CHANCERY BAR

RESPONSE BY CHANCERY BAR ASSOCIATION

TO LAW COMMISSION CONSULTATION PAPER 208

Matrimonial Property, Needs and Agreements

1.1.Introduction and General Observations.

1.2. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

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

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

1.5. This response is the official response of the Association to the Bar Council's consultation on the Practising Certificate Fee (PCF). It has been written by Andrew Francis and Miranda Allardice.

1.6. The response of the Chancery Bar Association is of course of limited scope in view of the nature of the work undertaken by the members of the Association.

1.7. It is also recognised any substantial reform of the Matrimonial Causes Act 1973, will require wide consultation beyond lawyers. It is clear that society at large has a vested interest in the financial consequences of relationship breakdown. See *Hyman v Hyman* [1929] AC 610 Lord Atkin held that one reason for the prohibition of a spouse from contracting out of their right to apply to court was; *"to prevent the wife from being thrown upon the public for support".*

2. In relation to Chancery work however, it is relevant to note the following points in addition to those made below where the questions in the Response Form and the terms of Consultation Paper No. 208 may have a bearing on Chancery practice:

(i) The corporate veil and sham trusts cases referred to below.

(ii) Offshore trusts and shares within companies held offshore and business assets.

(iii) Property held on constructive trust often held in the names of nominees for tax etc. purposes. Here for example, in buy to let properties there may be a need to ensure if not the property then the income is brought into account in the matrimonial context.

(iv) The "deemed divorce" test set out in section 3(2) of the Inheritance (Provision for Family and Dependants) Act; "the 1975 Act". This is a difficult test to apply, even under the present law. See Francis, Inheritance Act Claims, Law, Practice and Procedure, Chapter 8. It is clearly important that any reform (as contemplated by the present consultation paper) accommodates the need to apply this "deemed divorce" test as one of a number of factors relevant in applications by spouses etc. under the 1975 Act. A recent example of the weight that can be given to the fiction is found in the case of *Lilleyman v Lilleyman* [2012] EWHC 821 (Ch). The enactment, or change in guidance in the law for a divorcing couple will, therefore, impact upon the provision that is to be made for a surviving spouse. This will, therefore, relevant in all the areas under consideration:

(a) Marital Agreements (b) Non-Matrimonial Property (c) Needs.

See further observations on the 1975 Act in the response to para. 7.11 below.

(v) Further the reform of the law relating to Financial Remedies for divorcing spouses will be relevant to family succession planning. Thorpe LJ in *Radmacher* [2009] 2 FLR 1181 Para 27 expressed the view that a driver for the introduction of marital agreements in second marriages, was a desire to

protect the children of the first marriage and allow "first family property" to pass to the children of the earlier marriage.

(vi) A clearer enunciation of the matrimonial law relating to non-matrimonial property, (with the same being ring fenced to some extent), may give the testator/settlor greater confidence to make an outright gift to their child. Currently in big money matrimonial cases, there may be complex trust arrangements, under which both or one spouse only are beneficiaries. Here the matrimonial law may conflict with the law of trusts, with the matrimonial courts giving "judicious encouragement" to trustees, to finance an award to the non-beneficiary spouse, see the case of *Whaley v Whaley* [2011] EWCA Civ 617. What is judicious encouragement in the Family Division may be perceived to be improper pressure on the trustees.

(vii) Quite apart from the wider questions of non-matrimonial assets raised in the Response Form assets held (for example) under constructive trusts may well be the subject of an attempt to either set aside those trusts or to bring them within the matrimonial jurisdiction for the purposes of relief. This also applies to estoppel cases where there may be an overriding estoppel over the property. There is clearly a tension at present between those assets which are held on constructive trusts or subject to overriding estoppels and the jurisdiction of the Matrimonial Causes Act 1973 ("MCA") to bring those assets in to the assessment for the purposes of provision following divorce etc.

(viii) Under current law the MCA appears to trump any arguments as to constructive trusts etc between the married couple. The position will be

different if there third party interveners, whose beneficial interest has to be determined. However, if there is to be guidance on the treatment of non-matrimonial property, a number of potential problems need to be addressed. In particular, the apparent conflict between the legal ownership of a property; e.g. both parties on the title deeds of a holiday home (inherited by one party only). Which interest is to trump the other? The origin of the asset under the MCA, or recognition of the declaration in the TRI in which both have a beneficial interest?

(ix) No reference is made, as it seems to be outside the terms of reference in the Consultation Paper, to the fact that merely *cohabiting* parties are outside any form of statutory safeguard (compare the law in Scotland) and one of the questions which the Law Commission may have to consider (as it did in 2007) even within the context of the present Consultation Paper, is how far the questions raised in the Response Form should be considered alongside the interests of those who cohabit outside marriage or civil partnership.

The responses to the questions raised in the response form are as follows.

Paragraph 7.2

7.2 Do consultees agree with our central argument that the current law requires reform to ensure that the payment of spousal support is founded on a principled basis that explains what has to be paid by way of spousal support, and for how long?

Yes.

Paragraph 7.3

7.3 Should spousal support:

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

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

Paragraph 7.3(2) is preferred.

Paragraph 7.4

7.4 In answering the question at paragraph 7.3 above it would be helpful to hear consultees' views on the relevance or otherwise of:

(1) the length of the marriage;

(2) the marital standard of living;

(3) the way that joint responsibilities (for example, provision of childcare or care for an elderly parent) have been shared during the marriage and will be shared after its ending; and

(4) the occupation of the former matrimonial home following divorce.

All factors under sub paragraph 1-4 are relevant.

Paragraph 7.5

7.5 If consultees favour a principled reform of spousal support, should it take the form of:

(1) a reformed discretionary approach; or

(2) a formulaic calculation?

Paragraph 7.5(1) is preferred.

Paragraph 7.6

7.6 To what extent do consultees think that either a reformed discretionary basis or a formula should embody incentives towards independence by placing limits on the extent of support that might be given?

(a) There could be greater emphasis on the earning capacity of a party, e.g. in respect of welfare reforms a parent may be expected to work from the children attaining school age. Such a parent could be expected to either be in education to re-qualify or seek employment. There could be an attribution of an earning capacity built into any award, subject to the dependant spouse being able to show they had sought employment and failed to gain any.

(b) In arriving at a "fair" result the perception that the economically weaker party is at least contributing to their welfare in an important feature, for those paying periodical payments. The "meal ticket for life" may be perceived to be less offensive if the dependant spouse is contributing to her staple diet and requiring only top up sustenance

(c) Greater use of term orders where the dependant party bears the burden of bringing the matter back for a review, limited only to the issue of ongoing support.

(d) A tapered level of support e.g. 40% of paying parties' net income in first 3-5 years and thereafter falling to 20%

Paragraph 7.7

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

(1) who should do that work;

(2) what methodology should be adopted;

(3) what sort of timescale and investment would be required?

This is the responsibility of social scientists and not lawyers. It is suggested that organisations such as the Joseph Rowntree Foundation are approached to do the work and carry out the suggested research.

It follows that the case study on page 6 of the Response Form and the case study on page 7 on the Response Form is not something to which the Chancery Bar Association can usefully contribute. The same thing applies to the case study on page 8.

Paragraph 7.8

7.8 Consultees are asked to give us their views about the following possibilities for statutory and non-statutory reform.

(1) Statutory provision to the effect that the courts, in making provision for spousal need, must aim to ensure that a payee spouse is enabled to become independent within a reasonable period, while bearing in mind also that independence is unlikely to be practicable until the children of the marriage or civil partnership finish their education.

(2) An authoritative source of guidance for the courts and for members of the public about:

(a) the considerations involved in an assessment of need (see Supplementary Consultation Paper, Part 5, paragraphs 5.43 to 5.48);

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

(3) Provision about the following either by way of statutory amendment or in the form of authoritative guidance:

(a) the time within which independence is to be expected (see Supplementary Consultation Paper, Part 5, paragraphs 5.33 to 5.39);

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

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

(4) Who should provide that guidance? Would it be appropriate for it to be produced by the Family Justice Council in the form of Practice Guidance?

(5) Publication of that guidance on the information hub to be provided in response to the Family Justice Review.

The Family Law Bar Association will be better placed to contribute. However the following observations are offered:

(1) *Statutory Provision.*

The inclusion of Section 25A MCA directing consideration of termination of periodical payments does not contain any guidance as to what constitutes undue hardship. The absence of any such guidance may have lead to the Section being applied *sparingly.*

(2) An authoritative source of guidance for courts and the public

Other jurisdictions e.g. in Crime the Sentencing Council and in PI the General Damages Guidelines have been used in preference to statute.

(a) The considerations involved in the assessment of need

(i) The Law Commission has already identified that this is can be an elastic term e.g. in *Radmacher* a restrictive interpretation in the context of the recognition of agreements was adopted, whereas the phrase reasonable requirements was an expansive interpretation.

(ii) The problem for any comprehensive definition remains the context in which the definition is applied; i.e. the standard of living during the marriage S25 (c) MCA. There is a further difficultly as to how long this remains the relevant bench mark.

(iii) Further the evaluation by the parties of their needs, post separation, has to have regard to the fact that there may be one main income only to be apportioned. In compiling a Form E budget this feature in often ignored.

(iv) We would suggest that the work of the Joseph Rowntree Trust should assist in providing a comprehensive checklist of what particular constituent parts may make up the package of needs. The Joseph Rowntree Trust research on basic needs and wages may be of assistance at the cases where funds are very limited.

(b) The priority to be afforded to different elements

(i) Housing for both parties may be felt to be a central element in allowing separating couples and their children to make a difficult transition.

(ii) Prior to pension sharing, under the auspices of a *Mesher* Order, a wife often gave up her pension claim to secure a greater share of the bricks and mortar. However a strict application of the sharing principle in respect of different type of assets may in practice have reduced the availability of this useful order.

(3) Statutory amendment or guidance on the following matters.

(a) Time and independence.

Where one is dealing with children and/or long marriages a crude time frame may result in hard cases.

(b) Term Orders.

Term Orders would concentrate the mind of the dependant spouse on re-qualification or employment. The original order could contain what was expected of the spouse in terms of re-training etc. However, term orders would need to be able to be extended, if targets had been missed.

(c) Short childless marriages.

Either Statute or guidance could provide that for short childless marriages of up to 3-5 years an adjustment period of up to 3 years applied in the first instance (unless one party is disabled) or is without housing; e.g. by reason of loss of a secure tenancy.

(4) & (5) The Chancery Bar Association recognise the real concern of the Law Commission that the absence of public funds for divorcing couples requires the Guidance to be readily available to the lay parties.

Paragraph 7.9

7.9 Consultees are asked to tell us about any other reform measures that would make the law relating to needs more consistent and accessible, short of the fundamental and principled reform envisaged in Part 4.

Other areas from where may need to be considered are in the following topics.

(a) To what extent should the corporate veil be pierced following the recent decision in *Petrodel Resources Ltd & Ors. v Prest & Ors*. [2012] EWCA Civ 1395; understood to be subject to a possible appeal to the S.C. (See also in the issue of piercing the corporate veil, *VTB Capital plc v Nutritek Intl. Corp. & Ors.* (S.C. ref. UKSC 2012/0167) where judgment is awaited from the Supreme Court after the hearing on 12th November 2012).

(b) To what extent should sham trusts be the subject of reform so as to allow assets lying within such trusts to be available for provision? See, for example, *A v A* [2007] EWHC 99 (Fam).

(c) How far should the existing anti-avoidance provisions in section 37 MCA be reformed; compare s. 10-12 1975 Act.

Paragraph 7.10

7.10 We invite consultees' views as to whether, as well as stating that it shall not be possible to contract out of provision for needs by means of a qualifying nuptial agreement, statute should also specify the level of needs for that purpose.

The Law Commission make a charitable observation as to human nature that:

"Many of those entering into qualifying nuptial agreements will not be motivated by a desire to squeeze need to a minimum."

Whatever the motivation, one of the main arguments for marital agreements it that it gives parties certainty in their financial affairs. Therefore in order to achieve clarity for those engaged in drafting marital agreements, it may be necessary to ensure that need is not to be interpreted in the way limited by Lord Phillips as *"real need"* .

Rather that in determining whether the marital agreement amounts to a qualifying nuptial agreement, provision for needs will have to have regard to the standard of living during the currency of the marriage.

If a higher level of provision for need is to be endorsed then it should be made clear that any concept of needs within a marital agreement, should reflect the term as generally applied in matrimonial law outside the marital agreement arena.

<u>Paragraph 7.11</u>

7.11 We provisionally propose that non-matrimonial property, defined as property held in the sole name of one party to the marriage or civil partnership and:

(1) received as a gift or inheritance; or

(2) acquired before the marriage or civil partnership took place

should no longer be subject to the sharing principle on divorce or dissolution, save where it is required to meet the other party's needs.

Do consultees agree?

See the issues raised under paragraph 7.9 above.

No definite answer can be given as the question will require consideration of (a) needs and (b) what the application for provision should aim to achieve.

But in the context of the question relevant reference should be made to the jurisdiction under section 9(1) the 1975 Act, where the deceased's severable share in jointly owned property can (to such extent as appears to the Court to be just in all the circumstances of the case) be treated for the purposes of the 1975 Act as part of the net estate of the deceased. *This is in order to facilitate the award of reasonable financial provision under the 1975 Act.* Note that purpose. So we suggest that the proviso above is crucial, but how "needs" are defined will be key question.

Note as regards the quotation in para. 3.3 of the Paper, that under the 1975 Act the "bus driver" is told where to drive the bus; i.e. to answer the questions in s. 1 of that Act as to whether or not reasonable provision should be made at the appropriate standard for the claimant and according to that claimant's status under s. 1(1). Perhaps some form of approach under a reformed MCA will assist in defining the object of the application to be made under it.

Paragraph 7.12

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

This is a fact-specific question.

There are clearly extremes which can arise on the evidence.

On the one hand, there are large landed estates in which the main family home is situated (e.g. often a Grade 1 Listed historic house with surrounding parkland etc.) but this is not reflective of the majority of cases.

The majority of cases are those where the family home is of relatively modest value. In such cases it is suggested that the family home (if within the definition of non-matrimonial property) should be excluded unless it is unjust to do so. It should, therefore, be brought in where, for example, it is necessary to do so in order to satisfy needs.

One question which may arise under this heading is whether the family home (if within the definition of non-matrimonial property) should be treated as within the matrimonial property from the start, or should be treated outside at the start and only bought in at the later stage where it is necessary to do so in order to satisfy needs etc.

Paragraph 7.13

7.13 We ask for consultees' views on whether property acquired by one party during cohabitation with the other party should be excluded from the definition proposed above.

Where the parties remain cohabitees only, the current law respects property rights. The recent case law of *Stack v Dowden* and *Kernott & Jones* allows for the operation of a constructive trust as opposed to a resulting trust, but does not provide for the relationship per se to determine the outcome of a constructive trust case. The definition proposed at 6.41 of the Consultation Paper proposes that all property,

acquired prior to the marriage held in the sole name of the party, should not be subject to the sharing principle. As the definition stands property acquired in one party's sole name during a period of cohabitation would be excluded, from the sharing principle save where it was required for needs.

There is a potential problem for same sex partners, where civil partnership was not available pre December 2005. It may be that specific provision would have to be considered to protect this group who had long lead in times to their civil partnerships.

Paragraph 7.14

7.14 We provisionally propose that non-matrimonial property should not lose its status as such merely by virtue of having been used by the family.

Do consultees agree?

No.

This is because use alone should not be sufficient to alter the nature of non-matrimonial property to matrimonial property. Evidential questions will abound. For how long should the "family use" have been taking place? In what circumstances? How many "homes" are there which are owned by each party? What is "use"? The example of a holiday home is given. This type of non-matrimonial property is likely to attract arguments of improvement etc. by an active "DIY" homebuilder spouse and perhaps illustrates the problems of the MCA "trumping" constructive trust claims.

Paragraph 7.15

7.15 We provisionally propose that where non-matrimonial property has been sold and substitute property bought, that property should be matrimonial property if it has been

bought for use by the family, save where the substitute property is of the same kind as the property sold.

Do consultees agree?

Yes in brad terms.

The illustration at para. 6.82 of the Paper indicates a positive decision by one spouse to allow the mingling of assets. If there is a deliberate decision e.g. by placing the same in joint names, that decision should be recognised by the MCA. But not if the facts are otherwise. But as with para. 7.14 above, the evidential issues which will arise may be complex; e.g. over what is the "same kind" of property; e.g. one sports car for another, where the latter turns out to be far more valuable when the application if made. The same can apply to the example of the picture at para. 6.81 of the Paper.

Paragraph 7.16

7.16 We provisionally propose that where non-matrimonial property has been sold and the proceeds invested in matrimonial property, the property (following that investment) should be matrimonial property.

Do consultees agree?

Yes in broad terms.

Here there is a further intermeshing of the non-matrimonial property into the family unit and interdependence. But as under 7.14 and 7.15 above, complex evidential issues can arise, as they do in tracing claims where (for example) the errant trustee is in breach of trust and the tracing remedy has to be applied to the funds used; see Snell's Equity, 32nd Edn. 30-050 ff and see the entire Chapter (41) devoted to this complex

subject in Lewin, Trusts, 18th Edn. Any reform will have to tread carefully here and any rules will need to be precise and practical if they are to work.

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It is recognised that matters at paras. 7.14 - 7.16 may all be the subject of a further regulation by the parties entering into a marital agreement. Therefore, those concerned to opt out of sharing any pre-acquired or inherited property are likely to be able to do so subject to the important caveat of satisfying needs.

Paragraph 7.17

7.17 We ask consultees to tell us whether they think that it is possible to devise rules – or a guided discretion – for the treatment of cases where non-matrimonial property has grown due to the investment of one or both the spouses? What values should be expressed in those rules?

The case of *Jones v Jones* [2011] EWCA Civ 41 attempted by the use of forensic accountants to identify:

(i) The value at the time of the marriage

(ii) The value at the point of exit from the marriage

(iii) The economic passive growth using the FTSE

Wilson L.J. accepted that the result was somewhat arbitrary, but had the advantage of a transparent method being adopted.

It is agreed that the current case by case basis is not satisfactory, for devising a transparent mechanism and that guidance is needed.

As to tools one can use the RPI/CPI Tables (e.g. in respect of a pecuniary legacy) and other Indices in respect of house values and prices.

The more difficult issue is the values to be applied in either ring fencing or allowing access to the investments.

See also the comments at 7.15 and 7.16 above.

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