Chancery Bar Association

THE CHANCERY BAR ASSOCIATION RESPONSE TO LAW COMMISSION

CONSULTATION PAPER 198

MARITAL PROPERTY AGREEMENTS

<u>This is a response to the proposal at paragraph 7.89</u>

The nature and purpose of the responding body.

(i) The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,000 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Membership of the association is restricted to those barristers whose practice consists primarily of Chancery work.

(ii) Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

(iii) Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

(iv) This response is the official response of the Association. It has been produced by Andrew Francis, Barrister, of Serle Court, 6 New Square, Lincoln's Inn, London WC2A 3QS, who is the author of "Inheritance Act Claims - Law Practice and Procedure (Looseleaf, pub. Jordans) (referred to below as "Francis") and Miranda Allardice, Barrister, of Pump Court Chambers, 3 Pump Court, Temple, London EC4Y 7 AJ, and who is a major contributor to that book.

The Response.

The proposal at para. 7.89 states:-

"We provisionally propose 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 under the Inheritance (Provision for Family and Dependants) Act 1975, save insofar as application is made for provision for maintenance (as that term is used in the context of the Inheritance Provision for Family and Dependants Act 1975).
Do consultees agree?"

1. Preface

(i) Reference is made here to paragraph 7.77 to 7.88 of the Consultation Paper. The context of the Consultation Paper is such that the questions arising in it do not deal with claims by those other than spouses or civil partners (or former spouses or former civil partners) under the 1975 Act. A preliminary question, therefore, arises as to whether or not (as part of the review of marital property agreements) agreements akin to such agreements made between cohabitees and those in other relationships should fall within the same considerations.

(ii) In this response, it is considered that in view of the issues that the Law Commission has already considered in its report "Cohabitation: the financial consequences of relationship breakdown (2007) Law Com No. 307) and in its consultation paper relating to Intestacy and Family Provision Claims on death (2009 Law Com. No. 191) this response will not deal with issues which may arise in respect of agreements which are designed to govern claims after the death of one of the parties to relationships which fall outside marriage, or civil partnership. That is not to say that issues might arise in the context of other relationships where "quasi" marital property agreements may have a role to play, but they will not be considered in this response given the context and purpose of the Consultation Paper.

2. Consideration of the proposal at para. 7.89.

(i) The reference to a marital property agreement in this paper refers to a "qualifying nuptial agreement" as effectively defined by paragraphs 5.7 to 5.8 of the Consultation Paper. It will, therefore, be assumed that any Marital Property Agreement ("MPA") will conform to the definition

and inherent validity of such an agreement as set out in those paragraphs of the Consultation Paper. But clearly the MPA in this context will be designed to restrict or modify the rights of the survivor of the marriage (or civil partnership) under the 1975 Act.

(ii) If a MPA is to be considered relevant and capable of affecting the surviving spouse's claim under the 1975 Act, the context is very different from the circumstances which apply in an ancillary relief claim on divorce where a MPA might also be relevant and applicable[1]. The contrast is a well known feature of such claims under the 1975 Act, given the "deemed divorce test" in s. 3(2) of the 1975 Act, but the Courts do their best to grapple with it, as in *Fielden v Cunliffe* [2006] Ch 361.

(ii) The distinctions between claims under the 1975 Act and those for ancillary relief following divorce are numerous, not the least being the effect of the death of one of the spouses, or civil partners upon the means of the family unit. Reference should be made here to, in particular, paragraph 7.87 of the Consultation Paper where it is wisely said that "widowhood may be far harder than the parties anticipated". This is frequently the case for many reasons, and not just financial ones. In addition, the imposition of rules which may affect the way in which people can dispose of their property on death may conflict with the overall principle of testamentary freedom in English Law. It is, however, the case that in practical terms such testamentary freedom is relative and is restricted, for example, by the 1975 Act itself. The express purpose of the 1975 Act is to ensure that the survivor of a relationship can apply to the court for relief from financial need. We would endorse the observation at paragraph 7.88 that the 1975 Act fulfils a public role in preventing hardship.

[1] Reference in this paper to a surviving spouse claim includes reference to a claim by a civil partner and also, where applicable to claims by former spouses, or former civil partners which have not been barred under sections 15, 15ZA, 15A or 15B of the 1975 Act.

(iii) Thus, any proposal to allow MPA to be given effect in 1975 Act claims must be considered against the background of the distinction to be drawn between the operation of a MPA in ancillary relief claims and the situation which applies after death.

3. Relevant considerations in 1975 Act claims as regards a MPA.

(i) The starting point for consideration for the proposal and question raised as paragraph 7.89 of the Consultation Paper is whether a MPA should be considered by the court in a 1975 Act claim at all.

(ii) It is suggested that the answer to this question should be 'Yes'. There is no policy reason why not. And for all the reasons recently expressed and in particular in *Radmacher*, there is no public policy reason to exclude a MPA which if formally and inherently valid from consideration. The MPA may certainly be "relevant" under the present law under section 3(1)(g) of the 1975 Act. Further, if the proposals recommended by the Law Commission in the Consultation Paper are enacted, then the relevance of the MPA will no doubt affect the "deemed divorce" factor in section 3(2) of the Act.[2] Relevance (as such) clearly accords with the recommendation at paragraph 3.84 of the Consultation Paper, namely that an MPA 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 of the marriage, or civil partnership. By the application of such considerations to 1975 Act claims and by virtue of the fact that the MPA provides for the distribution of the deceased's estate in a particular manner, the same conclusion as to relevance can be reached.

[2] See *P v G* [2006] 1 FLR 431, as to whether the divorce fiction provides a floor or a ceiling.

(iii) But, if an MPA is not void, or against public policy, how much further should it go beyond being merely a "relevant factor". Should it be determinative in excluding or modifying the claimant's rights? What about the rights of others such as beneficiaries? Should terms in wills or codicils preventing claims under the 1975 Act, or in other some way affecting the ability to claim (eg. conditional gifts[3]) be given greater force than at present?

(iv) One final relevant factor in the context of these questions is the jurisdiction to make barring orders in ss.15, 15ZA, 15A and 15B of the 1975 Act. At present it is generally thought that the presence of these sections prevents an exclusion of the jurisdiction by other means. So any reform will have to recognise that the jurisdiction to make barring orders does not affect the Court's jurisdiction to admit a MPA and thereby accept a restriction or limitation on the claim under the 1975 Act by that MPA.

(v) The proposal at 7.89 is interesting because:-

(a) It seems to go further than merely saying that the MPA should be, or can be a relevant factor, for example under section 3(1)(g). It clearly envisages that the MPA may have a *determinative* effect

(b) It deals only with a MPA and not with terms in wills etc. (or letters of reasons or wishes) which might affect the ability to claim under the 1975 Act.

[3] See for example *Nathan v Leonard* [2003] 1 WLR 827 and the discussion in Francis, Chapter 16, para. [5].

(c) It limits the effect of a MPA to any provision above the maintenance standard.

(vi) If paras. (v)(a) and (b) above are accepted as desirable in terms of reform[4], the remaining question arises as to whether the limitation in terms of maintenance is appropriate; (v)(c) above. If the limitation is seen as a safeguard, it does provide a minimum level below which provision cannot fall. This may however not be much use in practice in the context of claims where the higher standard applies (as it will in a surviving spouse's claim) for the following reason alone. And there may be others. Such a limitation may be too restrictive, given the contrast between the maintenance standard and the higher standard under section 1(2)(a) (or 1(2)(aa). In many cases, the standard of living enjoyed by the parties during the lifetime of both of them is one which should, in reality, be continued if at all possible, allowing for the value and composition of the net estate. In applying the divorce fiction (without an MPA) the family provision court could properly have regard to the standard of living enjoyed prior to the breakdown of the marriage, section 25(2)(c) Matrimonial Causes Act 1973.[5] In addition, as is recognised in paragraph 7.87, widowhood may be far harder than the parties anticipated. So not only will real hardship be encountered if the MPA is adhered to literally, but also real hardship may be encountered *even if the maintenance test is to be regarded as some form of minimum standard.* (For example a MPA which only allows provision of £X p.a. or £Y as a capital sum, which in terms may be sufficient for the claimant's maintenance but gets nowhere near the former style of living.) Further it does not address issue of increased needs; eg. by reason of residential care becoming necessary on the death of a carer spouse.

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[4] It is assumed that reform will not extend to giving any extra weight to reasons in wills or other documents as to why no provision, or only certain provision has been made. Such reasons may or may not be of any weight under s. 3(1)(g); see *Re Coventry* [1980] Ch 461, at p. 488H, per Goff L.J., and the other cases cited in Francis at Chapter 7 para. [15](b)

[5] In relation to cohabitees the Court of Appeal in *Negus v Bahouse* [2008] EWCA Civ 1002, indicate that the standard of maintenance should have regard to the lifestyle of the couple.

(vii) In addition, as is stated in other parts of the Consultation Paper where proposals deal with the effect of formal and inherent validity of agreements (Chapter 6) should not MPAs in the context of 1975 Act claims to be safeguarded in the same way? It would seem that this must be the case given the definition of a qualifying nuptial agreement at paragraph 5.8. But this needs to be clarified in the context of 1975 Act claims. It is important to recognise that a MPA (if taking effect as a restriction on the distribution of the estate to a claimant) should in policy terms rank equally in line with the formal validity and inherent validity requirements of wills, codicils, nominations, DMC and joint property interests. It could hardly be envisaged that an MPA could ultimately "outrank" the will or some other valid disposition of the deceased's estate if no less attended with formal or inherent requirements as to validity.

4. Conclusions

(i) It is considered that it would be right in accordance with the proposals set out in paragraph 7.89 that a qualifying nuptial agreement (if introduced into matrimonial law) can be taken into account and given effect to, so far as it restricts or modify the ability of either party to the relationship to apply to the court for provision under the 1975 Act.

(ii) Whilst it is clearly in the interest of the parties and in particular the surviving party to prevent any qualifying nuptial agreement from affecting a claimant's right to seek maintenance out of the net estate within the definition in section 2(1)(b) of the 1975 Act, there is some concern that in certain cases this may impose too low a threshold. Accordingly, 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. One example of this which has already been given is where the lifestyle of the parties to the marriage, or civil partnership was such that it went beyond the maintenance standard and there is no good reason given the nature and composition of the net estate (and no doubt all other relevant circumstances) to allow that to continue.

(iii) Given in particular the formal rules as the validity as wills and other testamentary documents and also the other formal rules as to other dispositions of property which may take effect on death, rules as to the formal validity and inherent validity of qualifying nuptial agreements which are to operate in the context of the 1975 Act claims should be strictly defined. It is suggested that such agreements should not only have on their face a record that both parties have been independently advised as to the legal effect of the agreement, or have at least had the opportunity to take such independent advice, but that in addition to the proposed requirements for validity set out in Chapter 6 the signature of each of the parties should be witnessed by an independent witness in the same manner as it required under the Law of Property Act (Miscellaneous Provisions) Act 1989 section 1 for the validity of Deeds. There is a residual concern that if qualifying nuptial agreements were to be introduced as potentially restricting or modifying the rights of parties to apply under the 1975 Act, (given the importance of such documents and the opportunities for their challenge) there might be some form of "growth industry" in such challenges. However, it is considered that this consequence may well be unavoidable and it is already encountered in the context of 1975 Act claims where prior questions are often the subject of determination in contentious probate proceedings as to the validity of wills and also in other proceedings as to the validity of lifetime trusts and other dispositions of property which may affect the net estate. So the safeguards above may be the only way to restrict such challenges and to protect the parties to such agreements.

(iv) As a matter of practicality specific amendment of the Act will be needed to require the Court to treat qualifying nuptial agreements as a relevant factor and for those to be taken into account when considering the claim. It is suggested that given the present proposal to limit the admission of qualifying nuptial agreements to claims by surviving spouses, or civil partnerships, the logical place to introduce the mandatory consideration of such agreements will be under sub sections (2) and (2AA) of section 3 of the 1975 Act. There will also have to be further specific provisions dealing with the maintenance limitation and (if adopted) the discretion to limit the effect of the agreement further where circumstances dictate.

11th April 2011.