements”. These provisions were originally designed to regulate separation agreements (see paragraph A.5 above), in order both to confirm that terms purporting to remove the court’s discretion were void, and to provide that such terms did not make separation agreements void. Sections 35 and 36 give the courts jurisdiction to vary maintenance agreements.
- A.11 In *MacLeod v MacLeod*⁵ the Privy Council held that sections 34 to 36 are also applicable to post-nuptial agreements including those that contemplate a hypothetical, rather than actual, separation or divorce.
- A.12 Clause 2 of the draft Bill extends sections 34 to 36 of the Matrimonial Causes Act 1973 to include agreements entered into before the marriage or civil partnership takes place. Accordingly, following the abolition of the public policy rule referred to in clause 1, all three types of agreement (pre-nuptial, post-nuptial and separation agreements, whether or not these are made as qualifying nuptial agreements) are on the same footing. None is void for reasons either of public policy or because they purport to remove the court’s jurisdiction; all are subject to the court’s power of variation.
- A.13 Clause 2(3) replaces the definition of “financial arrangements” with a definition that reflects the terminology used in clause 1 of the Bill, as explained at paragraph A.8 above, and applies the section to, additionally, pre-nuptial agreements.
- A.14 Clause 2(5) amends the title of section 34 from “Maintenance agreements” to “Section 34 agreements” to reflect the extended definition of the agreements covered by this section. The remainder of the clause makes consequential amendments to the Matrimonial Causes Act 1973 and the other legislation set out at A.4 above.
- A.15 The clause has been drafted taking account of the amendments made to sections 35 and 36 of the Matrimonial Causes Act 1973 by the Crime and Courts Act 2013 (which are yet to be brought into force).

Clause 3: Maintenance agreements: civil partnerships

- A.16 Clause 3 makes amendments to the Civil Partnership Act 2004 to the same effect as those made by Clause 2 to the Matrimonial Causes Act 1973.
- A.17 The clause has been drafted taking into account the amendments made to paragraphs 69, 70 and 73 of Part 13 of Schedule 5 to the Civil Partnership Act 2004 by the Crime and Courts Act 2013 (which are due to be brought into force shortly).

⁵ [2008] UKPC 64, [2010] 1 AC 98.

Clause 4: Maintenance agreements: death

- A.18 Clause 4 amends section 17 of the Inheritance (Provision for Family and Dependents) Act 1975, which deals with the variation and revocation after death of what was formerly called a “maintenance agreement”.⁶ It brings it into line with the changes made to section 34 of the Matrimonial Causes Act 1973 and paragraph 67 of Schedule 5 to the Civil Partnerships Act by clauses 3 and 4 (respectively) of the Bill. It does this by substituting a new definition.

Clause 5: Qualifying nuptial agreements: marriage

- A.19 Clause 5 amends Part 2 of the Matrimonial Causes Act 1973. It deals with the effect of qualifying nuptial agreements, which are defined in additions to the schedules to the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004, explained below at paras A.29 to A.48. Qualifying nuptial agreements are a new form of enforceable nuptial property agreement that restrict the court’s jurisdiction to make financial orders on the dissolution of marriage that are inconsistent with the terms of the agreement, except where such orders are necessary to meet the needs of a party.
- A.20 Clause 5(2) inserts section 25G into the Matrimonial Causes Act 1973 and gives effect to Schedule A1 as inserted by clause 5(6) and explained below at paragraphs A.29 to A.43.
- A.21 Clause 5(3) amends section 31 of the Matrimonial Causes Act 1973. This amendment ensures that where a court exercises its power to vary, discharge or enforce certain orders that have already been made for financial relief, and a qualifying nuptial agreement is in force, the court can only exercise its powers consistently with the limits on its powers under paragraph 1 of the new Schedule A1, as explained at paragraphs A.26 to A.28 below. That is, only to meet the needs of a party to the marriage or in the interests of a child of the family.
- A.22 Clause 5(4)(a) amends section 35 of the Matrimonial Causes Act 1973 to exclude qualifying nuptial agreements from section 35(2). This creates a distinction between the court’s power to vary qualifying nuptial agreements, which is set out in the new subsections 2A and 2B added by clause 5(4)(b), and the court’s power to vary nuptial agreements which are not “qualifying”. In the case of non-qualifying nuptial agreements, the court retains the power to alter an agreement where there has been a change in circumstances that requires an alteration or in the interests of a child of the family, as set out at section 35(2).

⁶ See para A.10 of these Notes.

- A.23 Clause 5(4)(b) inserts new subsections 2A and 2B into section 35 of the Matrimonial Causes Act 1973. These subsections set out the circumstances in which a court may make an order to vary a qualifying nuptial agreement. A court may only make permitted alterations to a qualifying nuptial agreement. Under the new subsection 2B, an alteration will be “permitted” where it is made in order to meet the needs of a party or in the interests of a child of the family. So the court can alter a qualifying nuptial agreement to the same extent as it can make orders inconsistent with a qualifying nuptial agreement that is in force under the new Schedule A1 (explained below at paragraphs A.26 to A.29). Subsection 2C (also inserted by Clause 5(4)(b)) sets out that, following alteration by the court, a nuptial agreement, whether qualifying or not, is to continue to have effect as if any alteration had been made by legally binding agreement between the parties. This replaces the former wording which provided that the effect of an alteration of an agreement by the court would be “...as if any alteration made by the order had been made by agreement between the parties and for valuable consideration.”
- A.24 Clause 5(5) amends section 36(4) of the Matrimonial Causes Act 1973 to state that where alterations to an agreement are made by the court after the death of one party to the marriage, the agreement shall continue as if the alteration had been made by “legally binding agreement between the parties” before the death of the party. This amendment ensures that the language used to describe the effect of a variation by the court of an agreement is now consistent across sections 35 and 36 of the Matrimonial Causes Act and section 17 of the Inheritance (Provision for Family and Dependants) Act 1975. As qualifying nuptial agreements are made by deed, as described below at paragraph A.33, the words previously used in section 35(2) to describe the effect of the variation are not suitable.

Qualifying nuptial agreements

- A.25 Clause 5(6) inserts a new Schedule A1 into the Matrimonial Causes Act 1973 and introduces and defines the qualifying nuptial agreement.

Effect of such agreements

- A.26 Paragraph 1(1) of the new Schedule A1 sets out that paragraph 1 applies where a qualifying nuptial agreement exists between the parties to the marriage and the court is deciding whether and how to exercise a power under sections 23(1)(a), (b) or (c), 24, 24A, 24B or 24E of the Matrimonial Causes Act in relation to a party to the marriage. These sections give the court the power to provide financial relief to parties in the context of divorce, nullity or judicial separation.
- A.27 In such a case, paragraph 1(2) provides that the court cannot exercise those powers in a way that is inconsistent with the terms of the qualifying nuptial agreement unless it is doing so to meet the needs of a party to the marriage or in the interests of a child of the family. “Needs” includes financial needs arising from the obligations and responsibilities of a party, for example caring for children of the family. Paragraph 1(2)(b) of the new Schedule is to be read with section 29 of the Matrimonial Causes Act, which deals with the duration of financial provision orders for children, and age limits on making certain orders in their favour. Paragraph 1(3) confirms that needs must be understood in the light of section 25 of the Matrimonial Causes Act.

- A.28 The effect of a qualifying nuptial agreement is therefore not to remove the court's jurisdiction in areas covered by the agreement. Rather, it prevents the court from making financial orders that are inconsistent with the qualifying nuptial agreement. This allows the court to make orders dealing with the whole range of financial remedies that might be needed in any particular case.

Definition of a Qualifying Nuptial Agreement

- A.29 Paragraph 2 of the new Schedule A1 defines "qualifying nuptial agreement" as a "nuptial agreement" that meets six requirements as to formation, timing, disclosure, advice, validity, and variation.
- A.30 A "nuptial agreement" is defined at paragraph 2(3) of Schedule A1 as being an agreement between parties to a marriage (whether made before or during the marriage or after any dissolution or annulment of it) which makes provision for separation, divorce or dissolution of that marriage. Qualifying nuptial agreements can therefore be pre-nuptial, post-nuptial or separation agreements.

Formation requirement

- A.31 Paragraph 3 of Schedule A1 provides the "formation requirement" for qualifying nuptial agreements, which is that the agreement be made by deed and must contain a relevant statement.
- A.32 A "relevant statement" as a statement that each party understands that the agreement they are making is a qualifying nuptial agreement that will limit the court's powers as described above in paragraph 1 of the Schedule.
- A.33 Paragraph 3(3)(b) requires that the deed should be made in accordance with section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. That Act provides, among other things, for the formal requirements for an instrument to be a deed and for the valid execution of a deed.
- A.34 Paragraph 3(4) states that parties making an agreement whose formation is governed by the laws of a territory other than England and Wales must also comply with the "formation requirement" if the agreement is to be a qualifying nuptial agreement. This means that a foreign agreement, to be a qualifying nuptial agreement, must be made by a validly executed deed and that a relevant statement, as described above at paragraph A.32 must be included.

Timing requirement

- A.35 Paragraph 4 states the "timing requirement" for qualifying nuptial agreements. Qualifying nuptial agreements cannot be made within the period of the 28 days ending with the day of the marriage ceremony. The timing requirement is therefore only relevant in cases where the qualifying nuptial agreement is entered into before marriage.

Disclosure requirement

- A.36 The “disclosure requirement” is defined at paragraph 5. In order to make a qualifying nuptial agreement, both parties must disclose to the other such circumstances as would reasonably be considered “material” to a decision by the other party to enter into the relevant terms of the nuptial agreement, defined at paragraph 5(3) as those dealing with the financial consequences of separation. Paragraph 5(4) and 5(5) make further provision as to the disclosure requirement, including the burden of proof if non-disclosure is alleged.
- A.37 In relation to paragraph 5(5) the party against whom non-disclosure was alleged could also show, if that were the case, that what he or she did not disclose was not “material” to the decision or was already known about by the party alleging non-disclosure. If he or she were successful in doing so the agreement would still meet the disclosure requirement.

Advice requirement

- A.38 Paragraph 6 sets out the “advice requirement”. The parties must each receive advice from a qualified lawyer as to the effect of the whole agreement. A qualified lawyer, under paragraph 6(3), is defined so that this means a solicitor, barrister or legal executive. Paragraph 6(4) creates a rebuttable presumption that legal advice has been received by a party if the party and his or her lawyer have signed a written statement that he or she has received it.

Validity requirement

- A.39 Paragraph 7 defines the “validity requirement”, which is that a qualifying nuptial agreement must be a valid and enforceable contract, so far as its relevant terms are concerned. “Relevant terms” is to have the same meaning as described in paragraph 5 and explained at paragraph A.36 above.
- A.40 Under paragraph 7(3), in determining whether a qualifying nuptial agreement is a valid and enforceable contract, any presumption of undue influence is disregarded. This is the case whether such presumption arises from the facts of the parties’ relationship as a couple or another relationship that they have together. Undue influence can still be proved, rather than presumed, on the facts of the particular case.
- A.41 Paragraph 7(4) states the circumstances in which an agreement governed by the law of a territory other than England and Wales will be held to meet the “validity requirement”. Such agreements will meet the requirement where they would be valid and enforceable under the law of England and Wales were they subject to the law of this jurisdiction. Their validity or otherwise under the law of the foreign jurisdiction will not be relevant to their status as a qualifying nuptial agreement.

Variation requirement

- A.42 Paragraph 8 of the new Schedule sets out the variation requirement. If the parties to a qualifying nuptial agreement vary the terms of that agreement, the formation, timing, disclosure, advice and validity requirements must be met in respect of the varied agreement for it to remain a qualifying nuptial agreement. If the agreement is altered by the court, as explained at paragraph A.23 above, the variation requirement does not have to be met.

- A.43 Clause 5(7) amends section 17 of the Inheritance (Provision for Family and Dependants) Act 1975 so that where an agreement is varied after the death of one party to the marriage, the agreement shall continue as if the alteration had been made by “legally binding agreement between the parties” before the death of the party. This amendment ensures that where the court has altered a qualifying nuptial agreement, the altered agreement continues to have effect as if it were a qualifying nuptial agreement that had been varied by the parties.

Clause 6: Qualifying nuptial agreements: overseas divorce etc

- A.44 Clause 6 amends the Matrimonial and Family Proceedings Act 1984, Part III of which gives the courts of England and Wales the power to grant financial relief to parties who have divorced overseas, subject to certain conditions. Clause 6(2) adds section 18A to the Matrimonial and Family Proceedings Act 1984, which limits the court’s powers under section 17 of that Act (orders for financial and property adjustment) where a qualifying nuptial agreement exists between the parties. For this purpose “qualifying nuptial agreement” has the meaning it has under Schedule A1 of the Matrimonial Causes Act 1973 (as inserted by clause 5).
- A.45 Where this is so, as under paragraph 1 of the Schedule A1, the court cannot exercise those powers in a way that is inconsistent with the terms of the qualifying nuptial agreement unless it is doing so to meet the needs of a party to the marriage or in the interests of a child of the family.

Clause 7: Qualifying nuptial agreements: civil partnerships

- A.46 Clause 7 inserts a Part 7A into the Civil Partnership Act 2004. The effect of this Part, for the equivalent civil partnership legislation, is identical to the effect of Schedule A1 which the draft Bill inserts into the Matrimonial Causes Act 1973, as explained above in paragraphs A.25 to A.43.
- A.47 Clause 7(3) replicates, for the equivalent civil partnership legislation, the effect of Clause 5(3), described above at paragraph A.21, dealing with the court’s powers of variation or discharge of orders.
- A.48 Similarly, Clauses 7(4) and 7(5) replicate, for the equivalent civil partnership legislation, the provisions of Clauses 5(4) and 5(5), respectively, described above at paragraphs A.22 to A.24, dealing with the alteration by the court of agreements during the lives of the parties, or after the death of one party.

Clause 8: Qualifying nuptial agreements: overseas dissolution etc of civil partnership

- A.49 This clause amends Schedule 7 to the Civil Partnership Act 2004. The effect of this Part is identical to the effect of clause 6 of the Bill but applies to civil partnerships, rather than marriages, which have been dissolved overseas.

Clause 9: Qualifying nuptial agreements: claims under the Inheritance (Provision for Family and Dependants) Act 1975

- A.50 The Inheritance (Provision for Family and Dependants) Act 1975 enables the relatives of a deceased person, and some others, to make a claim against a deceased person's estate if the will, or the operation of the rules of intestacy (whichever is relevant), leaves that claimant without reasonable financial provision. The categories of people who can claim include a surviving spouse and a former spouse who has not remarried. A surviving spouse making a claim under the Act is not restricted, in contrast to all other categories of applicant, to claiming reasonable financial provision only for their maintenance.
- A.51 Clause 9 amends section 3(2) of the 1975 Act which sets out the matters to which the court is to have regard when deciding whether, and, if so, how to make financial provision for an applicant. This section already requires the court to consider, on an application for financial provision by a surviving spouse, what provision the applicant would have received had the marriage been ended by divorce rather than death. Clause 9(2) inserts a further additional factor to which the court must have regard on such an application: any provision included in a qualifying nuptial agreement which states the intentions of the deceased and applicant as they relate to a claim by the applicant under the 1975 Act.
- A.52 The court cannot be bound by any such provision. But it will be a matter for it specifically to take into account on such applications. Couples making a qualifying nuptial agreement may wish to use it, for example, to underline the intention behind financial provision (or the lack of) made in a will. The clause only addresses, in its amendment of section 3(2) of the Act, applications by a surviving spouse because of the more generous standard of provision available to such applicants. The court can take into account equivalent provisions contained in documents other than qualifying nuptial agreements (including other forms of nuptial property agreements) by virtue of section 3(1)(g) of the Act.
- A.53 Clause 9(3) makes an amendment of identical effect to the equivalent civil partnership legislation.

Clause 10: Termination of qualifying nuptial agreements

- A.54 This clause amends Part 2 of the Matrimonial Causes Act 1973 and Part 13 of Schedule 5 to the Civil Partnerships Act 2004. It makes provision for those situations where both parties to a qualifying nuptial agreement wish to terminate the agreement.
- A.55 Clause 10(1) inserts section 36A into the Matrimonial Causes Act 1973. It provides that an agreement by the parties to terminate a qualifying nuptial agreement will be void unless the agreement is made in writing and signed by, or on behalf of, both parties.
- A.56 Clause 10(2) inserts paragraph 73A into Schedule 5 to the Civil Partnerships Act 2004. The provisions of this paragraph mirror those of section 36A inserted into the Matrimonial Causes Act and are identical in effect and meaning.

Clause 11: Short title, commencement, application and extent

- A.57 Clauses 11(2), 11(3) and 11(4) make provision for the Act to be commenced on a day appointed by the Secretary of State. Clauses 11(5) and 11(6) make clear that the Act does not apply to any agreements made before it commences, nor to agreements made after it commences but which vary an agreement made before commencement of the Act.

APPENDIX B

RESPONSES TO CONSULTATION QUESTIONS NOT DEALT WITH IN THE REPORT

- B.1 There remain some questions, posed in the 2011 CP and the 2012 SCP, which we have not dealt with in the main body of the Report because the substance of the responses we received mean that the options raised in these questions could not be pursued. In order not to make the main body of the Report too long, we set out these questions and an overview of the responses we received to them below.

Should reform be postponed to await a wider review of the law of financial orders?

- B.2 At paragraph 5.72 of the 2011 CP we asked consultees if reform of the law relating to marital property agreements should be postponed to await a wider review of the law of financial orders.
- B.3 A large majority of consultees thought that reform regarding marital property agreements should go ahead without the need to await a wider review. Most did not see any particular desirability in postponing reform; a few thought that a wider review first would be ideal, but accepted that it was unlikely to be a priority at present. The Family Law Bar Association described such a review as a “mammoth undertaking”, which would require a fundamental re-examination of the basis of the current English law. The Family Law Society added that beginning with reforming the law relating to marital property agreements could encourage a wider review of financial orders and “spur government to act in a positive manner” to bring about other changes in the field of family law.
- B.4 Several consultees felt that reforming the law relating to marital property agreements was of such importance that it should not be postponed for any reason. Andrew Turek thought that “parties wanting to make their own arrangements should not be kept waiting”. Furthermore, some consultees commented that consistency between reform of marital property agreements and the existing law of financial orders would not be problematic. Joanna Miles said that she “would be surprised if any future reform of AR [ancillary relief] would depart drastically from the basic shape/ ideas currently underpinning AR” and felt that any reforms to the law relating to marital property agreements could easily sit alongside the current law on financial orders. The Law Reform Committee of the Bar Council also thought that “it should be possible to integrate reform in relation to marital property agreements into the existing law”.
- B.5 Prompt clarification of the law relating to marital property agreements was therefore deemed to be preferable.

Should qualifying nuptial agreements contain only terms relating to non-matrimonial property?

B.6 In our 2011 CP we gave two models for qualifying nuptial agreements. The first was a broad model which would be unlimited in the scope of their financial terms and so could govern all of the property owned by the couple. The second model was narrower and would contain only terms relating to the following property:

- (1) property acquired before the marriage or civil partnership;
- (2) property inherited by either party, before or during the marriage or civil partnership; and
- (3) property given to either party before or during the marriage or civil partnership.

B.7 The introduction of qualifying nuptial agreements in that narrow form would create an optional “community of acquests”. Under this model, pre-acquired, inherited or gifted property could be excluded from the scope of financial orders by a qualifying nuptial agreement. All other property acquired by either party during the marriage or civil partnership would remain subject to the law on financial orders. It could potentially be subject to a marital property agreement, but such an agreement would not be automatically binding and would be considered by the court under the current law.

B.8 We asked consultees whether qualifying nuptial agreements should be able to contain only terms relating to pre-acquired, gifted or inherited property. Consultees gave a wide range of views but of those who expressed support for the introduction of qualifying nuptial agreements, the majority thought that they should be able to cover all assets.

B.9 The main argument put forward in favour of the broad model in which qualifying nuptial agreements would cover all assets was that of autonomy. A number of consultees thought that the parties’ own choice should determine what property could be included in a qualifying nuptial agreement. The Family Law Society said that:

As part of the principle of maximal private ordering of adult relationships consistent with a liberal democracy, we strongly recommend that [a qualifying nuptial agreement] not be limited to preacquired, gifted or inherited property.

B.10 Related to the autonomy argument was the idea that reform should not take an unduly restrictive approach. Joanna Miles said:

It is a matter of chance what type of assets particular parties happen to have, and there may be good reason to want to exclude from sharing assets other than [pre-acquired, gifted or inherited property]. ... it might be asked whether the potential exclusion of marital (rather than pre- or non-marital) assets would be any more deleterious to the institution of marriage than the exclusion of pre-marital etc. Presumably the argument runs that assets acquired during the marriage are in some sense to be regarded as the fruits of joint endeavour, the joint partnership of marriage. But it is not at all clear why that should be the only available model of marriage – after all, we didn't think so until [*White v White*] – and other jurisdictions manage to accommodate separation ... there is nothing necessarily unfair about total separation of property, and so it should be open to parties to achieve this by agreement.

- B.11 Some consultees thought that restricting the application of qualifying nuptial agreements might lead to unfair results. 29 Bedford Row thought that problems might arise where the bulk of a couple's property is pre-acquired, gifted or inherited. In such cases, a qualifying nuptial agreement might create hardship, depending on the level of the safeguards in place. Mills & Reeve LLP concluded that:

... Our extensive experience shows that are other examples of situations in which a restrictive approach to marital property agreements would not necessarily help couples agree an arrangement that they think is appropriate and fair. ... Limiting the scope of qualifying nuptial agreements to only certain types of capital is too restrictive when most cases will involve some other capital or income elements.

- B.12 Several consultees also pointed out practical problems such as significant difficulties with identifying pre-acquired, gifted and inherited property that changes through time, for example if the other spouse makes contributions to such property and it increases in value. John Eekelaar noted that “there are well-known problems about tracing such properties and how to treat income from them”. He thought that the best way to deal with potential problems would be for individual agreements to specify which property was to be included and how it was to be identified, rather than to attempt to make general rules in advance. 29 Bedford Row thought that problems with tracing would be one of the “unfortunate consequences” of introducing qualifying nuptial agreements of limited scope.
- B.13 Several consultees thought that the narrow model encompassing only pre-acquired, gifted or inherited property would be fairer as it would mean that assets acquired during the marriage would still be shared. Elizabeth Morrison felt that this would “preserve the approach of treating marriage as a partnership as regards matrimonial property” and The Law Society believed that:

There is an inherent fairness in this limited form of agreement as there would be no attempt to directly regulate the marital wealth but rather the personal wealth brought into the relationship.

- B.14 A number of consultees thought that restricting qualifying nuptial agreements to pre-acquired, gifted or inherited property would be an efficient way of approaching reform as they would be the types of property parties would be most concerned about protecting, and the most likely to give rise to disputes. The Chartered Institute of Legal Executives said that pre-acquired, gifted and inherited property constituted “the types of items that cause many problems between spouses”. The Mission and Public Affairs Council of the Church of England referred to such assets as “important wider interests” which currently may be given insufficient protection in financial orders proceedings, adding that:

An opportunity to demarcate these interests by legal agreement from any subsequent valuation of the matrimonial estate may be wholly appropriate.

- B.15 The Law Society thought that pre-acquired, gifted and inherited property would “in most cases be easily identifiable”. However, other consultees who were in favour of limiting the scope of qualifying nuptial agreements to these types of property nevertheless felt that defining these categories might present some difficulties, albeit not insurmountable ones. The Family Law Bar Association mentioned a number of examples that might need attention, such as the status of a business that is in existence at the beginning of the marriage but grows later, or how distributions made to a beneficiary of a trust should be dealt with.

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.

- B.16 Very few consultees made any further suggestion for reform here beyond those already considered in our 2012 SCP. The majority response from the Judges of the Family Division said:

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. [Emphasis in original]

- B.17 Other consultees used this question as an opportunity to recommend other areas of family law for reform, for example, the Family Law Bar Association suggested:

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*.¹ 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.

B.18 Similarly, the Chancery Bar Association said:

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).

¹ *Fleming v Fleming* [2003] EWCA Civ 1841.

(c) How far should the existing anti-avoidance provisions in section 37 MCA be reformed; compare s. 10-12 1975 Act.

If it is not possible to contract out of needs using a qualifying nuptial agreement, should statute specify the level of needs for that purpose?

- B.19 In the 2012 SCP at paragraph 5.70 we asked for 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 agreement, statute should also specify the level of needs for that purpose. Some consultees reiterated in their response to this question that they did not believe that couples entering into qualifying nuptial agreements should be obliged to make provision for needs. The Centre for Child and Family Law Reform said:

Qualifying Nuptial Agreements (QNA) should play a key part in reducing the current uncertainty 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 out of provision for needs just as in Australia, where such agreements are binding even if needs are not met.

- B.20 On the whole, consultees were not of the view that the definition of financial needs should be any different in the context of qualifying nuptial agreements than needs as understood in the context of an application of the Matrimonial Causes Act 1973, section 25 factors. One member of the public said simply,

There is no logical reason for a separate definition of need in relation to qualifying nuptial agreements...

- B.21 Consultees were also concerned about the practical difficulties of defining needs in a way that could produce a fair outcome. The majority response from the Judges of the Family Division said:

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.

- B.22 Some consultees drew further attention to the need for each case to be assessed on an individual basis and felt that a statutory definition would be too prescriptive. The Association of Her Majesty's District Judges thought that "... 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." Whilst Resolution said:

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.

- B.23 Other consultees felt that a statutory definition, whilst not providing a definitive answer, could give some guidance about what provision had to be made. Manches LLP said in their 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.

- B.24 Only four consultees supported a statutory definition of needs in the context of qualifying nuptial agreements. Professor Anne Barlow answered our question with:

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.

- B.25 Overall, however, consultees were in favour of retaining the current understanding of needs, as it is found in the context of financial orders following divorce or dissolution. Most cited the need for the courts to retain their case-by-case discretion and the practical difficulties in drafting a workable and fair definition of needs as the reasons for this.

APPENDIX C

CASE STUDY QUESTIONS FROM THE 2012 SCP

CASE STUDY ONE

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

CASE STUDY TWO

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

CASE STUDY THREE

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

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?

APPENDIX D

SECTION 25 OF THE MATRIMONIAL CAUSES ACT 1973

[25 Matters to which court is to have regard in deciding how to exercise its powers under ss 23, 24[, 24A, 24B and 24E]

[(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24 [, 24A[, 24B or 24E]] [any of sections 22A to 24BB] above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), [section 22A or 23 above to make a financial provision order in favour of a party to a marriage or the exercise of its powers under section 23A,] 24 [, 24A[, 24B or 24E]] above in relation to a party to the marriage, the court shall in particular 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 that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

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

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

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

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

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

(g) the conduct of each of the parties[, whatever the nature of the conduct and whether it occurred during the marriage or after the separation of the parties or (as the case may be) dissolution or annulment of the marriage], if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

(3) As regards the exercise of the powers of the court under section 23(1)(d), (e) or (f), (2) or (4) [section 22A or 23 above to make a financial provision order in favour of a child of the family or the exercise of its powers under section 23A,] 24 or 24A above in relation to a child of the family, the court shall in particular have regard to the following matters—

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;
- (e) the considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c) and (e) of subsection (2) above.

(4) As regards the exercise of the powers of the court under section 23(1)(d), (e) or (f), (2) or (4), 24 or 24A [any of sections 22A to 24A] above against a party to a marriage in favour of a child of the family who is not the child of that party, the court shall also have regard—

- (a) to whether that party assumed any responsibility for the child's maintenance, and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
- (b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
- (c) to the liability of any other person to maintain the child.

[(5) In relation to any power of the court to make an interim periodical payments order or an interim order for the payment of a lump sum, the preceding provisions of this section, in imposing any obligation on the court with respect to the matters to which it is to have regard, shall not require the court to do anything which would cause such a delay as would, in the opinion of the court, be inappropriate having regard—

- (a) to any immediate need for an interim order;
- (b) to the matters in relation to which it is practicable for the court to inquire before making an interim order; and
- (c) to the ability of the court to have regard to any matter and to make appropriate adjustments when subsequently making a financial provision order which is not interim.]]

APPENDIX E

RESPONDENTS TO THE 2011 CP AND THE 2012 SCP

LEGAL ORGANISATIONS

Association of Her Majesty's District Judges
Bar Council
Centre for Child and Family Law Reform
Chancery Bar Association
Charles Russell LLP (law firm)
City of Westminster and Holborn Law Society
Family Justice Council
Family Law Bar Association
Family Law Society
Farrer & Co (law firm)
Institute of Family Law Arbitrators
International Academy of Matrimonial Lawyers
Irwin Mitchell Solicitors (law firm)
Law Reform Committee of the Bar Council
Law Society
Manches LLP (law firm)
Mills & Reeve LLP (law firm)
Mishcon de Reya (law firm)
Resolution
Society of Trust and Estate Practitioners
Stonewall
Tony Roe Solicitors
Unquoted Companies Group
Withers LLP (law firm)
29 Bedford Row (chambers)

OTHER ORGANISATIONS AND GROUPS

Board of Deputies of British Jews
Chartered Institute of Legal Executives
Christian Concern
Country Land and Business Association
Historic Houses Association

Institute for Family Business
Men's Aid
Mission and Public Affairs Council of the Church of England
Relationships Foundation

JUDGES

Mrs Justice Baron
Mr Justice Charles
Judge Rogers
Judge Million
Deputy District Judge Morrison
District Judge North
District Judge Regan
Lord Wilson of Culworth
Judges of the Chancery Division
Judges of the High Court (Family Division)

INDIVIDUAL LEGAL PRACTITIONERS

Henry Brookman (solicitor)
Dina Cooper (solicitor)
Valentine Le Grice QC (barrister)
Harriet Gore (barrister)
David Hodson (solicitor)
Steven Jackson (solicitor)
Aina Khan (solicitor)
Jonathan Middleton (solicitor)
Tracey O'Dwyer (solicitor)
Narinder Paul (solicitor)
Adrian Pellman (solicitor)
Rhys Taylor (barrister)
Julia Thackray (solicitor)
James Tillyard QC (barrister)
Andrew Turek (solicitor)
Tony Roe (solicitor)
Douglas Wade (notary and attorney in South Africa)
Nicholas Yates QC (barrister)
Marilyn Young (solicitor)

ACADEMICS

Professor Anne Barlow (University of Exeter)
Professor Chris Barton (Staffordshire University)
Dr Stephen Cretney (University of Oxford)
Dr Thérèse Callus (University of Reading)
Professor Susan Edwards (University of Buckingham)
Professor Lorna Fox O'Mahony (Durham University)
John Eekelaar (University of Oxford)
Judith Bray (University of Buckingham)
Dr Fae Garland (University of Exeter)
Dr Robert George (University of Oxford)
Peter G Harris (University of Oxford)
Joanna Miles (University of Cambridge)
Professor J T Oldham (University of Houston)
Nick Rees (Oxford Brookes University)
Dr Jens M Scherpe (University of Cambridge)
Dr Kathryn O'Sullivan (University of Limerick)
Dr Mary Welstead (Visiting Professor at the University of Buckingham)

OTHER INDIVIDUALS

Baroness Ruth Deech QC (Chair of the Bar Standards Board)
David Norgrove (former Chair of the Family Justice Review)
Alec Samuels (former barrister and reader in law)

MEMBERS OF THE PUBLIC

Many members of the public responded to our two consultations; because so many of these responses were confidential, we have not published the names of any members of the public in this Report but we are extremely grateful to all those who shared their experiences and opinions with us.

