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# The Law Commissions review of financial remedy law after divorce and dissolution of Civil Partnership

On 4 April 2023, The Law Commission announced its next review of the laws that determine how finances are dealt with after divorce and dissolution of civil partnership. This review has been announced 50 years after the passing of The Matrimonial Causes Act 1973 (*'The MCA'*) and almost 20 years after the passing of The Civil Partnership Act 2004. The review will consider whether the current law is effective and provides fair and consistent outcomes. Preliminary work has begun on the project and the aim is for a scoping paper to be published in September 2024; this paper may pave the way for a full review and reform of financial remedy law.

Some may argue that this review is long overdue and is a natural next step after the introduction of no-fault divorce law last year which was a bold move towards minimising the risk of conflict and uncertainty in family law cases. However, others may argue that the law governing financial remedy applications is now sufficiently clear. The case of *WC v HC* [2022] that was before Mr Justice Peel seems to be a case in point for the latter school of thought. At paragraph 21 of his judgment Mr Justice Peel set out a very clear and comprehensive reminder of the general law applicable to financial remedy applications (the below is paraphrased):

- There is a two-stage exercise, computation and then distribution
- The outcome ought to be as fair as possible in all the circumstances
- There should be no discrimination between husband and wife and their respective roles

- S25 criteria is to be applied with the first consideration being the welfare of any child of the family
- There is a strong encouragement for a s25A clean break
- Needs, compensation and sharing are the essential principles
- The principle of compensation being applied successfully is very rare
- Where the result of applying the needs principle is an award greater than the result of applying the sharing principle, the former shall prevail
- It is only in cases where there is a surplus of assets that the sharing principle will be successfully applied
- Essentially, the sharing principle is the equal division of marital assets with non-matrimonial assets to be retained by the party to whom they belong, unless there is good reason otherwise
- Drawing the distinction between marital and non-marital assets can be difficult. Non-marital wealth includes property brought into the marriage by one party; property generated by one party after separation; and inheritance or gifts. Assets that start out as non-matrimonial can become matrimonial and such will depend on the circumstances
- Needs are an elastic concept
- The standard of living the couple had together during the marriage should be reflected as far as possible after the marriage as far as the available financial resources permit it
- Needs should be set at a level as close as possible to the standard of living enjoyed

during the marriage

- Standard of living is not an inflexible guide
- Source of wealth is relevant to needs

The outcome of this case involved Mr Justice Peel determining an appropriate award based on his assessment of the wife's needs. The length of the parties' relationship; the children's needs; the available financial resources; the standard of living during the marriage; the source of the wealth; and the existence of a post-marital agreement were also factors considered. In total, the wife was awarded approximately 60% of the total assets. At paragraph 67 Mr Justice Peel said, *"s tepping back and looking at it in the round, in the light of all the s25 criteria, with the children as my first consideration, I am confident that this is a fair outcome for both parties"*.

If the law in relation to financial remedy after divorce or dissolution of civil partnership is settled, then maybe it is more of a question as to whether the law is uniformly applied. The Law Commission lists one of the specific areas of its review being consideration of the discretionary powers given to Judges when determining financial awards and whether there is a requirement for a clear (or clearer) set of principles to provide much more certainty of outcome to separating couples. Some may argue that the current law relies too much on understanding and interpreting case law and this is not helpful in most modest cases (as it tends to be the higher net worth families who appear in reported cases). Those who are involved in higher net worth, international, or more complex cases may argue that the current discretionary approach works as it provides flexibility and a more formulaic approach may result in significant injustices.

However, it seems that financial *'needs'* remains an elastic concept which is open to wide judicial interpretation and can also be mistakenly interpreted by parties as aspirational expenses. In as far back February 2014, The Law Commission produced their Matrimonial Property, Needs and Agreements report. The question of what it meant to meet each other's financial *'needs'* was central. It was concluded that the law on this point was not in need of statutory reform, as in practice the Orders made by the Courts and other financial settlements often lead the parties to financial independence. It was acknowledged that clarifying guidance should be produced by the Family Justice Council. The guidance subsequently produced explained the primary needs in most cases are for housing and that present and future income and needs will be measured by assessing the available financial resources and the standard of living during the relationship. The guidance and subsequent case law goes some way to providing a clearer definition, but perhaps it is lacking

in precision.

The Law Commissions current review will also consider other specific areas such as whether there should be wider powers given to the Courts to make orders for children over the age of 18; how maintenance payments for ex-spouses or civil partners should work; what consideration the Courts should give to the behaviour of separating parties when making financial Orders; and Orders relating to pensions and whether they are overlooked when dividing the separating parties' assets. Whilst these are important issues, there remain other areas of family law upon which many feel parliamentary reform would be helpful. These include the law in relation to cohabitees, the enforcement and recognition of foreign orders and the recognition and enforcement of qualified pre- and post-nuptial agreements.

It will be interesting to read the outcome of The Law Commissions review in hopefully the autumn of 2024. It has been said that the exercise will involve a comparative review of laws determining finances on divorce in other common law and civil law jurisdictions, the latter of which operate matrimonial property regimes, which are selected by couples when they marry or enter civil partnerships. Will the report favour the current bespoke and discretionary approach used by applying the s25 factors in the MCA, or will the report favour a more certain and clear set of principles and possibly even a formula that is designed to *'fit most'* families.

This is a huge exercise and no doubt The Law Commission will be keen to hear from those that operate in this area of the law on a day-to-day basis; there will likely be a very mixed bag of views. The International Family Law Group LLP will continue to monitor the progress of the report and will provide an update once more information is published. An extended article on this topic is to follow from Partner and Professor David Hodson OBE KC(Hons) MCIArb.

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