



The Law Commission's Recommendations in Relation to Matrimonial Property, Needs and Marital Agreements

In 2009 the Law Commission initiated a review of the law relating to Prenuptial and Postnuptial Agreements. This was later extended to include a review of “financial needs” upon divorce (and in particular whether this concept could be clarified) as well as the issue of “non-matrimonial” property.

Following extensive consultation in relation to all 3 issues, the Law Commission has today published their recommendations. These are set out below in relation to each topic in turn:

Financial Needs

The “financial needs” of each party are key to the division of property and income upon divorce. However, it is not a term which is defined in statute and the Law Commission considers that it requires clarification.

The Law Commission has confirmed that in their view, the legislation which underpins matrimonial

finance work remains appropriate and it should, therefore, remain untouched. However, as the number of litigants in person within the Court system increases, the concept of “financial needs” must be clarified in order to allow lay people to understand this essential concept.

In addition the consultation undertaken by the

Law Commission revealed evidence of regional inconsistencies in the judicial application of the concept of “financial needs” and as such the Law Commission considered that Judiciary would also benefit from guidance in this respect.

As such, the Law Commission has recommended that the meaning of “financial needs” should be clarified in guidance published by the Family Justice Council to ensure that the term is applied consistently by the Judiciary as well as being accessible to the public.

In addition to the above the Law Commission has recommended that work should be undertaken to assess whether it is possible to produce a formula that would generate guidelines in terms of the appropriate divisions of assets and income upon divorce. The view is that, again, this would provide the Judiciary with a more structured approach (likely to produce a more uniform outcome nationally) whilst also giving litigants in person a range of outcomes within which they might negotiate their own settlements.

Qualifying Nuptial Agreements

The Law Commission recognises that the Courts are now paying far greater regard to agreements entered into by individuals with a view to regulating the division of their assets upon divorce. It is clear that there is also a growing desire amongst the public to retain some autonomy in this respect.

The Law Commission recognises that Nuptial Agreements provide a greater degree of certainty and can help reduce the prevalence of lengthy and costly family litigation.

As such the Law Commission has recommended that legislation should be enacted to introduce “Qualifying Nuptial Agreements”. These agreements would be binding contracts which, provided that certain procedural safeguards were in place, would not be subject to the scrutiny of the Courts. This is subject to the caveat that Qualifying Nuptial

Agreements would not be allowed to be used by parties to contract out of meeting one another’s “financial needs” (which, per the above is to be clarified).

The Law Commission has suggested that the following requirements would need to be established before an agreement should be recognised as a “Qualifying Nuptial Agreement”:

- (a) The agreement must be contractually valid;
- (b) The agreement must be made by deed and must contain a statement signed by both parties confirming that he or she understands the agreement to be a Qualifying Nuptial Agreement that will partially remove the Court’s discretion to make financial orders;
- (c) The agreement must not be made within the 28 days preceding the wedding;
- (d) Both parties to the agreement must have received financial disclosure and legal advice; and
- (e) The Law Commission has recommended that it should not be possible for either party to waive their right either to disclosure or legal advice.

Non-Matrimonial Property

Initially the Law Commission considered that it may be useful to introduce some statutory guidance as to the treatment of non-matrimonial property (such as preacquired, gifted or inherited property) within the context of financial proceedings.

However, the consultation responses demonstrated that any such provision would be unacceptably controversial in the Law Commission’s view and as such they have decided not to make any recommendations in relation to this issue.

The Law Commission appears to have justified their stance on the basis that where the parties to a marriage do wish to achieve certainty in terms of the ownership of nonmatrimonial property, they should now be free to enter into contractual arrangements (i.e. Qualifying Nuptial Agreements) in order to achieve this.

This article offers general guidance only. It reflects the law as at March 2014. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.

