



What the Law Commission is really saying about pre-nups

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"When you are discontent, you always want more, more, more. Your desire can never be satisfied. But when you practice contentment, you can say to yourself, 'Oh yes – I already have everything that I really need'". (Dalai Lama).

Oh, if everything was that simple! In the world of financial remedies, very little is. Financial 'need' has become a dominant factor in most cases involving the division of finances on divorce and dissolution of a civil partnership.....whether it is expressed as a need for a £5million apartment in Knightsbridge or for a modest bungalow in Somerset....

Significant divergence in local court approaches to the assessment of financial 'needs' led the Law Commission to extend its [originally] narrow consultation on the enforceability of nuptial agreements to one dealing with the broader concepts of 'Matrimonial Property, Needs and Agreements'.

The long-awaited recommendations have today been released: they are, it appears at first blush, less radical than the current law's apparent problems and difficulties would otherwise have permitted. The report is analytical and it is cautious in drawing its conclusions. The Law Commission's menu of recommendations ranges from proposals for statutory reform and judicial guidelines to suggestions for official Government-led research and unofficial endorsement of an approach to the division of non-matrimonial

property. It is perhaps more striking as to what *isn't* recommended. The MCA 1973 will remain largely unchanged. Section 25(2) will not be altered. The court's wide discretion is to be retained, save in those cases involving a qualifying nuptial agreement (see below).

The Law Commission's [report](#) runs to 172 pages and includes a draft Nuptial Agreements Bill. 54% of the report's content relates to the applicability and enforceability of agreements (qualifying nuptial agreements or QNAs). A broad summary of the proposals – and divided by topic - are as follows:

Needs

Recommendation is made that **guidelines are formulated [by the Family Justice Council] to provide [non-binding] direction to judges to assist in the assessment of need**. The aim is to provide a single objective rather than a broad range of assessment for judges in all court centres. The guidelines are intended to provide answers to such questions as (a) what are needs (b) at what level should they be met and (c) what is the appropriate duration for the provision for needs and the transition to independence?

The Law Commission also proposes that further data-capture and analysis is undertaken to assess the potential for a formula to be devised to calculate an appropriate level for periodical payments and spousal support. It is recommended that the Government establishes a working group to undertake this analysis over a five year period.

Qualifying nuptial agreements (QNAs)

A QNA (pre- or post-nuptial) will prohibit the court from exercising its discretionary powers to make a financial order inconsistent with its terms unless it is doing so to meet the needs of a party or of a relevant child. Need will be interpreted and understood as in the general law; the guidelines referred to above will impact on the assessment of that need. There will be no overall test of fairness. A nuptial agreement, however, will only be a 'qualifying' one if it meets certain minimum formalities. The QNA must:

- a. be a valid contract;
- b. be made by deed;
- c. be formed more than 28 days before the marriage or civil partnership;
- d. include a statement by each party indicating their understanding that the QNA removes the court's discretion (save as to meeting needs);
- e. be accompanied with disclosure of 'material' information about each party's financial position (no recommendation is made that a party can waive their right to such disclosure);
- f. be accompanied by independent legal advice at the time the agreement is formed dealing with (1) the exclusion of the court's discretion save as to need and (2) the effect of the agreement on the rights of the party being advised;
- g. include a statement raising an evidential presumption that legal advice has been given (paragraph 7.59 of the report includes a helpful and non-exhaustive list of the matters and issues that legal advice should cover)

Thereafter, the Law Commission envisages a world in which the content and substance of each individual agreement will be freely devised by the parties themselves. Any subsequent variation of the QNA would need to comply with the formalities listed above.

Non-matrimonial property

The Law Commission makes no recommendations to amend the law regarding the division of 'non-matrimonial property' (that which is acquired, for example, by inheritance or gift or prior to the marriage): there is to be no statutory definition of such property and no statutory imperative as to its division; nor is there to be any [formal] guidance, as in the case of defining 'need'. However, the Law Commission does explicitly endorse the Court of Appeal's [more formulaic] approach in *Jones v Jones* to the treatment of non-matrimonial property as preferential to the [wider, discretionary] method applied by the same Court in *Robson v Robson*. Therefore, the favoured approach, as far as the Commission is concerned, is to determine the matrimonial and non-matrimonial property (with whatever degree of specificity the circumstances allow), disregard the non-matrimonial property (if not required to meet need) and share the

remaining property equally. This 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'* (paragraph 8.81).

The Law Commission report is not quite the revolution I was expecting. The overall impression is one of caution, of endorsement of the value of judicial discretion (at least in the medium term), of entrenchment of the principle of respect for personal autonomy but with a definite nod to the paternalistic state enforcing minimum safeguards and security. There are 172 detailed pages to get to grips with and I have done nothing more than my best to summarise the key points in this article. Happy reading!

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