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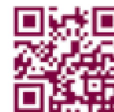

Reform of s25 criteria for a divorce financial settlement: after 50 years it’s time for the Law Commission to propose a new law

The statutory criteria to decide what is a fair financial settlement on divorce comes from the Matrimonial Causes Act 1973, now almost 50 years old. In reality it derives from judge made law. This has the benefit of being responsive and able to change. It has the disadvantage that there is no public or policy input into the law or changes in the law. It has the significant difficulty that by reference to almost unfettered discretion with propensity for contradictions or nuances in the judge made law it encourages litigation and discourages early settlement.

David Hodson has proposed to the Law Commission, in its request for topics for its 14th programme of reform, that there should be a review of the criteria for fair and appropriate financial settlements. This sets out his proposals for the need for reform. It is in a question-and-answer process as required by the Law Commission for any submissions. It would be very helpful to hear from other lawyers and members of the public with their opinions on whether reform is needed and, far more problematical, that that reform should be.

In general terms, what is the problem that requires reform?

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Financial provision on divorce. Specifically, uncertainty of the law thereby leading to unnecessary and longer litigation and consequently unnecessary costs, delays and adverse impact onseparating families including indirectly on parenting.

Can you give an example of what happens in practice?

As a separating couple may be unclear whether an asset is marital e.g. because non-marital may have been mixed and mingled with marital assets or acquired shortly after separation or a sole asset put into the marital home or on the fringes of needs, and thereby whether it will be automatically shared, even after specialist legal advice, the matter has to go to an FDR as a minimum and sometimes either a final hearing or an unsatisfactory compromise. Clarity, certainty and predictability in law would allow far greater likelihood of earlier settlement and resolution.

To what area of law does it relate?

It is explicitly s25 Matrimonial Causes Act 1973, the criteria to be used in coming to a financial resolution on divorce. This is obviously now 50 years old. In reality it has no bearing on the present law apart from being a rudimentary checklist of some factors. In reality it is wholly judge made law which in itself has had a tremendous freedom to be progressive and responsive. But at the same time is not well known other than to specialist lawyers, has not had the opportunity of public debate and carries all the risks of judicial contradictions, concentration on bigger money issues and potentially being out of touch with some public opinion. Moreover, it had an absolute change in direction in 2000 with the then House of Lords decision of White, itself hugely commendable introducing a starting point of gender equality but has over the subsequent 20 years led to uncertainty as to how this works itself out in a number of situations. Some reforming judges have done their very best to state the position in some leading cases but either this is then contradicted/nuanced or then further distinguished.

Can you give us information about how the problem is approached in other legal systems?

I believe I have a good understanding because of my international perspective. Part of the problem of this reform is that there is no obvious model on which to borrow. But equally England is a leading player in the international family law environment and should be forming an innovative

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approach to fit the mid-21st-century, from which many other countries are then likely to borrow. The divide of course is between civil law and common law. The categorisation of marital assets found in the civil law system is now significantly stronger in England than 20 years ago.

But should any reform go much further towards a tougher division without flexibility? The common law has invariably been highly discretionary. But countries such as New Zealand have limited, fettered, discretion with characterisation of categories of assets. Again, their model is probably too harsh. It is believed they are reviewing it and this is a further reason for an English reform model to review. Australia places significant weight upon contribution which England should not borrow because we have the significant benefit of gender neutrality yet equality of roles. Many American states have similarities with England with discretionary criteria and variations on the weight given to categorisation.

I believe any reform will inevitably give significant weight to categorisation of assets and the discussion must be the circumstances in which there would be any departure. But should this be needs only or should there be some other and perhaps greater weight to hardship or prejudice caused by reliance on the marital relationship or undue benefit/hardship? I believe this may be one area for reform debate which is being discussed in places around the world.

Does the problem occur in all of the UK or any part?

The present law applies only in England and Wales. Northern Ireland generally follows the position in England. Scotland has always had a very different tradition in this area of law and outcomes on divorce can be significantly different between England and Scotland. This response is only in respect of England and Wales.

What you think needs to be done to resolve the problem?

After 50 years of judge made law on top of a very general piece of legislation, and specifically 20 years after a major change in direction, the law needs to be stated, and perhaps in places simply statutorily restated, after full public and parliamentary debate on what is now considered fair and appropriate financial provision on divorce for the mid-21st-century. A number of judges over this half century have done an incredible job responding to changes in the public mores, demographic expectations, gender equalities and changing patterns of family life and wealth holdings. So, in some respects it may be simply putting into statutory form where we have now got to, not least thereby in itself creating more certainty, predictability and reliability. Under no circumstances does

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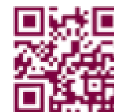

this response to the consultation suggest we should be kicking over all traces of the work done in these past 20 years.

But there are other elements which must now have far greater certainty, primarily in the arena of what assets will have a starting point of equal sharing. Moreover, I would want the previous excellent recommendations of the Law Commission in respect of marital agreements to be restated and incorporated in the same reformed law.

Moreover, previously the Law Commission passed to the legal profession the responsibility of defining needs. This itself is not chiefly the problem creating litigation but would warrant restating.

Spousal maintenance is in some ways separate to sharing of marital capital but also needs review although I strongly depart from those who believe it should be only ever short-term.

Finally in answer to this question, I believe strongly that reform of this law should be expected to have a life expectancy of several decades. It is inconceivable even by the end of this decade that we will continue to operate without the benefit of significant AI involvement. Our present law is almost impossible to operate through AI because of the breadth of discretion. I have argued previously that there should be more reference to this in our laws and the Law Commission has kindly acknowledge this e.g.: *"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."* Para 3.159 February 2015 report. I believe one significant driver for resolution of the problem is a law with significantly fettered discretion which in many cases can through AI lead to the outcome for a majority of cases.

What is the scale of the problem?

We are in England in a dreadful state of shortage of hard data regarding the family law justice system. We are compelled to rely on anecdote and legal experience. But the fact that we have so many cases dealing with financial remedies going through the courts must be some evidence although I acknowledge far more can be done to encourage matters through out-of-court resolution. However, mediation and other ADR operates in the shadow of the law which is difficult if the law is foggy; and I am a mediator and arbitrator and bring this experience.

It is particularly a problem with very many cases involving litigants in person, unable to afford legal fees or choosing not to involve lawyers, and yet with uncertainty about outcome disinclining

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towards settlement.

Greater certainty, on a law based after proper public and parliamentary debate and reform consultation, will lead to less litigation. Greater confidence in marital agreements should lead to less litigation, although I am fully aware of real anxieties about the gender inequalities in their formation. I believe the scale of the problem is significant.

What would be the positive impacts of reform?

Litigation is for the vast majority of ordinary people a horrid experience. It is expensive in money, time and energy. It can create distrust and polarisation, which is particularly harmful when at the same time many separating couples are trying to start their life afresh including co-parenting in a very different environment as separated parents. It can lead to physical and mental ill-health and have an adverse impact in the realm of employment and community life. So, reform must be aimed at overcoming these elements and similar. It cannot possibly be right that couples who have fallen out of love find themselves further apart as a consequence of the resolution process than when they first started, and yet too often this is what happens.

- We need a law which helps a couple resolve matters better in order better to move on with their lives both generally and specifically as parents.
- We must have a law which maintains an element of discretion which has been the keynote of the success in English family law over the past 50 years but equally have a law in which the discretion is not so unfettered and uncertain as to lead to the present unsatisfactory state of play.
- We must have a law that is susceptible to artificial intelligence providing the likely solution or, more probably, a narrower range of likely solutions than the present breadth provided by the judicial experience.
- We must have a debate about when the absolutely eminent marital sharing should

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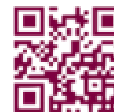

appropriately be limited in the very big money cases which probably does very little for the concept of marriage itself; this is a very sensitive and tricky subject but has to be addressed.

- We must have a law which allows people to settle more quickly and more cheaply with confidence and satisfaction about the fairness of both the process of resolution and the law of resolution.
- We must have a reform process in which we can hear from the public about whether the expectations of marriage have indeed changed, perhaps with the demographics and perhaps with societal patterns generally; judge made law has done pretty well but is obviously not open to that debate.
- We must also have a law which is holistic with other sexual relationships in our society: many would support some form of provision for cohabitants short of equivalence with marriage, but it is thoroughly unreliable to construct a cohabitation law on the relatively shaky foundations of a differential with the position on divorce given the concerns expressed in this response.

The ideal of course would be a staggered financial provision law, for divorce and civil partnership and then for the distinguishing with cohabitation. This might be a reform too far but would be holistically beneficial.

The overall benefits for our society generally and specifically for the directly affected divorcing population of quicker, better, less expensive, less adversarial, more predictable and satisfactory outcomes are immense.

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What would be the negative impact of the reform?

I cannot see any obvious! With any new litigation there is short-term uncertainty, so anyone involved in the legal reform process has to accept a short-term process of bedding in. But I remember the incredible reforms of the Children Act 1989, when I was directly involved in many seminars teaching the legal profession. This is one of the highlights of the English family law system, borrowed around the world. It was remarkable how quickly judges and lawyers adjusted, perhaps because there was so much acknowledgement of the benefits of the changes and the need for them. I would hope the same again. The negative impact of the CA was very limited. There would be no need of extra regulation or courts, and hopefully much less.

Does the problem adversely impact equality, diversity and inclusion by affecting certain groups in society or particular areas of the country more than others?

No, not to any material extent in my estimation.

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But in this regard, I have a particular anxiety based on the lack of awareness in our society of our present judge made law which adversely affects those unable to, or choosing not to, takeexpensive legal advice pre-marriage. At present, a premarital asset which is not mixed andmingled with marital assets or used for marital purposes will not be shared equally. Yet this goesagainst many traditions and many spouses will have their own volition put premarital assets intojoint names or in other ways use them jointly. They are then very surprised, because of the generalignorance of the law, when they find it is subject to equal sharing. Yet for those either wealthy orfrom a tradition or position of taking legal advice will be advised by specialist lawyers, such asmyself and my firm, to make sure that such assets remain separate and not mixed and mingledthereby making sure they are not shared on any divorce unless required for needs. I see this often.It is most unfair. If there was greater knowledge, arising from a public debate on reform of what isthe law or should be the law, then this would not occur. But this in itself begs an even greaterissue. If our present judge made law was actually known across society, I suspect it would have asignificant change in marital behaviour in the way assets are dealt with during the marriage. I'mnot sure that change is necessarily beneficial for marriage, it's longevity and its stability. But this isyet further reason why there must be a reform consultation and public debate, to overcome initself the unfairness of the different appreciation across sectors of society.

Why is it an independent non-political law commission the appropriate body to undertake this work as opposed to a government department, Parliamentary committee or non-government organisation?

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This reform requires wholesale consultation, analysis from academia, judiciary, legal practitioners and beyond, international perspective and demographic awareness. This is the very essence of the law commission as operating in England and Wales. It must also be remembered that the Law commission has done vital work already in this arena. Witness no-fault divorce many years ago, the clean break recommendations leading to the 1984 legislation, the work leading to the Children Act 1989, and then more recently albeit frustratingly not implemented the work in respect of marital agreements, on cohabitation reform and on needs and also, lesser but linked, enforcement of marital orders. So, the foundation has already been laid. Arguably others would not have the breadth to deal with this issue, but I acknowledge I do not have the expertise to answer this question more confidently.

Have you been in touch with any part of the government about this problem?

No but this consultation would be against the backdrop that over quite a few years a private members bill has been presented in the House of Lords on this very reform. I was involved at the outset of the discussions although not agreeing some of the content of the proposed reform. It seems unlikely the successive introduction of that private legislation will cease because it clearly has some support. Many family lawyers are unhappy with its content. I do not argue for reform on the basis of that draft legislation. But I have come somewhat reluctantly to the conclusion that we must now have statutory reform. I appreciate a number of the risks inherent in this process as distinct from a continuation of the judge made process of law. But 20 years on from White with still significant uncertainty, I have now come to the view that reform should now be statutory.

Is any other organisation currently considering this problem?

I am aware it has been discussed within family law organisations recently and over recent years. But I'm not aware of other discussions outside the family law profession.

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