Law Commission

Consultation Paper No 208

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

A Supplementary Consultation Paper

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Hon Mr Justice Lloyd Jones (*Chairman)*, Professor Elizabeth Cooke, Mr David Hertzell, Professor David Ormerod and Frances Patterson QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation: To examine the treatment of "needs" and non-matrimonial property in the law governing financial provision on divorce or the dissolution of civil partnership.

The topic for consultation is whether the law relating to needs and non-matrimonial property should be reformed.

Scope of this consultation: The purpose of this Supplementary Consultation Paper is to examine the law relating to needs and non-matrimonial property and assess potential options for short-term and long-term reform.

Geographical scope: This Consultation Paper applies to the law of England and Wales.

Impact assessment: An impact assessment will be published with our final Report.

Duration of the consultation: We invite responses from 11 September 2012 to 11 December 2012.

How to respond
Send your responses either –

By email to: propertyandtrust@lawcommission.gsi.gov.uk or

By post to: Property, Family and Trusts team, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://update.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance.

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Availability of this consultation paper: You can view or download this Consultation Paper free of charge on the consultations pages of our website: www.lawcom.gov.uk.

Freedom of Information statement

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

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THE LAW COMMISSION

MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS

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GLOSSARY

"Ancillary relief": the term formerly used to describe financial orders made on divorce and dissolution, and excluding orders made under schedule 1 of the Children Act 1989.

"Clean break": an order which imposes no ongoing financial liability on either party.

"Family Justice Review (also referred to as the Norgrove Review)": the wide-ranging examination of the family justice system in England and Wales chaired by Sir David Norgrove. The final report was published on 3 November 2011.

"Financial orders": we used this term to refer to financial orders made on divorce and dissolution, and excluding orders made under schedule 1 of the Children Act 1989; it is thus used here as the exact equivalent of "ancillary relief".

"**Marital property agreements**": agreements made before or during marriage or civil partnership which seek to regulate the couple's financial affairs during the relationship or to determine the division of their property in the event of divorce, dissolution or separation. Often referred to colloquially as "pre-nups" and "post-nups", and sometimes in legal writing collectively as "nuptial agreements".

"Needs": a very broad concept with no legal definition, discussed fully in Part 2 at paragraph 2.14 and following.

"Periodical payments": a series of payments made for a definite or indefinite period of time, typically paid on a monthly basis.

"Qualifying nuptial agreement": a term used in our 2011 Consultation to refer to a marital property agreement which is enforceable, providing certain conditions are met, without the need for the agreement to be scrutinised by the court in its discretionary jurisdiction. Such agreements are not available under the current law.

"**Spousal support**": we use this term in a sense wholly synonymous with "needs", and therefore encompassing capital as well as income requirements (for example provision for housing).

"**Spouse**": we use this term to refer to one of the parties to a marriage or a civil partnership.

PART 1
INTRODUCTION

THE EXTENDED PROJECT

1.1 This Supplementary Consultation Paper is part of a Law Commission project whose original remit was to examine the legal status of marital property agreements. We published a Consultation Paper in January 2011.[1]

1.2 Our research and consultation on marital property agreements has focused our attention on a number of issues that are closely linked with, but go beyond, our work on agreements. In particular, we have given consideration to two other aspects of the financial consequences of divorce and of the dissolution of civil partnership: the status of "non-matrimonial property", and the meaning of "needs". The former is a concept developed by the courts; the latter is a term found in the statutory provisions relating to this area of the law. Both are important not only in the context of marital property agreements but also for the financial aspects of divorce and dissolution where no agreement has been made. Our project has now been extended to encompass work on those two areas of the law, with a view to making the general law relating to financial provision clearer and simpler, thereby benefiting a wider range of people.

1.3 Accordingly, our final Report (which we expect to publish in autumn 2013) will cover three aspects of the law relating to financial orders.

(1) It will examine the role of provision for needs on divorce and dissolution. As we explain below,[2] the recommendations we make about this are likely to be in two groups. Some relate to fundamental and principled reform, and will require further research and piloting after completion of the Law Commission's project before there is a change in the law; but some of our recommendations about needs will be designed for immediate implementation so as to provide short-term improvements. Of those recommendations, some will be for non-legislative measures, and few if any will require statutory amendment; those that do will be incorporated in a draft Bill.

(2) The Report will make recommendations about non-matrimonial property, reflected in provisions in the draft Bill.

(3) The Report will make recommendations about the legal status of marital property agreements and, again, the draft Bill will include clauses to reflect those recommendations.

1.4 In this introductory Part we first summarise the outcome of our 2011 Consultation, including the broad outlines of our conclusions on marital property agreements; the detail of our policy, our recommendations for reform and the full reasoning behind our recommendations will be set out in our final Report. Here

[1] Marital Property Agreements (2011) Law Commission Consultation Paper No 198, referred to in this Supplementary Consultation Paper as the "2011 Consultation".

[2] See paras 1.39 to 1.41 below.

we go on to explain why we took the view that our project should be extended so as to encompass needs and non-matrimonial property, and how that extension came about. We summarise the structure of this Supplementary Consultation Paper and the consultation questions asked in the remaining Parts. Finally we acknowledge the very considerable assistance we have received from legal professionals and others in the course of preparing this paper.

THE CONSULTATION ON MARITAL PROPERTY AGREEMENTS

1.5 Marriage and civil partnership are an expression of commitment and of shared lives; they are also legal statuses which generate both privileges and responsibilities. The ending of marriage by divorce, or of civil partnership by dissolution, inevitably has financial consequences. The ending of the relationship may cause considerable financial hardship over many years, particularly for those who made financial sacrifices in the expectation that the partnership was going to continue.[3] The negotiation, and in some cases litigation, of the financial arrangements following divorce and dissolution are therefore crucially important to both parties; but they are often difficult and traumatic.

1.6 The law relating to financial orders on divorce and dissolution is to be found in the Matrimonial Causes Act 1973 and in the Civil Partnership Act 2004, which contain equivalent provisions for a wide range of financial orders to be determined at the discretion of the court. Principles have been developed by the courts for the exercise of that discretion, which can be divined from the study of a vast body of case law.

1.7 In our 2011 Consultation we reviewed the place of agreements within the law relating to financial provision on divorce and the dissolution of civil partnership. It is often claimed that pre-nuptial and post-nuptial agreements are in the interests of both parties because if the financial consequences of the ending of the relationship are resolved in advance, then the expense and trouble of litigation is avoided. Realistically, it has to be acknowledged that such agreements are used in order to ensure that one party is later unable to claim some or all of the financial provision he or she might otherwise have received. The courts' response to such agreements has been set out by the Supreme Court in *Radmacher v Granatino*:

> A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements – whether they are ante-nuptial or post-nuptial. The parties cannot, by agreement, oust the jurisdiction of the court. The court must, however, give appropriate weight to such an agreement.[4]
>
> … Under English law it is the court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an

[3] H Fisher and H Low, "Who Wins, Who Loses and Who Recovers from Divorce?" in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (2009) pp 227 to 256.

[4] *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 at [2] by Lord Phillips (giving the judgment of the majority).

> end. A prior agreement between husband and wife is only one of the matters to which the court will have regard.[5]
>
> … The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.[6]

1.8 That latter paragraph represents a considerable change in the courts' policy over the last two decades; nevertheless, the enforceability of a marital property agreement cannot be predicted, still less guaranteed. Enforceability still rests with the courts' discretion. While some are in favour of this supervisory jurisdiction, others feel that the law lacks predictability.

1.9 Accordingly, in the 2011 Consultation we asked whether the law should be reformed so as to introduce "qualifying nuptial agreements" which would be enforceable provided that certain conditions were met, without the need for the agreement to be scrutinised by the court in its discretionary jurisdiction. We discussed what those conditions might be, both in relation to the formation of the agreement (for example, the taking of legal advice and the possibility of a requirement of disclosure) and in terms of the effect of the agreement. We also asked whether the effect of such agreements should be restricted to property acquired by either party before the marriage or civil partnership, or by gift or inheritance at any time.[7] That would mean that it would be impossible to use a qualifying nuptial agreement to ensure that property acquired by one party after marriage or civil partnership (other than by gift or inheritance) would not be shared on divorce or dissolution.

1.10 Responses to our consultation on marital property agreements revealed considerable support for the introduction of qualifying nuptial agreements;[8] and while there was some support for restricting their effect to pre-acquired, gifted and inherited property, we concluded that qualifying nuptial agreements should not be limited in this way. However, consultation responses also revealed concern – which we share – about the potential effect of such agreements. Agreements made without safeguards for the financially weaker party at the point they are made, or that are enforced no matter what their terms, would not be acceptable to many of our consultees, nor to us.

5 Above, at [3].

6 Above, at [75].

7 For a full list of our provisional proposals and consultation questions for the 2011 Consultation see Marital Property Agreements (2011) Law Commission Consultation Paper No 198, Part 8.

8 We were also assisted by research funded by the Nuffield Foundation and carried out by Professor Anne Barlow and Dr Janet Smithson of the University of Exeter on public perceptions of pre-nuptial agreements, entitled "Exploring Pre-Nuptial Perceptions". We discussed this research in the 2011 Consultation (see paras 1.52, 6.82, 7.29 and 7.60) and we hope to be able to include a full consideration of the data in our final Report. See A Barlow and J Smithson, "Is Modern Marriage a Bargain? – Exploring Perceptions of Pre-Nuptial Agreements in England and Wales" (2012) *Child and Family Law Quarterly*, forthcoming.

1.11 Our final Report will contain recommendations about the requirements for the formation of qualifying nuptial agreements, and will discuss issues such as independent legal advice, disclosure and timing. As to the effect of qualifying nuptial agreements, we made it clear in the 2011 Consultation that a qualifying nuptial agreement must not be used to enable the parties to escape their responsibilities to their children, nor to leave either party dependent upon state benefits. But we have concluded that more is required.

1.12 Many consultees expressed concern that certain agreements should not be enforced even if they were correctly formed, did not jeopardise support for children, and did not impose costs upon the state. That concern was expressed in a variety of ways. Some consultees felt that an agreement must be set aside if it had become unreliable over time; others spoke of "significant injustice", "serious injustice" or "substantial hardship". Others took the view that an agreement should be liable to be set aside or varied if its effect was that the needs of either spouse were not met;[9] and we have concluded that a provision to the effect that it is not possible to contract out of provision for needs would provide an important safeguard for qualifying nuptial agreements.

1.13 "Needs" is a technical term within this area of the law. It derives from the wording of the statutes which require the court to have in mind the "financial needs, obligations and responsibilities" of the parties[10] and indeed "needs" has become a central concept in the case law. The term has a very wide meaning in this context and includes not only income provision but also the provision of housing; the assessment of needs involves consideration of both the immediate and the long-term – sometimes lifelong – financial position of the parties. A provision that the enforcement of a qualifying nuptial agreement must not deprive the parties of provision for their needs would meet many of the concerns that have been expressed about the enforceability of such agreements,[11] from the point of view not only of the welfare of the spouses but also of the children, the wider family and society generally. It would enable couples to contract out of sharing property that is not required to meet needs.

1.14 That conclusion points to the importance of some further analysis, because it would be helpful to have a definition, or at least a description, of the meaning of "needs". And as we shall explain in the later Parts of this paper, the current law conspicuously lacks any such definition. We revert later in this paper to the question whether it would be possible to construct a definition or description of "needs" solely for the purpose of assessing the validity of qualifying nuptial agreements.

1.15 We also became aware during the course of our work on marital property agreements of the importance to many people of protecting property that they

[9] Some consultees thought that an agreement should be varied or set aside if it failed to meet the parties' needs, narrowly defined; others thought that an agreement should be varied or set aside if it failed to meet the parties' needs and to provide compensation for losses caused by the relationship.

[10] Matrimonial Causes Act 1973, s 25(2)(b); and Civil Partnership Act 2004, sch 5, part 5, para 21(2)(b).

[11] See the discussion in B Hale, "What's the Deal? Marital Property Agreements, Past Present and Future" [2011] *International Family Law* 282.

acquired before their marriage or civil partnership, or that has been bequeathed or given to them. We have explained that we do not consider that qualifying nuptial agreements should be limited to pre-acquired, gifted or inherited property.[12] But while some couples may wish to provide that they will not share any property beyond what is required to meet needs arising on divorce and dissolution, others will want to protect only identified items of property. A particular business, or an investment, or a valuable collection may be identified in a qualifying nuptial agreement together with a provision that it will remain the property of one of the parties.

1.16 For such terms to be enforceable without the need for the exercise of judicial discretion, provision is needed for property that changes over time. An asset may be sold and replaced, or it may become more valuable as a result of further investment – financial or personal – by either its owner or the other spouse, or it may be sold and the proceeds invested in something that belongs to both spouses, or in a property purchased as the family home. Other jurisdictions that make provision for the enforceability of marital property agreements without the need for judicial scrutiny also provide rules that determine what is to happen when property changes in these and other ways,[13] and if qualifying nuptial agreements are introduced we shall need to recommend similar provisions.

1.17 The obvious context in which to look for precedent for such provision is in the context of non-matrimonial property, a term used to describe property which under the current law is less likely to be shared on divorce or dissolution.[14] There are circumstances in which it is necessary to determine whether property that was originally non-matrimonial has remained so following changes over time. But that issue has scarcely arisen in reported cases and the courts have not developed rules that could be used in the context of qualifying nuptial agreements. Further work is therefore needed.

THE WIDER REFORM POTENTIAL OF WORK ON NEEDS AND MATRIMONIAL PROPERTY

1.18 Two areas, therefore, need development in the context of qualifying nuptial agreements, and each involves issues of some complexity.

1.19 But both these areas – needs and provisions about property that changes over time – are also important in the current law of financial provision that affects all couples undergoing divorce or dissolution. Most instances of divorce and dissolution involve consideration only of needs. Non-matrimonial property, by contrast, is not an issue in every case; but where it is, disputes arise because the consequences of the classification of property as matrimonial or non-matrimonial have not been worked out by the courts.

1.20 This means that work to clarify the law on needs and non-matrimonial property has the potential for wider benefit beyond reform of the law of marital property

[12] See para 1.10 above.

[13] K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action: Volume IV: Property Relations Between Spouses* (2009) pp 521 to 532.

[14] We say this with deliberate vagueness; as we discuss in Part 6, it is generally not shared, but the courts have arrived at different ways of expressing this: see para 6.29 below.

agreements. As our 2011 Consultation made clear, we do not anticipate that everyone will wish, or should be able, to make a qualifying nuptial agreement. Couples who do not do so will have to rely on the general law governing financial orders on divorce and dissolution. Any work that we do on the meaning of needs, and on the identity and status of property, therefore has the potential to improve the law more generally.

1.21 Each of these issues is very difficult.

1.22 The meeting of needs on divorce or dissolution is an important focus of virtually all financial provision cases. In the vast majority of financial negotiations on divorce – most of which never reach the courts[15] – the meeting of needs is the only practical issue and there is no property available for sharing as all of the couple's resources are taken up in meeting needs insofar as that is possible.

1.23 Family lawyers understand what "needs" means. Yet the term has no legal definition. Where negotiations are managed by lawyers that lack of definition may perhaps be unimportant, especially as in most cases needs cannot be met in full because the resources that supported one household are inadequate for two. Nevertheless, the lack of legal clarity about the nature of needs is problematic. In the many cases where the couple has no legal advice – and there will be far more of these in the future as legal aid becomes unavailable[16] – the law gives them very little guidance as to what their entitlements and responsibilities are. In the more complex cases even lawyers might benefit from clarification of this very discretionary area of the law.[17] The reason for the lack of clarity is the lack of principle within the law. The law has not developed a clear answer to the question why needs have to be met; as we shall discuss,[18] it gives expression to a number of different, and mutually inconsistent, reasons for meeting need, so that uncertainty and inconsistency are the inevitable results.

[15] In 2010 there were 119,589 divorces in England and Wales: Office for National Statistics, *Divorces in England and Wales 2010*, Statistical Bulletin (8 December 2011) pp 1 to 2, available at http://www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2010/index.html (last visited 27 July 2012). In the same year there were 82,290 disposals of applications for ancillary relief made in the county courts (note that each individual may ask for more than one type of order and therefore this number is greater than the total number of divorces involved), of which only 5% were contested. The majority (73%) were not contested; 22% of disposals were initially contested but subsequently agreed: Ministry of Justice, *Judicial and Court Statistics 2010* (2011) pp 45 and 54, available at http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf/?type=Finjan-Download&slot=000002FA&id=000006F9&location=0A640210 (last visited 27 July 2012). See also the findings of C Barton and A Bissett-Johnson, "The Declining Number of Ancillary Financial Relief Orders" (2000) 30(Feb) *Family Law* 94, 100.

[16] See Legal Aid, Sentencing and Punishment of Offenders Act 2012. We say more about this in Part 3, see paras 3.33 to 3.35 below.

[17] We were grateful to hear from over three hundred legal practitioners as part of a nationwide questionnaire conducted on our behalf by Resolution. Nearly 80% of respondents stated that they could "sometimes" predict accurately how the court will quantify their clients' "needs" under section 25 of the Matrimonial Causes Act 1973, with only 13.7% stating that they could "always" make this prediction. For a summary of the results of this survey, see http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm. See also para 3.42 below.

[18] See paras 3.25 to 3.41 below.

1.24 We have discussed above the need to be clear about the treatment of property dealt with in a nuptial agreement but which changes over time, and have drawn parallels with the current law's treatment of pre-acquired, gifted and inherited property on divorce or dissolution.[19] Such assets benefit from considerable protection within the law of financial provision already, being regarded as non-matrimonial property. But it is not clear what happens when such assets are sold and replaced after marriage, or when either of the spouses invests money or effort in them. Greater clarity on the definition of non-matrimonial property, how it is treated on divorce and dissolution, and what happens when it changes over time would assist couples generally to negotiate financial settlement, where non-matrimonial property is involved, as well as being applicable in the more specialised context of qualifying nuptial agreements. These issues are particularly suitable for a law reform body that can look at the issues in the round rather than being resolved by the courts, case by case and issue by issue.

THE EXTENSION OF THE PROJECT

1.25 There have for some time been calls for a wholesale review of the law governing financial orders on divorce and dissolution. We note the responses to our consultations on the Tenth and Eleventh Programmes of law reform, in 2007 and 2010, which asked us to review the law of financial provision.[20] A number of the responses to our 2011 Consultation argued that the law relating to marital property agreements should not be reformed before financial provision as a whole was addressed at some future date. There have been judicial calls for reform[21] as well as academic criticism of the law for many years.[22] Many have been explicit that this work should be undertaken by the Law Commission.

1.26 As we explained in our Tenth and Eleventh Programme documents,[23] the Law Commission has not undertaken a major project on ancillary relief because successive Governments have not supported our undertaking that work.[24] A full-scale review of this area would be a major undertaking and reform would be likely to require substantial primary legislation.

1.27 The Law Commission therefore undertook its work on marital property agreements on the basis of Government's indication that it would prefer the Commission to examine the law governing the status and enforceability of marital property agreements rather than the wider issue of ancillary relief.[25] While our project has been ongoing the Government independently established the Family Justice Review, chaired by Sir David Norgrove, to undertake a wide-ranging

[19] See paras 1.16 to 1.17 above.

[20] Tenth Programme of Law Reform (2008) Law Com No 311; Eleventh Programme of Law Reform (2011) Law Com No 330.

[21] See in particular *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [121] to [122] by Sir Mark Potter P (giving the judgment of the Court).

[22] See Part 4 below.

[23] Tenth Programme of Law Reform (2008) Law Com No 311, paras 5.4 to 5.9; Eleventh Programme of Law Reform (2011) Law Com No 330, paras 3.7 and 3.9.

[24] The Law Commission's Protocol with Government formalises the need for Government support when taking on a new project: Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission (2010) Law Com No 321.

[25] Tenth Programme of Law Reform (2008) Law Com No 311, para 5.7.

examination of the family justice system in England and Wales. The review sought to improve the family justice system by reducing conflict and by making it more straightforward, efficient and cost-effective.

1.28 Although the substantive law of ancillary relief was outside the scope of its review, the Family Justice Review was persuaded that the problems with that law needed to be addressed; in its Interim Report, it suggested that the Government examine the possibility of legislative reform to "establish a codified framework [which] could reduce the need for judicial determination".[26] In November 2011, in its Final Report, it recommended that:

> Government should establish a separate review of financial orders to include examination of the law.[27]

1.29 Government's response to the recommendations of the Family Justice Review was published in February 2012 and included an announcement of the extension of our project in response to the call for a review of the law of financial orders:

> The Law Commission is already taking forward a project to look at how provision might be made for pre-nuptial, post-nuptial and separation agreements to be given legal effect, so as to provide couples with more control and certainty about how their assets are to be divided on divorce. Ministers have agreed that this project should be extended to include a limited reform on the substantive law on Financial Orders relating to needs and non-matrimonial property. The project will take around 18 months to complete. The Law Commission will then undertake a separate project to make recommendations for improving the enforcement of Financial Orders. These two projects together will improve the substantive law and make it easier to enforce Financial Orders once made by the courts.[28]

1.30 That extension to our project recognises the wider benefit of work in those areas beyond its relevance to the creation of qualifying nuptial agreements.

1.31 It is important to stress that those terms of reference are narrowly constrained. Our extended review does not cover the law of child maintenance, which is subject to a different statutory regime and has received a great deal of legislative attention in the last two decades.[29] Nor will it question the importance or validity of the "sharing principle", developed following the House of Lords' decision in

[26] Family Justice Review Panel, *Family Justice Review: Interim Report* (March 2011) para 129, available at http://www.justice.gov.uk/publications/policy/moj/2011/family-justice-review (last visited 27 July 2012).

[27] Family Justice Review Panel, *Family Justice Review: Final Report* (November 2011) p 178, available at http://www.justice.gov.uk/publications/policy/moj/2011/family-justice-review-final (last visited 27 July 2012).

[28] The Government Response to the Family Justice Review: A System with Children and Families at its Heart (2012) Cm 8273, annex 1, recommendation 133.

[29] And further reform has been recommended: Government's Response to the Consultation on Strengthening Families, Promoting Parental Responsibility: The Future of Child Maintenance (2011) Cm 8130; see further Supporting Separated Families; Securing Children's Futures (2012) Cm 8399.

White v White,[30] which states that there is no place for discrimination between the spouses on the basis of the roles undertaken during marriage, still less on the basis of gender. However, in proposing provisions about non-matrimonial property, as well as developing the current law as to the ability of couples to contract out of sharing, we hope to provide some solutions to the as yet unanswered questions about the application of the sharing principle.

1.32 This project is not, therefore, a full review of this area of the law. A wholesale review of the law of financial provision would be a very significant undertaking which would arguably not be possible without a substantial body of empirical research which is currently unavailable. Given that there appears to be little prospect of a wholesale review of the law, we have concluded that it would be wrong to let pass the opportunity to improve it in some respects. But we take the view that needs and matrimonial property are useful issues to examine by themselves. We hope that by doing what we can to clarify these two very contentious areas we shall be able to allay some of the concern that the law of financial provision has generated.

1.33 Our task now, in addition to our work on marital property agreements, is therefore to consider the meaning of needs in the law of financial provision generally, and to consider also the status of non-matrimonial property.

1.34 In preparing to consult on these issues we have been struck by the difficulty of reaching any consensus upon them. That is not a reason not to recommend reform. It is a reason to listen to as many groups and individuals as possible and to tread very carefully in making recommendations for change.

1.35 We have held discussions with legal practitioners and the academic community, and other groups of stakeholders have written to us in advance of our publication. We were also pleased to hear from over three hundred legal practitioners who responded to a nationwide questionnaire conducted on our behalf by Resolution.[31] Some have strong views that a particular change is required. Some feel that any reform of the law in this area can only make things worse; others have said that any change can only be for the better. Some lawyers have said to us that the current law on needs and on non-matrimonial property needs no reform because judicial discretion achieves individualised justice in every case, and indeed that for that reason uncertainty does not matter. Yet for most couples in the course of divorce and dissolution, judicial discretion is not part of the process. Few commence court proceedings in order to resolve financial issues; most of those that do reach a settlement before a final hearing.[32] Other lawyers have spoken of their embarrassment, and their clients' sense of grievance, that it is not possible to set out the financial responsibilities of former spouses or to give clear advice on the outcome of litigation.

1.36 We are mindful of the range of views among the public and among lawyers. We are grateful to all those who have helped us to formulate the questions presented

[30] [2000] UKHL 54, [2001] 1 AC 596.

[31] This online survey was conducted between March and April 2012. For a summary of the results, see http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm.

[32] See para 3.35 below.

in this paper and we look forward to working with consultees' responses to formulate improvements in the law.

THE STRUCTURE OF THIS PAPER AND OUR CONSULTATION QUESTIONS

1.37 Following this introductory Part, in Part 2 we explain briefly the legal background to our extended project; this is ground that was covered in more detail in the 2011 Consultation.

1.38 In Part 3 we explore in more detail how the law relating to needs has developed, and why reform is necessary.

1.39 In Part 4 we ask why needs are met, following divorce and dissolution, at any level at all; we then examine possible approaches to principled reform that would provide a rationale for the meeting of needs, telling us what level of needs has to be met and why. We then ask consultees for their views on such a rationale, and we seek their views about future reform and about the economic and other impacts that such reform would have. We also ask consultees for their views about the legal and practical research and piloting that would have to underpin any reform. We note that such a process would take some considerable time.

1.40 The recommendations that we make in our Report arising from this Part will not be for immediate legislative change. We expect to make recommendations both about the principled basis upon which needs should be met, and about the way in which the practical consequences of those recommendations should be tested and piloted before legislative change eventually takes place. We would expect that legislation in response to our recommendations about the principled basis on which needs should be met would take some years to be formulated, in line with the experience in other jurisdictions that have gone through this process. It is vitally important that provision for spousal support should be formulated in a way that neither causes unacceptable hardship for adults nor impacts adversely upon children; and it is also important to consider the economic effect of any recommended change on society as a whole and on the public purse.

1.41 In view of that timescale, in Part 5 we consider the extent to which the current law relating to needs might be clarified in the meantime. We consider a limited legislative amendment so that the law might give a clearer message about the expectation that divorce should not normally be followed by permanent financial dependence, without compromising the fact that couples must remain to some extent responsible for each other while they still have shared responsibilities to others, in particular their children. We also ask questions about the potential development of non-statutory, but authoritative, guidance that will help couples to reach financial settlements when they are not able to access legal advice, and may also assist the judiciary and make for more consistent outcomes.

1.42 In Part 6 we discuss non-matrimonial property. We provisionally propose that it should be defined in the law; we also ask questions about what that definition should be and about how its status might change in certain circumstances.

ACKNOWLEDGEMENTS

1.43 We are extremely grateful to the individuals and organisations who have assisted us in the preparation of this paper.

1.44 We would like to extend our warm thanks to Resolution, who kindly hosted a survey on financial needs on their website, and to all the Resolution members who responded to the survey. We received 366 responses from practitioners around England and Wales. The results have made a highly valued contribution to our project.

1.45 Particular thanks are also due to our advisory group who have generously continued to offer us their time and expertise. The members of the group are: Sarah Anticoni, Charles Russell LLP; Dr Thérèse Callus, University of Reading; James Carroll, Russell Cooke LLP; Nicholas Francis QC, 29 Bedford Row; Mark Harper, Withers LLP; Dr Emma Hitchings, University of Bristol; David Hodson, The International Family Law Group; His Honour Judge Million, South Eastern Circuit; Jeffrey Nedas, Jeffrey Nedas & Co; Tony Roe, Tony Roe Solicitors; His Honour Judge Mark Rogers, Midland Circuit; Marilyn Stowe, Stowe Family Law LLP; and Richard Todd QC, 1 Hare Court.

1.46 The project also benefited from the discussions arising from a seminar attended by academics who volunteered their specialist knowledge of these areas of law. We therefore thank Professor Anne Barlow, University of Exeter; Judith Bray, University of Buckingham; Baroness Deech; Professor Alison Diduck, University College London; Professor Gillian Douglas, Cardiff University; Professor Susan Edwards, University of Buckingham; John Eekelaar, University of Oxford; Dr Rob George, University of Oxford; Dita Gill, London Metropolitan University; Stephen Gilmore, King's College London; Mavis Maclean, University of Oxford; Joanna Miles, University of Cambridge; Dr Jens Scherpe, University of Cambridge; and Hilary Woodward, Cardiff University.

1.47 Finally, we would like to thank the Money and Property Committee of the Family Justice Council for discussing our extended project with us. Thanks are also due to the Family Law Society and Men's Aid for their written comments.

PART 2
THE LEGAL BACKGROUND TO THE EXTENDED PROJECT

2.1 In the 2011 Consultation we gave a detailed account of the law relating to financial provision, and we do not wish to make this paper unduly long by repeating that here.[1] Accordingly we present here a summary of the law, and indicate the role and importance both of non-matrimonial property and of the concept of "needs" within it.

THE STATUTORY PROVISIONS

2.2 The statutory provisions that relate to the financial obligations of former spouses to each other are contained Part 2 (sections 21 to 40A) of the Matrimonial Causes Act 1973 and schedule 5 to the Civil Partnership Act 2004. These two groups of provisions are equivalent; the statutes make no distinction between marriage and civil partnership for these purposes.[2] They enable the courts to make the range of orders formerly known, collectively, as "ancillary relief" because the financial orders were said to be ancillary to the main decree of divorce or dissolution.[3] We refer to them here simply as "financial orders."[4]

The range of orders

2.3 The range of financial orders is wide; there can be orders for periodical payments, for secured periodical payments, for lump sums, and for the transfer, settlement[5] or sale of property. A wide range of orders for the sharing of pensions is available.[6] It is unlikely to be the case that there will be any financial arrangement desired by the parties or the court that cannot be achieved because

1 See Marital Property Agreements (2011) Law Commission Consultation Paper No 198, Part 2.

2 There has been only one reported decision of the court on the financial consequences of the dissolution of a civil partnership (*Lawrence v Gallagher* [2012] EWCA Civ 394, [2012] 1 FCR 557), and it is too early to say whether or not the courts will distinguish between the two statuses in this context.

3 In discussing the role of the courts, two recent developments should be borne in mind: first, the introduction of a new family arbitration scheme (for a summary of the scheme, see "IFLA: Family Arbitration" (2012) 42(Jan) *Family Law* 92, and for discussion, see M Geffin, "New Family Arbitration Scheme is No Alternative to Litigation" (2012) 156(9) *Solicitors Journal* 9); and secondly, the prospective development of a unified family court (see the Crime and Courts Bill, sch 10, available at http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0004/lbill_2012-20130004_en_1.htm (last visited 27 July 2012)). Neither development affects the substance of the law here.

4 There is some scope for confusion here; in this Supplementary Consultation Paper we use the term to refer to orders under the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004, and not to orders made for the benefit of children under schedule 1 to the Children Act 1989.

5 "Settlement" in this context refers to a range of orders, including those that specify that the property will remain unsold for a period and regulate both its occupation pending sale and the division of sale proceeds, without imposing any formal trust structure.

6 Matrimonial Causes Act 1973, ss 21A, 21B, 21C, 24B to 24G and 25B to 25G; Civil Partnership Act 2004, sch 5, parts 4, 4(A), 6 and 7.

of limitations in the range of orders available, because it is always possible for a party to give an undertaking to the court to do something that is not within the range of orders in the statute – for example, an undertaking to make mortgage payments.[7] So an infinite range of outcomes can be ordered.

2.4 A particularly useful arrangement can be made using the provision that enables the court to make a property adjustment order.[8] The court can order a deferred sale of the family home, on terms that one party shall be able to continue to live there with the children until the children leave home, and also to make provision for the division of the sale proceeds. Such an arrangement generally requires one of the parties to give an undertaking to be responsible for the mortgage payments. It is known as a *Mesher* order after the case of that name;[9] it can be seen as a helpful way of combining an order about the use of the family home with an order about its value. However, the spouse who is to live in the property may be exposed to vulnerability later when the house has to be sold; he or she may have compromised earning power over the years in order to look after the children. The division of the sale proceeds should be ordered in proportions that reflect the parties' anticipated needs at that future date.

The basis on which orders are to be made

2.5 The statutory criteria on the basis of which the court will choose what order or orders to make are set out in section 25 of the Matrimonial Causes Act 1973 (and in equivalent wording in schedule 5, part 5, paragraph 21(2) of the Civil Partnership Act 2004):[10]

[7] No-one can be forced to give an undertaking, but undertakings can be given so as to enable an agreement to be embodied in, and be enforceable as, a court order.

[8] Matrimonial Causes Act 1973, s 24; Civil Partnership Act 2004, sch 5, part 2.

[9] *Mesher v Mesher and Hall* [1980] 1 All ER 126 (Note), CA.

[10] There are also provisions that set out the considerations the court is to have in mind when making orders for the benefit of children, which are not reproduced here. The court will make orders for the benefit of children only when the Child Support Act 1991 is inapplicable, either because there is no jurisdiction under that Act (because a parent is out of the country, for example) or because resources are at a level where the Act allows for "top-up" payments.

25 Matters to which court is to have regard in deciding how to exercise its powers under ss 23, 24, 24A, 24B and 24E

(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A, 24B or 24E above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.

(2) As regards the exercise of the powers of the court under section 23(1)(a), (b) or (c), 24, 24A, 24B or 24E above in relation to a party to the marriage, the court shall in particular have regard to the following matters—

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

2.6 Whilst a family lawyer would be able, in any given case, to predict, within a range, what sort of outcome the court might order, the lawyer can do so only because of his or her experience, along with knowledge of the case law. A member of the public reading section 25 of the Matrimonial Causes Act 1973, and without any other guidance, can have no sense of what the outcome would be within the range of possibilities that is opened up by the menu of available orders. We explain, in Part 3, the historical background to the current wording of the statutory provisions.

Provision for the variation of orders

2.7 Orders once made, on divorce or dissolution, cannot be made again, and once an application for an order has been dismissed, no further application for such an order can be made; but orders for periodical payments can be varied.[11] Section

[11] Save for some very limited exceptions, lump sum orders and property adjustments orders cannot be varied, see Matrimonial Causes Act 1973, s 31(2).

31 of the Matrimonial Causes Act 1973[12] makes provision for an application to be made to vary periodical payments orders, or to bring payments to an end, and the circumstances to be borne in mind include any change of circumstances since the order was made. For example, an applicant might be awarded monthly periodical payments on a joint lives basis, with applications for a lump sum order and a property adjustment order being dismissed; he or she can come back to court later to ask for the periodical payments order to be varied, but can make no further application for a capital order.

The clean break

2.8 The statute directs the court to consider whether it would be appropriate to exercise its power to make financial orders in such a way as to terminate the parties' financial obligations to each other "as soon after the grant of the decree as the court considers just and reasonable".[13] That may involve making only capital orders, or making orders for periodical payments for a limited period only, "for such term as would in the opinion of the court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party".[14]

2.9 An order that imposes no ongoing financial obligation – in particular one that involves only capital orders, or only an order for sale and division of proceeds of property – is known as a "clean break".[15] An order that provides for the ending of obligations in the future, by imposing a term upon periodical payments, is known as a "deferred clean break"; but a term order for periodical payments does not amount to a deferred clean break unless it is accompanied by a direction pursuant to section 28(1A) of the Matrimonial Causes Act 1973 that there can be no order to vary it in the future.[16] In the absence of such a direction the payee can apply for the term to be extended, provided that application is made before it expires.[17]

2.10 It is important to understand that the term "clean break" refers only to the form of the order and the absence of future obligations. It does not mean that no provision is made for needs. On the contrary, a clean break can embody an order that amounts to lifelong income provision for the payee, capitalised.[18] So when we discuss, as we shall do on a number of occasions in this paper, the time

[12] And see Civil Partnership Act 2004, sch 5, part 11.

[13] Matrimonial Causes Act 1973, s 25A(1); Civil Partnership Act 2004, sch 5, part 5, para 23(2).

[14] Matrimonial Causes Act 1973, s 25A(2); Civil Partnership Act 2004, sch 5, part 5, para 23(3).

[15] See N Lowe and G Douglas, *Bromley's Family Law* (10th ed 2007) pp 1023 to 1028.

[16] Or under Civil Partnership Act 2004, sch 5, part 5, para 23(4). See *L v L (Financial Remedies: Deferred Clean Break)* [2011] EWHC 2207 (Fam), [2012] 1 FLR 1283; and N Allen and V Taylor, "Till death or remarriage do our finances part: *L v L*" (2012) 42(Jun) *Family Law* 665.

[17] For a recent example see *Yates v Yates* [2012] EWCA Civ 532, [2012] Fam Law 951. In *North v North* [2007] EWCA Civ 760, [2008] 1 FLR 158 the wife applied to vary the order for nominal periodical payments made in her favour 20 years earlier.

[18] Such a payment can be calculated by a formula known as the *Duxbury* formula; see *Duxbury v Duxbury* [1987] 1 FLR 7 and further discussion in N Lowe and G Douglas, *Bromley's Family Law* (10th ed 2007) pp 1038 to 1039.

within which the courts expect a former spouse to become able to support himself or herself, we are not referring to the duration of periodical payments; we refer instead to the number of years' dependence provided for in a financial order – which may then be paid in the form of income or of capital and therefore may or may not involve a clean break.

2.11 The Court of Appeal has said that it will be very unusual for a clean break to be ordered when the couple have school-age children.[19] That, again, does not mean that periodical payments will actually be made – and periodical payments are in fact relatively unusual.[20] A clean break can be prevented by making an order for nominal periodical payments, of, say, £1 each year, so that there is an order in existence which can be varied in the future. That way the possibility of ongoing support is not ruled out.

THE CASE LAW: NEEDS, SHARING AND COMPENSATION

2.12 We noted above that the statute does not set out any objective to be achieved by the courts in making financial orders. The statute is silent on some vital issues. What is to be achieved in the making of an order for financial provision? Why might a particular order be made? For how long, if at all, must one spouse supplement the other's income after divorce, or provide the other with a home?

2.13 In the absence of statutory principle the courts have evolved principles.[21] The most authoritative statement of these is found in the House of Lords' decision in *Miller v Miller, McFarlane v McFarlane*, where it was held that a financial award will have three "strands": needs, compensation and sharing.[22] We can comment generally on those "strands" or "ingredients" as follows.

2.14 First, "needs". There is no legal definition of needs; the law developed during the period from the 1970s to the 1990s so as to make it clear that, where assets were sufficient to do so, an applicant for financial provision would be given an award that enabled him or her (usually her) to live at something commensurate with the marital standard of living. That meant, of course, that "needs" (or "reasonable requirements", as this generous measure of needs was called) encompassed a wide range of forms of provision. It included not only provision for income but also provision for accommodation, where possible by the provision of a capital sum; it also encompassed provision for old age in the form of pension or capital, travel,

[19] See para 5.15 below.

[20] In 2010 11,994 applications for periodical payments were dealt with in the county courts (note that this includes "uncontested", "initially contested, subsequently consented" and "contested" applications): Ministry of Justice, *Judicial and Court Statistics 2010* (2011) p 54, available at http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf/?type=Finjan-Download&slot=00000284&id=00000683&location=0A64420C (last visited 27 July 2012). See also N Lowe and G Douglas, *Bromley's Family Law* (10th ed 2007) p 1025, where it is noted that "empirical evidence shows that it [the clean break] has become the preferred outcome and spousal maintenance is increasingly unusual".

[21] We gave a fuller account of the development of this area of the law in Part 2 of the 2011 Consultation, and return to some of this history in Part 4 below.

[22] [2006] UKHL 24, [2006] 2 AC 618 at [10] to [20] by Lord Nicholls, and [138] to [144] by Lady Hale.

holidays and luxuries. Pension provision became more practicable towards the end of the 1990s when pension sharing orders became possible.[23]

2.15 The courts' conception of "needs" is therefore extremely wide; where possible, and where it is not clear that the payee has the opportunity to become financially independent in the relatively short term (three to five years, roughly), an award to meet needs will enable the payee to live at the marital standard of living for life. Of course, in most cases that is not possible, and the courts instead seek to make orders that would achieve a reasonable standard of living for both parties, albeit at a lower level of affluence (or a greater level of poverty!) than was experienced during the marriage.

2.16 However, until 2000, in cases where the family assets were more than sufficient to meet the needs of both parties, no further financial adjustment was made. This meant that where most of the wealth stood in the name of one party – usually the husband – the wife took no share in it.[24] This stood in stark contrast to most European jurisdictions[25] and many common law countries[26] at that date where the marital property, regardless of legal ownership, was shared on divorce.

2.17 In 2000, the courts' approach to the exercise of the section 25 discretion changed as a result of the House of Lords' decision in *White v White*[27] which established (together with the cases that followed it) what has come to be known as the "sharing principle", so that, generally, the division of marital assets is to be equal, subject to provision for needs. This was a major change, albeit one whose effects were felt only in those cases where the level of family assets exceeded what was required to meet the parties' needs. It was based upon two principles; one was the principle of equality, which means that the contribution of the breadwinner to the family's property is not to be valued more highly than domestic contributions.[28] The other is the idea of marriage as a partnership; on that basis, it is natural for the partnership property to be shared at the end of the relationship, as has been the law throughout continental Europe for many decades.

2.18 Turning to compensation: in our discussion in the 2011 Consultation we considered the meaning of "compensation" and suggested that it can be seen as highlighting something that has to some extent always been part of the concept

[23] Welfare Reform and Pensions Act 1999, part 3.

[24] See *A v A (Financial Provision)* [1998] 3 FCR 421, where the husband was worth over £200 million but the wife was awarded £4.4 million after a 14-year marriage. And see also *Conran v Conran* [1997] 2 FLR 615, where the wife received £6.2 million (bringing her wealth to £10.5 million) to meet her needs and to recognise her social and supportive contribution to her husband's career, at a time when the husband was worth around £80 million.

[25] We discussed the continental community of property regimes in Part 4 of the 2011 Consultation. The regimes generally fall into two groups: those that share all assets, whenever acquired by either party (principally the Netherlands and the Scandinavian jurisdictions) and those that share only the "marital acquest" – assets acquired during the marriage by either party, other than by gift or inheritance.

[26] See Part 4 of the 2011 Consultation.

[27] [2000] UKHL 54, [2001] 1 AC 596.

[28] *White v White* [2000] UKHL 54 at [24], [2001] 1 AC 596, 605 by Lord Nicholls.

of "needs", namely the making up of loss arising from the marriage.[29] It has not been prominent in the case law since *Miller v Miller, McFarlane v McFarlane*.[30] It is rare for the claimant, as the economically weaker party, to be able to demonstrate that he or she would in fact have been better off if not married,[31] and so where needs are awarded at something referable to the marital standard of living a separate claim for compensation does not arise.

THE LAW IN PRACTICE

2.19 The House of Lords in *Miller v Miller, McFarlane v McFarlane*[32] did not state which of the three "strands" was to take priority in the decisions made by the courts or indeed in the agreements made by the parties. In practice, we can explain the likely outcome of most cases by categorising them by wealth. At the lower end of the scale, where the vast majority of ancillary relief cases lie, all that can be achieved is an order that meets the needs of the parties, because there is not enough to do any more. Indeed, in most cases there is insufficient to do that; the court and the parties are trying to "get a quart out of a pint pot".

2.20 However, in the wealthier cases where assets exceed needs, the courts generally make no order specifically in respect of needs, as needs are met by an award of half the matrimonial property pursuant to the sharing principle.[33] Some property is regarded as "non-matrimonial" – generally, assets acquired before marriage, and property that has been inherited by or given to either party at any stage. Non-matrimonial property is generally not shared, but there are no clear rules about this; we say more about this in Part 6. Compensation is rarely relevant as a separate source of obligation.

2.21 Although we can say generally, therefore, what sort of financial order or orders will be made in a given case, it will be seen from the very brief account of the law given here that there are a number of uncertainties, which we discuss further in the rest of this paper.

[29] Marital Property Agreements (2011) Law Commission Consultation Paper No 198, paras 2.55 to 2.58.

[30] [2006] UKHL 24, [2006] 2 AC 618.

[31] And see the comments of Coleridge J in *RP v RP* [2006] EWHC 3409 (Fam), [2007] 1 FLR 2105 at [61] to [64].

[32] [2006] UKHL 24, [2006] 2 AC 618.

[33] It would be possible for the sharing award in such cases to be adjusted, for example if the assets only just met the aggregate needs of the parties and one party's needs were significantly greater than the other.

PART 3
NEEDS: THE CASE FOR REFORM

INTRODUCTION

3.1 In this Part we focus on the law relating to needs in order to explain why we take the view that there is a case for reform. We begin with a historical account to show how the law arrived at today's position. We then set out the aspects that appear to us to be unsatisfactory. Finally we explain our approach to reform, which we then develop in two different ways in Parts 4 and 5.

3.2 A note on terminology: "needs" is a term used in England and Wales; some other jurisdictions use the term "maintenance"; US writers tend to speak of "alimony"; "spousal support" is also a widely used term. However, some jurisdictions in referring to "spousal support" (by whatever label) refer only to payments made on a periodical basis. They refer to income and not to capital. In contrast, we use the term "needs" to refer to the English and Welsh concept of spousal support, which encompasses a wide range of provision: income and capital, present and future. It includes payments made with a view to providing income, whether made on a regular basis or capitalised, but it also includes the provision of owned housing where that is appropriate, and provision for old age. It is therefore significantly wider than the continental concept of "maintenance".[1] We use the terms "needs" and "spousal support" as synonyms (thus we can ask "what level of needs should be met?" or "what level of spousal support should be paid?"; the two questions are the same).[2]

THE DEVELOPMENT OF "NEEDS"

3.3 We noted in Part 2 that although the statute sets out considerations and matters to be borne in mind when financial orders are made, there is no objective set out in the statute, nor indeed any indication of what the former spouses' financial responsibilities to each other are. The situation facing family judges has therefore been likened to that of:

> … a bus driver who is given a large number of instructions about how to drive the bus, and the authority to do various actions such as turning left or right. There is also the occasional advice or correction offered by three senior drivers. The one piece of information which he or she is not given is where to take the bus. All he or she is told is that the driver is required to drive to a reasonable destination.[3]

[1] See for example, Case C-220/95 *Van Den Boogaard v Laumen* [1997] QB 759 (ECJ). That additional width may be in part accounted for by the prevalence of owner-occupation in this country. In other jurisdictions (including Scotland), renting one's home is far more widespread and is not regarded as unacceptable.

[2] And for the avoidance of doubt, the term "spousal support" is not used in this paper to refer only to periodical payments.

[3] P Parkinson, "The Diminishing Significance of Initial Contributions to Property" (1999) 13 *Australian Journal of Family Law* 52, 53, explaining Justice Chisholm's extra-judicial writing on the equivalent Australian statute.

3.4 The reasons why the statute presents this problem are historical; and although the history of the law relating to needs is well-known to family lawyers, it is worth reiterating here because the current law is to a large extent explained by its past.

The law before 1969

3.5 Before 1969, divorce in England and Wales was both fault-based and gendered. It was fundamental that an "innocent" wife was entitled to remain married for life, and that a "guilty" one could be divorced; but a husband could not thereby be relieved from the duty to maintain his wife.[4] So the justification for awards of spousal support in the pre-1969 law was found in the very foundation of marriage and divorce. If divorce is founded upon the breach of the marital obligation, then the continuation of financial obligations after divorce follows from that. The "innocent" party has the right to remain married; if she chooses not to, she does not then forego her right to be supported.

Divorce reform in 1969

3.6 Divorce reform in 1969 took away that foundation. For the first time[5] no-one had the *right* to stay married:

> Whereas before 1971 a valid marriage could not be dissolved against the will of an "innocent spouse", the effect of the 1969 Act is that any marriage can be dissolved at the instance of either party, whether or not the other agrees, after they have lived apart for five years.[6]

3.7 With reform in 1969 came the new provisions for ancillary relief. In the run-up to reform, women's groups were adamant that if divorce was to be liberalised, there also had to be reform of the basis for financial orders. The economic position at that date was rather different from the position of women today and there was a concern that women would be divorced and abandoned to poverty. There was pressure in particular for the introduction of community of property,[7] so as to give women *rights* in property, rather than being dependent upon discretionary provision.[8]

3.8 So family property reform was demanded as the price for divorce reform; but that price was not paid. Community of property was not introduced, and the discretionary jurisdiction of the Matrimonial Causes Act 1973 was substituted for

[4] Family Law: The Financial Consequences of Divorce: The Basic Policy: A Discussion Paper (1980) Law Com No 103 has a helpful account at para 10. Note that the courts eventually reached a position where the wife who was guilty of adultery nevertheless got a "compassionate allowance" to avoid her being "turned out destitute on the streets": para 12.

[5] If we leave aside the "supervening insanity" ground introduced in the 1930s.

[6] Family Law: The Financial Consequences of Divorce: The Basic Policy: A Discussion Paper (1980) Law Com No 103, para 15.

[7] See Marital Property Agreements (2011) Law Commission Consultation Paper No 198, para 2.13 and following.

[8] The Law Commission in its Working Paper, Family Law: Family Property Law (1971) Law Commission Working Paper No 42, para 0.22, noted the pressure for "definite property rights, not possible discretionary benefits"; and Stephen Cretney, in *Family Law in the Twentieth Century: A History* (2003) ch 9, relates the way that family property law reform was seen as the price of divorce reform.

the previous law. Independent property rights for women were not created, although there was wide scope for property adjustment.

3.9 On the other hand, a liability to pay spousal support in some form was never questioned, although the reason why that liability remained was not given either by Parliament or the courts. In an era when far fewer married women worked than is now the case, the hardship caused by divorce to women – who in many cases lost thereby their only means of support – was so serious that the relief of hardship would have seemed a justification in itself. Moreover, at that date child support was also ordered under section 25; there was no practical or conceptual separation of responsibility for children from responsibility for a former spouse, as there is today.

3.10 Two elements in the 1973 Act as first enacted are hard to reconcile with the new principle that divorce does not have to be fault-based and can be achieved by consent or, indeed, solely by separation.

(1) The overall objective in the "minimal loss principle" – the original wording of section 25 required the courts to place the applicant in the position he or she would have occupied had the marriage not broken down. This sounds very much like the corollary of fault-based divorce, namely that the innocent spouse must not lose out financially. On what basis can minimal loss be justified in consensual divorce?

(2) And yet fault was – and remains – one of the factors to be taken into account in making a financial award. But the statute does not say what effect fault is to have; it is simply a factor.

3.11 Those anomalies have been dealt with to some extent. As to conduct, the courts at a relatively early stage made it clear that the conduct of a party to divorce would prejudice him or her financially only if the conduct was extremely serious, going far beyond adultery or domestic violence.[9] This does not necessarily accord with the perceptions and expectations of the parties.[10]

3.12 The "minimal loss principle" remained for longer, and its eventual repeal derived from recommendations made by the Law Commission.

The Law Commission's 1980 Discussion Paper and the 1981 Report

3.13 In 1980 the Law Commission for England and Wales published a Discussion Paper on the financial consequences of divorce.[11] It was not a consultation paper, for reasons explained in its early paragraphs;[12] but it considered in some detail seven models that might form the basis – alone or in combination – of reform of the law governing the financial consequences of divorce:

(1) retain section 25 in its original form;

[9] *Wachtel v Wachtel* [1973] Fam 72.

[10] G Davis, S Cretney and J Collins, *Simple Quarrels* (1994) pp 51 to 56.

[11] Family Law: The Financial Consequences of Divorce: The Basic Policy: A Discussion Paper (1980) Law Com No 103.

[12] Not least the unlikelihood of consensus: above, paras 4 and 5.

(2) repeal the minimal loss principle;

(3) relief of need;

(4) rehabilitation;

(5) clean break;

(6) a mathematical approach; and

(7) restore the parties to the position they would have held if they had never been married.

3.14 The Discussion Paper noted the significance of the disappearance of:

(1) marriage as a meal ticket for life; the reality after the 1969 reform was (and remains today) that anyone who wishes to divorce (or, now, to dissolve his or her civil partnership) is free to do so; and

(2) divorce as a consequence of fault. As we noted above, without fault, which was the justification for post-divorce spousal support pre-1969, there is a need for an alternative explanation of lifelong support if that is to be awarded.

3.15 It also explored the reasons why lifelong support is not the right approach.

> "(i) A duty of life-long support is now out of date because it is rooted in the concept of marriage as a life-time union. If marriage were indeed still a life-long institution, it might perhaps be reasonable that the parties should expect that the benefits and burdens incident to the status of marriage would not be affected by divorce; but (it is said) in modern conditions it is unrealistic for married couples not to accept that there is a very real possibility that their marriage will break down. It is thus correspondingly unrealistic for them to suppose that if this should happen their financial position will remain unaffected.
>
> (ii) The change in the juristic basis of divorce from matrimonial offence to irretrievable breakdown has fundamentally altered the validity of the law's approach to support obligations. On this argument the obligation to provide life-long support is based on the analogy between marriage and contract, under which compensation would be available for its breach. Consequently, it is argued that now that divorce is available whenever the marriage has broken down, irrespective of whether one or other of the parties is in breach of his or her matrimonial obligations, it is inappropriate for the law to continue to found the parties' respective financial obligations after divorce on the now largely irrelevant notion of breach of duty; and it is unjust to do so since the present law may require a man to maintain his wife when she has herself been entirely responsible for the breakdown.

(iii) The objective of life-long support is almost invariably impossible to attain because in most cases one man's resources are insufficient to support two households.

(iv) The concept of a life-long support obligation is based on wholly out of date views of the division of function between husband and wife as well as of the economic status of women."[13]

3.16 The Law Commission's subsequent Report recommended that "weight should be given to the view that, in appropriate cases, periodical financial provision should be primarily concerned to secure a smooth transition" from interdependence to independence.[14] However, the Commission noted that the number of appropriate cases where a "final, once for all settlement" would be appropriate must be "comparatively few, and almost non-existent where there are young children".[15]

3.17 The Report recommended that section 25 of the Matrimonial Causes Act 1973 be reformed to make the needs of children a priority; to give greater weight to the wife's earning capacity and desirability of self-sufficiency; to encourage the ordering of a clean break[16] where practicable; and to get rid of the minimal loss principle.[17]

3.18 The result was the Matrimonial Proceedings and Property Act 1984 which added to section 25 the principle that the "first consideration" is to be the needs of any minor children of the family. It also added section 25A to the 1973 Act, which requires the court to consider whether a "clean break" – immediate or deferred – is possible. It does not say that a clean break is desirable. The 1984 amendments also removed the minimal loss principle. But no substitute was provided instead of that principle, and therefore it is impossible to discern in section 25 – and its equivalent today in the Civil Partnership Act 2004 – any objective that financial provision is to achieve.

3.19 There is no evidence that the 1984 reform caused any change in practice. In the vast majority of cases it was never possible in any event to effect a minimal loss, and in those cases the courts carried on meeting needs at a level somewhere below the marital standard of living.[18] Reform did not prevent awards aimed at lifelong support in "big money" cases (whether achieved by the award of a capital sum or of ongoing payments); we say more about this in the next section.

[13] Family Law: The Financial Consequences of Divorce: The Basic Policy: A Discussion Paper (1980) Law Com No 103, para 30.

[14] Family Law: The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law (1981) Law Com No 112, para 46(5)(ii)(b).

[15] Above, para 28.

[16] That is, an order that involves no ongoing liability; all payments are made now, or by a determinate time in the future. See paras 2.8 to 2.11 above.

[17] Family Law: The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law (1981) Law Com No 112, para 46(5).

[18] See para 2.15 above.

Reasonable requirements

3.20 The courts' approach to financial provision, in the absence of guidance in the statute, was to develop a measure known as "reasonable requirements" as a basis for an award, albeit only in the "big money" cases. Where it was possible in such cases, the financial award would reflect needs generously assessed by reference to the marital standard of living, for housing, income, entertainment, holidays, luxuries; but no provision was made beyond that for anything to save, or to bequeath to the next generation. Where possible, the amount needed to achieve lifelong support at that level was capitalised using the *Duxbury* calculation.[19] As a result the cases demonstrate a fairly constant measure of awards in these cases: an applicant, however, wealthy, would almost never receive more than £10 million to £12 million. A little extra might be awarded for special contributions, especially of the domestic or social variety; £15 million was pretty much a ceiling.

3.21 Thus, to take a well-known example, the applicant in *Conran v Conran*[20] had her reasonable requirements assessed at £8.4 million, of which she could meet £4.3 million from her own assets. This left a £4.1 million deficit, in addition to which she was paid £2.1 million in respect of her domestic contributions to her husband's wealth (which amounted to around £80 million after a 30-year marriage). She was therefore awarded £6.2 million. Had that divorce taken place in continental Europe, by contrast, the couple would have married under a community of property regime and (unless they had contracted out of community) the applicant would have been entitled to half the community property – around £40 million.[21] The law had a very gendered flavour, with a predominantly male judiciary making generous provision for housing and living expenses while denying any share of the family's property, which was regarded as belonging to the person who earned it – usually the husband.

White v White: a sea-change in financial orders

3.22 Calls for an ability to share capital, rather then only meeting needs, mounted. The community of property perspective – the perception throughout Europe that equal division was the norm – had little attention from academic writers during the 1990s, but they began to see the arguments for a property entitlement.[22] There was a growing concern within the judiciary that the law was not delivering appropriate outcomes.[23] Change finally came with the House of Lords' decision in *White v White*[24] which established (together with the cases that followed it) what

[19] A *Duxbury* calculation produces a lump sum which would, if suitably invested, provide sufficient income to meet the recipient spouse's reasonable requirements for the rest of his or her life: *Duxbury v Duxbury* [1987] 1 FLR 7. See para 2.10 above, fn 18.

[20] [1997] 2 FLR 615.

[21] Of course had the Conran divorce taken place in England after the decision in *White v White* [2000] UKHL 54, [2001] 1 AC 596, Mrs Conran could have expected a more equal division of the marital assets. See para 3.22 and following.

[22] *Dart v Dart* [1997] 1 FCR 21. See also A Barlow and C Lind, "A Matter of Trust: the Allocation of Rights in the Family Home" (1999) 19(4) *Legal Studies* 468; J Eekelaar, "Asset Distribution on Divorce – the Durational Element" (2001) 117(Oct) *Law Quarterly Review* 552.

[23] See P Singer, "Sexual Discrimination in Ancillary Relief" (2001) 31(Feb) *Family Law* 115.

[24] [2000] UKHL 54, [2001] 1 AC 596.

has come to be known as the "sharing principle", so that, generally, the division of marital assets is to be equal, subject to provision for needs.

Needs post-*White*

3.23 The term "reasonable requirements" should now have no place in the law of financial orders.[25] Instead, focus is on the parties' "financial needs", which is the term used in the statute.[26] We have noted in Part 2 the two very different roles that needs seem to play:

(1) it is often said that in the vast majority of ancillary relief cases all that can be achieved is an order that meets the needs of the parties, because there is not enough to do any more; and

(2) the House of Lords has held that an award of ancillary relief will have three "strands": needs, compensation and sharing.[27] The approach that the courts generally take in the very wealthy cases is to determine the needs of the applicant for the order, then to assess whether those needs will be met by an award of half the matrimonial property pursuant to the sharing principle.[28] Compensation is rarely relevant as a separate source of obligation.[29]

3.24 Needs, then, are crucial, whether at the lower or the higher end of the scale of family wealth; however, at the lower end of the scale the meeting of needs accounts for the total of the award, whereas in the wealthiest cases the calculation of needs acts as merely a check upon the adequacy, for the financially weaker party, of the award of a half share in capital.

THE CASE FOR REFORM

The meaning of needs in today's financial awards

3.25 There is no clear law to tell us what needs are. Our discussions with practitioners indicate that most family lawyers are confident that needs is something they know when they see it; none can offer a definition, although all can offer explanations and descriptions of what "needs" can include. In practice, practitioners and the courts offer a blend of pragmatism and the old "reasonable requirements" approach.

3.26 Needs are therefore assessed primarily by reference to the marital standard of living. That does not mean that the marital standard of living is achieved; but it is

[25] *White v White* [2000] UKHL 54 at [35] to [36], [2001] 1 AC 596, 608 to 609 by Lord Nicholls.

[26] Matrimonial Causes Act 1973, s 25(2)(b).

[27] *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [10] to [20] by Lord Nicholls and [138] to [144] by Lady Hale. Joanna Miles describes the combination of the three principles as an "unsustainable mix" in "Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions" (2005) 19(2) *International Journal of Law, Policy and the Family* 242, 255.

[28] See for example *Kremen v Agrest* [2012] EWHC 45 (Fam), [2012] 2 FCR 472 at [77] to [80] by Mostyn J. The award could then be adjusted in the unusual case where needs were not met by this method.

[29] We say more about compensation at para 4.24 and following.

inevitably a reference point. Mr Justice Charles in *G v G* said that "the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties".[30] In the vast majority of cases the marital standard of living, for both parties on a continuing basis after dissolution, cannot be achieved and therefore what is awarded is something that comes as close as possible to that – although, depending upon resources, that may not be very close.

3.27 In the "big money" cases, where the assessment of needs is primarily driven by budgets, those budgets are inevitably founded on the expectations that arise from the marital standard of living. We do find acknowledgement that there is no longer a right to be kept at the marital standard of living for life;[31] but it is not known what standard is aimed for. The only indication of what is wanted in *Lawrence v Gallagher*, for example, is a reference to the need "for each to live comfortably in their own homes".[32]

3.28 When family law practitioners are asked for how long needs have to be met at this level, there is, again, real uncertainty. There is an acceptance that needs may diminish over time[33] but it is by no means clear how long support should be provided for (whether by way of periodical payments or on a capitalised basis); generally some level of support is provided for the duration of the children's minority, but for how long after?[34] Where needs are being met in the wealthy cases by a capitalised sum, a generous approach is taken; where needs are being met by periodical payments, no term will be imposed unless it is clear that the claimant will be able to be self-supporting within a relatively short time.[35] There should generally be no term – or, if there is, no section 28(1A) direction[36] – while the children are still dependent.[37]

[30] [2012] EWHC 167 (Fam), [2012] All ER (D) 33 (Mar) at [136].

[31] See for example: Lady Hale's comments about the transition to self-sufficiency in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [158]; Bennett J's comments in *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 at [168] ("It must have been absolutely plain to the wife after separation that it was wholly unrealistic to expect to go on living at the rate at which she perceived she was living"); and Charles J's comments in *G v G* [2012] EWHC 167 (Fam), [2012] All ER (D) 33 (Mar) at [136] ("the objective of achieving a fair result … is not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage").

[32] [2012] EWCA Civ 394, [2012] 1 FCR 557 at [42] by Thorpe LJ.

[33] See for example *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 at [314] to [321] by Bennett J; *G v G* [2012] EWHC 167 (Fam), [2012] All ER (D) 33 (Mar) at [179] to [187] by Charles J.

[34] Consider the opacity of the consideration of duration in the closing pages of the judgment in *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 at [312] to [327] by Bennett J.

[35] C Bradley and E Moore, "The Maintenance Conflict: Crystal Ball Gazing Versus a Meal Ticket for Life" (2011) 41(Jul) *Family Law* 733.

[36] See para 2.9 above.

[37] *Suter v Suter and Jones* [1987] 2 FLR 232.

Issues in the law relating to needs

3.29 Taking the material we have looked at so far, we can formulate the problems within the law relating to needs as follows.

A lack of principle

3.30 The law has not evolved a principled basis on which a former spouse is required to meet the other's needs after divorce or dissolution; nothing has replaced the gap left by the disappearance of the pre-1969 explanation.

3.31 Instead, the law evidences a variety of explanations for the meeting of needs, including the long-lasting financial consequences of parental responsibility, the desirability of compensating loss, and the objective of enabling a transition to independence. There is no lack of justification for the meeting of needs;[38] but the presence of multiple justifications, which generate inconsistent results, means that outcomes are unpredictable.

3.32 It also means that practitioners have no clear legal principle to which they can point when asked by their clients why needs have to be met. They therefore offer a variety of responses. Some explain it as an aspect of partnership, or as a part of the marital obligation which does not disappear at dissolution. One solicitor told us that she tells her clients "you are a team when you are married, you are still a team after divorce". Some refer to "relationship-generated needs". Those who have no legal representation have no source of explanation for the demands that the law makes upon them following divorce; and those demands are themselves uncertain and undefined. And in the absence of principle, uncertainties within the law cannot satisfactorily be resolved.

The law is inaccessible

3.33 As we have seen, we can say, broadly, what level of needs the courts will generally award, but only by a study of the case law. The case law itself is derived from the disputes of the wealthiest couples, and it is not straightforward to translate that case law into guidance for the ordinary cases. That the law is inaccessible and difficult to discover is troubling in a context where currently by no means all separating couples take legal advice,[39] and where far fewer will be able to get publicly funded advice following reforms to legal aid.

3.34 Litigants without legal representation are thus a significant, and increasing, phenomenon. The Ministry of Justice has estimated that forthcoming changes to family legal aid will mean that at least 210,000 people making applications to the

[38] See paras 4.4 to 4.19 below.

[39] In the eight months to 31 August 2011, there was a 19% increase in the number of cases supported by the Personal Support Unit (PSU) in the Principal Registry of the Family Division compared with the previous year (the PSU provides "practical and emotional support" to litigants without legal representation): E Reyes, "Litigants in person numbers soar" (13 October 2011) *Law Society Gazette* 1. Sir Nicholas Wall has also noted the rise in the number of litigants without legal representation: "We are undoubtedly going to see a substantial increase in litigants in person, or 'self-represented litigants' (SRLs) as we must now learn to call them": *Keynote Address* (Annual Resolution Conference, The Queens Hotel, Leeds, 24 March 2012), available at http://www.judiciary.gov.uk/media/speeches/2012/pfd-speech-annual-resolution-conference (last visited 27 July 2012).

family courts will no longer be eligible for legal help.[40] The President of the Family Division has said that the family courts will "undoubtedly" observe a "substantial increase" in such litigants.[41] This is likely to be particularly problematic in financial provision cases where the statute provides limited assistance to a court user unfamiliar with the ways in which the court exercises its discretion.

3.35 So although the law on financial orders is built on the assumption that there is a judge who will exercise discretion, most couples will not access that discretion.[42] This is a major shift in the social context in which this area of the law operates, and one which the drafters of section 25 of the Matrimonial Causes Act 1973 could not have anticipated. Couples managing the financial consequences of dissolution are left to bargain in the shadow of the law, but it is not clear how they are to find out what the law is.[43]

Uncertainty within the current law

3.36 As we noted above, there is real uncertainty about the level of support payable and the duration for which support is to be given, whether in the form of ongoing periodical payments or in the form of a capitalised sum. The result of that uncertainty is that the level of liability to provide support is related – in an uncertain way – to the marital standard of living. As to duration, where a capitalised sum is awarded it is either calculated on a *Duxbury* basis so as to last a lifetime, or there is a discount on an uncertain basis;[44] where there are periodical payments they are often made on a joint lives basis, with the onus on the payer to apply later for variation.

3.37 There may also be uncertainty arising from the fact that judicial discretion is exercised inconsistently across the country. Practitioners have told us that there are some marked differences in the exercise of court discretion between various geographical regions. 57% of solicitors who responded to the relevant question in the Resolution survey agreed that they had issued proceedings in a certain court centre or area of the country because they believed the result would be more favourable for their client than issuing elsewhere.[45]

Dissatisfaction with the level of awards

3.38 For decades there has been regular critical press and public comment about perceived open-ended financial liability for "undeserving" former spouses after

[40] Ministry of Justice, *Cumulative Legal Aid Reform Proposals: Impact Assessment* (2011), annex A, available at http://www.justice.gov.uk/consultations/legal-aid-reform (last visited 27 July 2012).

[41] Sir Nicholas Wall, *Keynote Address* (Annual Resolution Conference, The Queens Hotel, Leeds, 24 March 2012), available at http://www.judiciary.gov.uk/media/speeches/2012/pfd-speech-annual-resolution-conference (last visited 27 July 2012).

[42] See para 1.22 above.

[43] We know that people without representation may not be wholly without legal support. We note in Part 5 some of the resources available to them at 5.53.

[44] *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 at [314] to [318] by Bennett J.

[45] See http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm for a summary of the results from the Resolution survey.

divorce.[46] Ex-wives, for it is ex-wives who have sustained most of the approbation, have been historically referred to as "alimony drones".[47] The image of a wife living a pampered existence at the ongoing expense of her former husband is an enduring one.

3.39 Whether there is widespread dissatisfaction with outcomes is unclear. Certainly there have always been those – lawyers and others – who take the view that claimants, generally women, get far too much. There has been press coverage expressing this view.[48] Certainly there are individuals who feel that they have had to pay, and to continue to pay, too much to their former spouse. Inevitably such individuals make their voices heard far more loudly than those who are content with outcomes; we cannot therefore derive any statistics from the expressions of dissatisfaction of which we are aware. But for some at least the law is fundamentally flawed in its current approach to needs.

3.40 That dissatisfaction may well be exacerbated by the tendency of the courts towards joint lives awards in the prominently-reported, but untypical, cases discussed above.

3.41 But on the other hand there remains a concern about inequality, despite the introduction of the sharing principle, because it is well-established that those who sacrifice earning capacity for the sake of the family tend to fare worse on dissolution, and indeed it is only in recent years that we have had proper data on the extent of the cost to those who bear an unequal share of family responsibilities.[49] Typically they are women, although we know that the old

[46] See for example, R Deech, *What's a Woman Worth? The Maintenance Law* (Gresham College Lecture, London, 13 October 2009), available at http://www.gresham.ac.uk/lectures-and-events/what%E2%80%99s-a-woman-worth-the-maintenance-law (last visited 27 July 2012). And see also for example, A Platell, "A Divorce Deal that Shames Women", *Daily Mail*, 3 April 2010, available at http://www.dailymail.co.uk/debate/article-1263182/AMANDA-PLATELL-A-divorce-deal-shames-women.html (last visited 27 July 2012).

[47] *Doyle v Doyle* (1957) 158 NYS 2d 909, 912 by Hofstadter J (cited in Family Law: The Financial Consequences of Divorce: The Basic Policy: A Discussion Paper (1980) Law Com No 103, para 46).

[48] A Platell, "Divorce Ruling: NOT a Victory for Women" *Daily Mail*, 25 May 2006, available at http://www.dailymail.co.uk/news/article-387758/Divorce-ruling-NOT-victory-women.html (last visited 27 July 2012); L Rogers: "Divorce - Do Women Win Too Much?" *New Statesman*, 19 February 2007, available at http://www.newstatesman.com/society/2007/02/divorce-marriage-european (last visited 27 July 2012); S Doughty, "Scrap the 50-50 Divorce Payouts that Rob Men, says Law Chief" *Daily Mail*, 15 September 2009, available at http://www.dailymail.co.uk/news/article-1213523/Scrap-50-50-divorce-payouts-rob-men-says-law-chief.html (last visited 27 July 2012).

[49] G Douglas and A Perry, "How Parents Cope Financially on Separation and Divorce - Implications for the Future of Ancillary Relief" (2001) 13(1) *Child and Family Law Quarterly* 67; A Diduck and F Kaganas, *Family Law, Gender and the State: Texts, Cases and Materials* (3rd ed 2012) pp 237 to 246; D Price, "Pension Accumulation and Gendered Household Structures" in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (2009); Economic & Social Research Council, *Factsheet: Welfare and Single Parenthood in the UK* (2005).

gendered division of labour within the family is no longer so deeply entrenched as it was.[50]

The case for reform

3.42 We can say that at the heart of the unease with the law relating to needs are two quite different concerns. One is the lack of a principled basis for a law which in practice appears to aim to award lifelong support at the marital standard of living.[51] The other concern is the position of people without legal representation who have to discover what their obligations are; the difficulties that face them are evident from the fact that even legal advisers have difficulty in predicting what awards will be made.[52]

3.43 There have been many calls for reform over the years. We referred to some of the more recent ones in Part 1,[53] but as long ago as 1998 the *Supporting Families* White Paper recommended the introduction of an "overarching objective" and set of "guiding principles" that every court must follow. But the objective suggested was drafted at such a level of generality (the court was to "endeavour to do that which is fair and reasonable between the parties and any child of the family") that it would not have brought significant certainty or clarity to the law.[54]

3.44 The debate about the basis in principle for the meeting of needs after divorce and dissolution is thus a longstanding one. We aim to make progress in the debate and to recommend future directions, but we take at this stage the pragmatic view that even if consultation reveals pressure for change, it would be difficult to recommend immediate fundamental reform. The difficulty is not only the unlikelihood of consensus (which makes it more difficult not only for the Law Commission to recommend but also for Government to implement) but also the fact that fundamental reform in other jurisdictions has been achieved only after extensive empirical research, and has taken a number of years to accomplish. We believe that it can be achieved in this jurisdiction, and that this consultation can function as a fresh start in the search for principle in this area of the law.

[50] Cabinet Office, Women's Unit, *Briefing: Women's Incomes over the Lifetime* (2000); H Fisher and H Low, "Who Wins, Who Loses and Who Recovers from Divorce?" in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (2009).

[51] We say "appears to aim" because the position is imprecise. In wealthy cases, the marital standard of living will be able to be funded out of a half share of the couple's assets. Yet there are judicial comments that assert that the marital standard of living cannot or should not be the objective of the award, particularly in the context of the wealthy but very short marriage; see para 3.26, fn 31 above.

[52] We have heard from practitioners about the difficulty of predicting results generally, and in particular courts, and about regional variations in the orders made. See http://lawcommission.justice.gov.uk/areas/marital-property-agreements.htm for a summary of the results from the Resolution survey.

[53] See para 1.25 above.

[54] HM Government, *Supporting Families* (1998) para 4.49. The Centre for Social Justice has recommended a "statutory objective of fairness": Centre for Social Justice, *Every Family Matters: An In-depth Review of Family Law in Britain* (2009) para 6.2.16, available at http://www.centreforsocialjustice.org.uk/default.asp?pageRef=372 (last visited 27 July 2012).

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3.45 So we conclude that there is a case for two quite different endeavours for our project:

(1) to consult about the theoretical and principled basis for reform of the law relating to needs, so as to make recommendations for fundamental reform in the future; but also

(2) accepting that principled reform will take some years to achieve, to recommend reform that will both improve the current law by giving some direction to discretion where that is possible, and providing fresh sources of information and authoritative guidance for separating couples.

3.46 We address the first of those two aims in Part 4. This is a difficult task and one that has to be regarded as a substantial undertaking; the work involved in change must extend beyond our project. We explore there the very difficult issues of why needs should be met at all, and what guiding principle or principles can be devised in order to arrive at clearer law.

3.47 In Part 5 we turn to the second objective, which represents a much more limited exercise; indeed, it can be seen as damage limitation. Without endorsing the current law we consult about measures that would make it more workable in the short term, pending principled reform. We also look in that Part at the measure of needs that must be met in order for a qualifying nuptial agreement to be valid, which represents an immediate and very practical issue in the light of the recommendations that we are minded to make about marital property agreements.

PART 4
PRINCIPLED REFORM

INTRODUCTION

4.1 What, then, can be done? In this Part we ask what policy choices should be made in order to provide a principled basis for the payment of spousal support (recalling that we use that term as a synonym for "needs").[1] In doing so we seek to provide a fresh start to a debate that began with the reform of the grounds for divorce in 1969, which removed the old fault-based rationale for the payment of spousal support post-divorce. Our objective is to recommend in our Report a principled basis that captures both the reasons why it remains appropriate for former spouses to be responsible for meeting each other's needs and the extent of that liability in terms both of time and of amount, so as to make the law more explicable and predictable. As we have noted earlier in this paper, that recommendation will have to be accompanied by further recommendations as to the way in which the new approach might be researched and piloted in order to develop specific provisions. Accordingly whatever recommendation we make for principled reform will not be embodied in the draft Bill that will accompany our Report.

4.2 In this Part we first consider the many reasons why needs should be met at all by a former spouse. This is an important issue because we have encountered the argument that provision for needs should simply be abolished; we discuss in general terms why we reject that view. We also address the question why there should be any provision for spousal support following the decision in *White v White*[2] and the introduction of the sharing principle. We then address the far more difficult issue: given that there should be some liability for spousal support, what is the principled basis upon which it is awarded? Put another way, what objective is being delivered when needs are met? Turning back to the analogy of the bus driver in paragraph 3.3: having established that the bus has to be driven, where is it to go?

4.3 In addressing that question, we consider the values that the law should be pursuing or upholding in this area. We then sketch out the broad lines of the debate that has been conducted on this topic over the past five decades. That debate is academic and theoretical, and we have tried to make it more accessible by reference to case studies. Finally we discuss some of the consequences of policy choices in this area and ask consultees for their views, both of what, if any, principled reform should be undertaken, and also on how it should be achieved.

WHY SHOULD NEEDS BE MET AT ALL?

4.4 There are many reasons why former spouses should retain some liability for spousal support following divorce or dissolution. Marriage and civil partnership involve co-operation, at least, and usually a level of interdependence. That interdependence is inevitably both emotional and practical. Choices and joint decisions are made. Economies of effort mean that individuals often take on

[1] See para 3.2 above.

[2] [2000] UKHL 54, [2001] 1 AC 596.

different roles. Sometimes sacrifices, and regularly compromises, have to be made. All this means that the relationship is not easy to unravel. Its practical and financial effects are unlikely to come to an abrupt end at the point of divorce or separation. Indeed, the longer the marriage or civil partnership, the more profound those effects will have been. To borrow Lady Hale's words:

> Choices are often made for the sake of the overall happiness of the family. The couple may move from the city to the country; they may move to another country; they may adopt a completely different life-style; one of them may give up a well-paid job that she hates for the sake of a less lucrative job that she loves; one may give up a dead-end job to embark upon a new course of study. These sorts of things happen all the time in a relationship. The couple will support one another while they are together. And it may generate a continued need for support once they are apart.[3]

4.5 As Joanna Miles puts it, "needs-based decisions [made by the courts] may be seen as the product of the view that marriage creates a relationship of dependency that can and should be expressed in needs-based remedies on divorce".[4] "Interdependency" may be a better word, as both parties to a marriage or civil partnership will generally alter their financial position in reliance upon the continuing relationship; when it comes to an end, either may require support in order to re-adjust.

4.6 The need for continued support is likely to be at its highest when the couple have responsibilities to others which continue despite the divorce or dissolution. The obvious case is the need to care for children; this is a joint responsibility, but it is often unequally shared during the marriage or civil partnership. Choices about roles may have been made during marriage – nowadays not so much along stereotyped gender lines but in response to preference or to financial considerations – in the safe environment of ongoing co-operation and mutual support. When that environment is brought to an end, the economic consequences of those choices will be very different from what was anticipated when they were made. Unless some financial provision is made in response to those choices, the ending of the partnership may have consequences that are both unfair and financially disastrous for one or both parties.

4.7 Those financial consequences of the ending of the partnership will be exacerbated when joint responsibilities are shared unevenly after divorce or dissolution. Again, care for children is the obvious example. Ideally the former spouses will both continue to provide that care. But it is almost inevitable that burdens will be shouldered unequally, for a variety of reasons, and that those

[3] *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 at [188].

[4] J Miles, "Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions" (2005) 19(2) *International Journal of Law, Policy and the Family* 242, 253 to 254.

burdens will generate costs that the payment of child support will not cover.[5] Those costs arise from the marriage or civil partnership; there is an obvious injustice in leaving one party to meet an unequal share of the financial obligations of the partnership. It is unrealistic to argue that the financial consequences of marriage or civil partnership simply end at decree absolute;[6] in many cases they will endure long after the youngest child attains independence.[7]

4.8 It has been argued that that should no longer be the case in an era when both parties are expected to undertake paid employment, and indeed when it is a government priority that equality should be achieved in the workplace.[8] Women's employment patterns have changed dramatically since the current law was enacted in 1969, and women's preferences and expectations have also changed. There is also a renewed understanding of the benefits for children of being cared for by both parents following divorce or dissolution, and that too might be thought to entail a more equal sharing of responsibilities. The days when it was obvious that the wife would give up work until the children grew up are long gone; patterns of employment and parenting have changed profoundly. But the reality of managing and making ends meet after divorce means that unequal arrangements continue to be made. Those who undertake the greater proportions of childcare or make the greater career sacrifices, whether men or women, will take on the greater risk of disproportionate disadvantage, inconvenience or even hardship. Neither the desirability of equality in the workplace, nor the value of shared parenting, means that it is acceptable for the parties to a marriage or civil partnership not to share the costs of its ending or indeed the costs that may continue to be incurred in meeting joint responsibilities after divorce or dissolution.

4.9 The obvious (though not exact) analogy to what happens on divorce and dissolution is the winding up of a business partnership, when there must be not

[5] The child support formula when first devised in 1991 was intended to cover an element of support for the parent with whom the child lives: see Children Come First: The Government's Proposals on the Maintenance of Children (Volume One) (1990) Cm 1263, para 3.4. The formula still embodies that intention. But the child support formula has never purported to cover housing costs, future lost earnings, or the impairment of ability to fund a pension – to name but a few of the obvious economic consequences of working part-time in order to provide a home for small children.

[6] In divorce proceedings the court first grants a "decree nisi"; this is followed by a "decree absolute", which makes the divorce final. For more information on the process, see http://www.direct.gov.uk/en/Governmentcitizensandrights/Divorceseparationandrelationshipbreakdown/Endingamarriageorcivilpartnership/Gettingadivorce/DG_193728 (last visited 27 July 2012).

[7] And independence itself is often delayed long after a child finishes school or university; parents often find themselves helping with accommodation, or even funding the purchase of a home, for their adult children. This may become more common with increasing youth unemployment, which at 22.2% is now at its highest level since 1986/87. See Office for National Statistics, *Characteristics of Young Unemployed People – 2012* (February 2012), available at http://www.ons.gov.uk/ons/rel/lmac/characteristics-of-young-unemployed-people/2012/rpt-characteristics-of-young-unemployed-people.html#tab-Youth-unemployment-highest-since-the-1980s- (last visited 27 July 2012).

[8] "The good mother … is rewarded in maintenance awards for staying at home … But we also expect to find women occupying half of the top jobs, getting equal pay, retiring at the same age as men with similar pensions": R Deech, *Divorce Law – A Disaster?* (Gresham College Lecture, London, 15 September 2009), available at http://www.gresham.ac.uk/lectures-and-events/divorce-law-a-disaster (last visited 27 July 2012).

only a division of the assets of the partnership but also the meeting of partnership liabilities. If those liabilities are ongoing, then ongoing arrangements have to be made. So it is with divorce and dissolution, where the parties may have continuing responsibilities to each other and to third parties.

4.10 So we reject the view that there should be no provision for the meeting of needs following divorce or dissolution. Personal partnership is no more likely than a business partnership to end without the need for financial arrangements and the fair sharing of liabilities.[9]

4.11 However, we do not take lightly the dissatisfaction expressed by some with the outcomes generated by the current law relating to needs. We noted in Part 3 that it is not clear how widespread this is, but we take it seriously. To some extent it can be addressed by rationalising the law; if liability for spousal support can be explained by a principle that tells us not only that needs must be met but also the extent of liability then dissatisfaction may be assuaged, and that is one of our objectives.

4.12 As we noted above,[10] although the law makes separate, statutory provision for child support, that support is not comprehensive. In particular it does not cover housing needs for the children and the parent with whom they live. Where the children live with the economically weaker party to the marriage, the other party will find that he (and we accept that it is usually "he") will not only have to fund child support payments but will also have to accept either that the family home is transferred to the other party, or that the family home has to be retained unsold for some years in order to house the children, thus keeping him out of his entitlement to capital. That arrangement embodies both child support and spousal support (and the latter especially may be a cause of bitterness, even though the evidence is that women continue to fare significantly worse than men, financially, following divorce).[11]

4.13 The provision, within the concept of spousal support, of owned housing is an inevitable consequence of a society that values owner-occupation, where the property of a couple often consists only of the equity in a house. The law relating to spousal support cannot change that, but any reform must take into account the fact that both child support and spousal support may well involve the redistribution of capital or the long-term use of a capital asset. We return to this point later in this discussion.

WHY MEET NEEDS POST-*WHITE*?

4.14 A more difficult attack on the continuing necessity for the law to require spousal support is the question: why should needs be met at all post-*White*? If the spouses get to share the marital property, why should either have any additional claim on the other?

[9] Ongoing liabilities deriving from a marriage could include care of children or care of an elderly parent, undertaken during the marriage by both parties, and of course financial liabilities such as the mortgage.

[10] See para 4.7 above.

[11] See para 3.41 above.

4.15 The first and most important practical answer to that is that there may be nothing to divide. So it was for Mr and Mrs McFarlane in *Miller v Miller, McFarlane v McFarlane*[12] (despite the wealth). More usually there will be very little – even if the matrimonial home was owned, there may be little equity in it, and no other resources. There may be no possibility of the available capital going more than a short way towards meeting the housing needs of any children, at best. Yet for both parties there will be costs of re-adjustment, and possibly ongoing financial consequences either of past choices or of future arrangements arising from joint responsibilities. Even in the absence of capital resources, financial provision has to be made.

4.16 Where there is something to divide in a low income case, the value of half the equity in the house is a disastrous receipt for the financially weaker party because the capital will not be enough to re-house him or her, but it will be a disqualification for receipt of state benefits.[13] So simple equal sharing is inappropriate because it is likely to leave one party with needs unmet whilst the other may have a surplus and indeed the capacity to borrow, which may not be the case for the financially weaker party.

4.17 Accordingly in most cases there is no sense in which the recipient of a needs-based award is "double-dipping", to use a phrase put to us by two groups. In most cases there is little or no capital to "dip" into at all, and needs remains a live issue which requires financial adjustment, whether that is an uneven share of limited capital resources or provision for ongoing support.

4.18 However, in the wealthy cases, it is often clear that a half share of the parties' capital resources, leaving aside non-matrimonial property, is ample to enable both parties to live at or near the marital standard of living. In such cases the courts' current practice is that no separate award based on needs is made. Again, there is no question of anyone recovering twice over. There may be a question as to whether this is the right approach, because there is a case for regarding the losses caused by the marriage as a joint responsibility, to be met out of the couple's property before it is shared. We revert to this issue later in this

[12] [2006] UKHL 24, [2006] 2 AC 618. *Miller v Miller* and *McFarlane v McFarlane* were appealed to the House of Lords in 2006; they arose from very different factual circumstances. Mr and Mrs Miller had been married for less than three years and were in their thirties. Mr Miller was a successful fund manager whose personal wealth was in the region of £23 million to £38 million. He argued that he should not have to pay £5 million to his former spouse on divorce after a short marriage in which he had made a special contribution. The House of Lords disagreed and upheld the award to Mrs Miller.

Mr and Mrs McFarlane had been married for 16 years. Mr McFarlane was a high earning accountancy partner and Mrs McFarlane had spent much of the marriage caring for their three children, having given up a potentially very lucrative career as a solicitor in order to do so. The McFarlanes had insufficient funds to achieve a clean break, and Mrs McFarlane therefore required periodical payments in order to meet her needs. The Court of Appeal had awarded periodical payments of £250,000 per year for a five-year period. On appeal the House of Lords upheld the amount but awarded it on a joint lives basis.

[13] Usually an individual cannot receive state benefits if he or she owns capital above a certain amount. Income support, housing benefit and council tax benefit are not payable if savings are held in excess of £16,000, subject to some exceptions. See, for example, Income Support (General) Regulations 1987/1967, reg 53 (as amended), made under the Social Security Contributions and Benefits Act 1992, s 134. See generally http://www.direct.gov.uk/en/MoneyTaxAndBenefits/BenefitsTaxCreditsAndOtherSupport/On_a_low_income/index.htm (last visited 27 July 2012).

Part.[14] The important point that we make here is that whichever way sharing is organised, the fact that needs remains a separate issue does not mean that there is double recovery.[15]

4.19 So despite the introduction of the sharing principle, provision for needs remains essential. There may be nothing to share; the sharing of limited resources may be useless in the circumstances; and even the equal division of ample resources may leave one party bearing an uneven share of the financial consequences of the marriage.

A PRINCIPLED BASIS FOR MEETING NEEDS (OR "HOW MUCH DO I HAVE TO PAY?")

4.20 Clearly, then, the bus has to travel.[16] Where is it to go? The search for a principled basis for meeting needs is for a rationale that will tell us what spousal support has to be paid. Before 1969, the rationale for meeting needs was to remedy a breach of the marital obligation; it followed, therefore, that the objective was to replicate the marital standard of living, for life or until re-marriage of the payee, insofar as that was possible.[17] That can no longer be the principled basis for spousal support. We have explained above the reasons why needs, in a broad sense, arise, and we can see within the current law a number of rationales that may dictate an outcome but that are mutually inconsistent and so do not in fact provide the rationale that is needed.

4.21 Thus we can say that the courts look at the length of a marriage – but we cannot say that needs awards are proportionate to length of marriage; we can identify judgments that argue for payment to ease a transition to independence,[18] yet in many cases awards are made (whether of capital or on an ongoing basis) that assume lifelong dependency.[19] We can see that the courts in general use the marital standard of living as a benchmark,[20] but it is not clear why that should be so. And we can also see the courts using compensation as a rationale for

[14] See paras 4.96 to 4.104 below.

[15] The continental community of property regimes exist alongside provision for maintenance – or, in some cases, an explicitly compensatory payment based on the disparity in lifestyles post-divorce. See paras 4.56 to 4.60 below; see generally K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action: Volume IV: Property Relations Between Spouses* (2009) pp 587 to 590.

[16] See para 3.3 above.

[17] See para 3.5 above.

[18] Lady Hale has said that a financial award should "enable a gentle transition from [the standard of living enjoyed during the marriage] to the standard that she could expect as a self-sufficient woman": *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [158].

[19] In *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26, 46 Ward LJ, while emphasising that the order did not constitute a "meal ticket for life", cautioned against "gazing into the crystal ball" and advised that "if there is uncertainty about the appropriate length of the term, the proper course is to impose no term but leave the payer to seek the variation". See also *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 (where Mrs McFarlane was awarded a joint lives order) and *S v S* [2008] EWHC 519 (Fam), [2008] 2 FLR 113.

[20] "The lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties": *G v G* [2012] EWHC 167 (Fam), [2012] All ER (D) 33 (Mar) at [136] by Charles J.

meeting need.[21] The inconsistency of these different strands means that we cannot say what the law is. Family lawyers can to some extent predict, from experience, the sort of awards that may be made; but it is small wonder that some members of the public regard the payment of needs-based awards as unjustifiable if there is no identifiable principle that determines how much is to be paid.[22]

4.22 What is wanted is a fresh policy direction for the law on spousal support. Granted that marriage and civil partnership generate need, in a broad sense, what financial relief is to be awarded in response to that need? This question has been debated many times over many years in western societies that have initiated divorce reform and have then had to address the same issues that this jurisdiction faces over financial provision. In the discussion that follows we summarise the main arguments put forward in this and other countries before asking consultees for their views.

4.23 Before we do so it is worth orientating ourselves by reference to values, because this area of the law is not morally neutral. What values should be embodied by the law relating to spousal support? We have hinted at one already, in arguing that there should be a sharing of the cost of the responsibilities arising from marriage and civil partnership. Those listed below seem to us to be particularly important; the first five are matters of general principle while the last two are principles specific to family law.

(1) Clarity: the law should be reasonably easy to understand, for the non-lawyer as well as the lawyer.

(2) Rationality: the law should be intellectually defensible.

(3) Fairness: the law should not leave someone with responsibility that is not theirs (legally or morally), nor shouldering a cost or loss, or making a sacrifice, that should have been shared.

(4) Equality: the law should not discriminate between men and women – explicitly or in effect.

(5) Realism: reform that passes costs to the state is less likely to be implemented.

(6) Support for family relationships: the law should not do anything that tends to encourage divorce or relationship breakdown; equally it should not impose or penalise particular choices made by couples as to how their family life is organised. The law should not discriminate between the different roles undertaken to support a family, particularly in light of the

[21] *G v G* [2012] EWHC 167 (Fam), [2012] All ER (D) 33 (Mar) at [136, (d), (e) and (f)] and [139] by Charles J; see para 4.32, fn 30 below.

[22] See paras 3.30 to 3.32 above.

fact that certain roles are disproportionately likely to be undertaken by women.[23]

(7) An expectation of independence: the law should not encourage dependence where that can be avoided.

4.24 We pause to observe that we also have to consider carefully the interaction between needs and compensation. "Compensation" is not a word that appears in the statute. It became important following *Miller v Miller, McFarlane v McFarlane*.[24]

4.25 In our discussion in the 2011 Consultation we considered the meaning of "compensation" in this context and suggested that it can be seen as highlighting something that has to some extent always been part of the concept of "needs", namely the making up of loss arising from the marriage.[25] It has not been prominent in the case law since *Miller v Miller, McFarlane v McFarlane*.[26] It is rare for the claimant, as the economically weaker party, to be able to demonstrate that he or she would in fact have been better off if not married,[27] and so where needs are awarded at something referable to the marital standard of living a separate claim for compensation does not arise.

4.26 If the law is reformed to provide for a principled basis for meeting needs, it will be necessary to assess whether there should also be provision for payment of compensation as a separate matter. It will also be necessary to re-assess the relationship between provision for needs and the sharing of resources.[28] We return to both these issues below after our discussion of the various available bases of liability for spousal support.

4.27 On the following pages we present three hypothetical scenarios. One is a fairly typical divorce case offering no special legal or practical difficulties; a range of possible outcomes can be predicted under the current law (whether those outcomes are negotiated or ordered by a court), depending upon the resources available. The financial circumstances of the family in case one are left deliberately uncertain, apart from the house value – and indeed, even that is vague as it represents an expensive house in some areas of the country and a low value house in others. Sarah and Ian are typical of a wide range of couples

[23] See *White v White* [2000] UKHL 54 at [24], [2001] 1 AC 596, 605 by Lord Nicholls. Equality is a complex concept and its meaning has been much debated; see A Diduck, "Ancillary Relief: Complicating the Search for Principle" (2011) 38(2) *Journal of Law and Society* 272.

[24] [2006] UKHL 24, [2006] 2 AC 618. The idea may have emerged partly as a result of the growing awareness of the cost of motherhood to women (Cabinet Office, Women's Unit, *Briefing: Women's Incomes over the Lifetime* (2000)), as well as emanating from Joanna Miles' discussion in "Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions" (2005) 19(2) *International Journal of Law, Policy and the Family* 242.

[25] Marital Property Agreements (2011) Law Commission Consultation Paper No 198, paras 2.55 to 2.56. Contrast the other sense of compensation – compensation not for the loss arising from the marriage but the loss arising from the divorce; see 4.37.

[26] [2006] UKHL 24, [2006] 2 AC 618.

[27] And see the comments of Coleridge J in *RP v RP* [2006] EWHC 3409 (Fam), [2007] 1 FLR 2105 at [59] to [64].

[28] We noted the ambiguity about this point at para 4.18 above.

whose resources do not exceed their needs under the current law, and for whom financial settlement is therefore about making ends meet somehow. For most of that range of families, reform would make no difference to the immediate financial outcome; but the law leaves these families uncertain as to when obligations have been met and as to how long they continue, as the case study narrative explains.

4.28 Two others are also offered as less straightforward cases; the third, in particular, is a situation the outcome of which is unknown under the current law. In considering the various available models for reform in the pages that follow, we refer back to these scenarios to consider the effect that each model would have; and consultees will no doubt have other situations in mind which they may like to discuss in their responses.

CASE STUDY ONE

Sarah and Ian are in their early thirties; they have been married for six years and have two young children aged three years and five years. Ian works as a deputy manager in the local building society and Sarah looks after the children full time, having given up her career as a speech therapist. They live in a home worth £250,000, with a mortgage debt of £200,000. Ian has accrued ten years of pension benefits. The couple have no other assets. They have agreed to divorce, and that the children will live with Sarah.

Possible outcomes include:

OUTCOME ONE: Sarah stays in the former matrimonial home with the children. Ian makes the usual child support payments in respect of the children. Ian additionally undertakes to repay the mortgage until Sarah is able to assume financial responsibility for the property. Both Sarah and Ian accept that she will be unable to achieve enough income to do that in the immediate future, not least because the costs of childcare would outweigh her likely earnings. Ian agrees to rent his own property. The current equity in the property cannot be released at this point, but the sale proceeds will be divided 60/40 in Sarah's favour when the children leave home. The court makes an open-ended nominal periodical payment order for Sarah. As a reflection of Ian's continuing contribution to the mortgage payments, and Sarah's greater equity share in the home, she reluctantly forgoes a share of his pension.

OUTCOME TWO: As in 1), save that the court declines to make a nominal periodical payment order for Sarah and therefore terminates her right to apply for periodical payments in the future.

OUTCOME THREE: Sarah has managed to get a part-time job. The former matrimonial home is sold and Sarah is awarded 75% of the equity which, combined with the income from her new job, is enough to raise a mortgage for a two-bedroomed flat. Ian is awarded 25% of the equity from the home and has to rent a flat for the time being (it is anticipated that he will be able to buy later) but retains 75% of his pension. He makes the usual child support payments and takes on liability for part of the mortgage payments on Sarah's flat.

Issues in the current law: The current law gives no clear rules as to the outcome in this case: it is not possible to say how much Ian has to pay, nor for how long. The two children will be needing care for a long time; financially, the ending of the marriage will impact more severely upon Sarah than upon Ian.

This is a case where there is no money to spare. In the "big money" cases, the courts' objective, in practice, is to achieve a lifestyle at or near the marital standard of living, for the lifetime of the economically weaker party, taking into account his or her own means if any. The available resources in Sarah and Ian's case – and indeed in the majority of cases – mean that it is not possible to achieve that objective in the foreseeable future. That in turn means that liabilities are open-ended, both as to amount and duration. Ian can be advised that when his or Sarah's circumstances change he may be able to apply for a variation of his liability to make periodical payments, or of his undertaking to meet mortgage payments. It is not possible to say at this point when Sarah might be expected to support herself. It is not possible to say what, if any, entitlement she has to share Ian's pension.

In the discussion that follows we review a number of different principles that would both provide an explanation for Ian's liability and, with varying degrees of precision, determine how much he has to pay and for how long. None is going to make a difference to the immediate future; one of the consequences of divorce is that this family is in financial difficulties and the two parents will have to continue, in effect, to pool their resources despite their separation in order to meet their shared responsibility to provide a home and care for their children.

CASE STUDY TWO

Sophia and Michael have been married for six years and have no children. Sophia is a consultant orthopaedic surgeon who works with private patients and earns a six figure salary. Michael is a carer for the elderly and works part-time. The couple live in a home in Central London worth £2 million, subject to a mortgage debt; the house was bought, and some of the mortgage debt paid off, using Sophia's earnings during the marriage. They enjoy a high standard of living with at least three overseas holidays per year and eat out at least five times a week. They have a housekeeper and team of domestic staff to run their home.

Issues in the current law: It is not clear how the courts would exercise their discretion under the current law. This would be regarded as a short marriage; but it is a very wealthy one. There is a capital asset – the matrimonial home. There is a significant disparity in earning capacity between the two parties, and that disparity does not seem to have been the result of the marriage, but it is not possible to know to what extent Michael might have made different choices had he not been married.

The case is unusual because of the wealth involved. But it highlights some issues in the current law that could be answered if the law were based on an identifiable principle:

- Is Michael entitled to continue to live at the marital standard of living?
- If so, for how long?
- If not, at what level and for how long is Sophia obliged to support Michael?

These questions can be obscured under the current law because in practice Michael may be able to achieve a very high standard of living as a result of a half share in the value of the house. The issues are highlighted if there is no capital: it is not possible to say under the current law how much Sophia has to pay, nor for how long. Put another way, is Michael's level of need determined by what he had during the marriage, or by what he would have had but for the marriage, or by some other measure?

A further issue is highlighted if we change the facts a little and suppose that Michael gave up a lucrative career when he married Sophia, partly in order to enable the couple to relocate so that Sophia could take up a new job but also because Michael was unhappy at work. Does his "sacrifice" mean that he is entitled to a higher level of spousal support (does he have a "relationship-generated need"), so as to raise the level of support to which he is entitled?

This is an unusually wealthy family; but consideration of the outcome for this couple may be helpful because it isolates the same sort of issues that we saw in the more average case of Ian and Sarah, but in a different context.

CASE STUDY THREE

Pat and Chris entered into a civil partnership eight years ago and have no children. They are both secretaries and they met at work. They live in a rented flat. Whilst on holiday, Pat suffered a devastating cycling accident and was left paraplegic. After eight months in rehabilitation Pat returned to the couple's home and was cared for by Chris. Pat is now unable to work. Pat has no grounds to make a personal injury or insurance claim in relation to the accident.

Issues in the current law: It is not clear how the courts would exercise their discretion under the current law. Pat "needs" a great deal of support; that need was not generated by the civil partnership. To what extent is Chris responsible for meeting that need? Again, this is an unusual case, and is useful in highlighting an issue of principle.

4.29 We turn now to the available models for reform. We discuss in turn the options that seem to us to be the most significant:

(1) a compensatory basis;

(2) unravelling the "merger over time";

(3) a formulaic calculation: the American Law Institute's Principles of the Law of Family Dissolution;

(4) formulaic guidelines: the Canadian Spousal Support Advisory Guidelines; and

(5) a focus on independence.

(1) A compensatory basis

4.30 Conspicuous among the available theoretical models is the view that needs should be met only if they are generated by the relationship – hence the term "relationship-generated needs".

Relationship-generated needs in the English case law

4.31 There are cases, and judicial comments, that support the view that "needs" are those generated by the marriage or civil partnership. But it is not clear what this means. In *Miller v Miller, McFarlane v McFarlane* Lady Hale explained:

> The most common rationale is that the relationship has generated needs which it is right that the other party should meet. In the great majority of cases, the court is trying to ensure that each party and their children should have enough supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage.[29]

4.32 There may be a mixture of rationales here: an examination of the needs to which the relationship has given rise, along with a desire to maintain the marital standard of living. So "needs" in this sense embodies a sense of entitlement to continuity rather than a measure of loss.[30]

4.33 However, a different approach – which is not currently seen in our case law – is to define "needs" only by reference to the losses caused by the relationship,

[29] [2006] UKHL 24, [2006] 2 AC 618 at [138]. But note Lord Nicholls' differing opinion, expressed at [11].

[30] And in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 Lady Hale goes onto say, at [140], that "compensation for relationship-generated disadvantage … may go beyond need, however generously interpreted" to include, for example, the loss of a career. In *G v G* [2012] EWHC 167 (Fam), [2012] All ER (D) 33 (Mar) at [132], Charles J quoted at length Lady Hale's explanation from *Miller v Miller, McFarlane v McFarlane*, in a judgment that reflected both the compensating of needs caused by the relationship and the claimant's obligation to take on a degree of independence.

comparing the economic position that the spouses are in now with the position they would have been in had they not married.[31]

The background: Ira Ellman and "The Theory of Alimony"

4.34 The academic pedigree of this view is long. The most important work is undoubtedly Ira Ellman's 1989 article "The Theory of Alimony".[32]

4.35 Ellman argued that the justifications usually put forward for spousal support[33] are inadequate. It cannot be justified contractually (the "contract" is too vague for it to be possible to say what terms have been breached, let alone what the damages are), nor on a partnership basis (because partnership ends when dissolved).[34] There are of course similarities, but neither idea is any more than an analogy, and neither provides a justification for spousal support.

4.36 However, in a search for a different justification, Ellman pointed out that in a typical "housewife marriage", the wife puts in her major investment at the start of the marriage. She makes a huge economic sacrifice by giving up work; the pay-back comes much later when she is supported for life and into old age. The husband, by contrast, sacrifices very little at the start – he carries on earning, children are produced, and the childcare is done. He shares his earnings to support the family, but that is nowhere near the loss that his wife suffers.

4.37 In economic terms, therefore, if the marriage ends after the parties have had children, without financial adjustment, the traditional housewife suffers a huge financial loss whereas her partner does not. Ellman argued that the post-divorce financial settlement should redress this, so as to incentivise, or at least make safe, economic sacrifice made for the common good. On that basis Ellman argued that spousal support should be paid on a compensation basis. The ex-spouse should be compensated for earning capacity she has lost in the interests of the marriage, in repayment of financial sacrifices made in furtherance of the joint enterprise. The claimant gets what she would have had but for giving up work in reliance on continued support; she does not get what she would have had if the marriage had continued, which would probably have been considerably greater. In the language of contract and tort law, the claimant gets an award of reliance loss rather than expectation loss.

4.38 The argument that spousal support should be restricted to the meeting of relationship-generated needs is a powerful one. It supplies a clear answer to the question: why should a former spouse meet someone's need, rather than the

[31] Lady Hale in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [158]: "[Mrs McFarlane's award] is undoubtedly more than she would need to get herself back to where she would have been had the marriage not taken place. But that has never been the express objective of the law … the court has to take some account of the standard of living enjoyed during the marriage".

[32] I Ellman, "The Theory of Alimony" (1989) 77(1) *California Law Review* 1.

[33] A reminder that we use this term to mean "payment to meet needs", whether in the form of income or capital (see para 3.2 above); Ellman was referring to the US concept of alimony, but his argument is equally valid for spousal support in the sense in which we are using it.

[34] We note that this is not quite right; a business partnership ends when it dissolves, but it may take many years for the ex-partners to deal with the continuing liabilities of the partnership to third parties and to each other.

other members of the claimant's family, or the state, or indeed no-one at all? If an ex-spouse is liable to meet these needs, that removes an economic incentive to divorce; perhaps more realistically, it is fair (because those who make economic sacrifices are not left bearing a disproportionate cost of the sharing of responsibility); and it promotes equality between different working choices and – because women give up work for the sake of childcare more often than men do – between the genders. And a compensatory basis transforms the claim for support, from a plea for discretion into a claiming of an entitlement. The results obtained in our scenario one[35] are probably much the same as they would be under the current law, although practical difficulties arise because this basis requires an assessment of what Sarah's financial position would have been but for her childcare role, and how soon she would be able to achieve that position. The compensatory basis can be seen as a logical and attractive basis for liability, even though calculation is not straightforward.

4.39 For some, however, this argument is unappealing because it appears to ignore the merging of lives and of expectations that marriage and civil partnership inevitably involve. It is a consequence of Ellman's argument that if the claimant was in very low-paid employment before the marriage and had no prospects of betterment, and is able to return to that employment post-dissolution, then the claimant has no claim for spousal support even if the other party is a millionaire.[36]

4.40 The weaknesses of Ellman's scheme can be summarised as follows.

(1) The assumption that people are rational economic actors: of course they are not. Even so, it must be right that the law should not provide financial incentives for divorce.

(2) His reasoning generates consequences which some find unacceptably harsh and far removed from the emotional reality of marriage. Consider its effect on our scenario two.[37]

(3) It also generates harsh consequences in the difficult cases where loss or disability arises during, but not because of, the marriage or civil partnership, so that there is simply no basis for relief. In our scenario three[38] Pat gets nothing.[39]

[35] See para 4.27 and following.

[36] If the couple have had children, there is another dimension. If a claimant has made a sacrifice because of having children, Ellman argues that she should get half her loss, because raising children is a cost that ought to be shared; where both have losses arising from childcare, the spouse with the larger loss gets half the difference between the two losses. Ellman assumes a child support system that properly allocates the cost of actually raising the children.

[37] See para 4.27 and following.

[38] See para 4.27 and following.

[39] This question is not answered in the current law, although many of the practitioners we have spoken to regarded this as part and parcel of the obligation to meet needs. An argument can be made for classifying this sort of need alongside relationship-generated needs on the basis that the fact that an accident happens, or a disability arises, during the partnership has a profound effect upon the way the accident victim responds to it.

(4) It raises the evidential difficulty that it requires proof of what might have happened had the marriage not taken place – which is unknowable – as well as prediction about when independence will be able to be achieved (in order to quantify loss).

4.41 In reality both parties may have relationship-generated needs, and each may be seen as responsible for both sets of needs. Ellman's model assumes a weaker claimant and a stronger payor, but the marriage partnership today may be rather more complex. How would the needs of both parties be incorporated in a discretionary system? And how would that joint responsibility be reflected? One answer to the latter point would be to use the joint resources of the couple to meet relationship-generated need before any calculation of sharing is made; contrast the courts' current approach in the "big money" cases, which is to calculate the claimant's needs and then check that they are met within his or her half share of capital.[40]

4.42 An issue that causes particular concern is that embodied in our scenario three: the need generated during the marriage but not "by" the marriage or civil partnership. We cannot say that Pat's disability was caused by the relationship. How far is Chris' commitment in taking on the civil partnership to be taken as a commitment to meet Pat's needs for the rest of Pat's life? Does that differ with the length of the civil partnership? How far is a requirement to meet that need consistent with Chris' right to a dissolution of the civil partnership? These are profound and difficult questions to which there are many different answers. None is obviously right or wrong.

4.43 Ellman's arguments form part of the basis for the American Law Institute's principles of spousal support,[41] and, less directly, for the Canadian Spousal Support Advisory Guidelines.[42] Both are formulaic rather than evidence-based methods of assessing spousal support, and we have to look at the reasons why they are formulated on that basis.

[40] We return to this issue below at para 4.96 and following.

[41] American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

[42] C Rogerson and R Thompson, *Spousal Support Advisory Guidelines* (July 2008), available at http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html (last visited 27 July 2012).

Our case studies: a compensatory basis for needs

Case one:

Sarah's need is generated by the relationship. She is going to have a lower income than she could otherwise obtain because of the need to care for the children; her earning capacity has probably already been affected by having time out of the workplace, and that is likely to continue for some years, whether or not she obtains some part-time employment.

So the immediate outcomes for Sarah are unaffected on this basis. However, a strictly compensatory approach requires an assessment both of what Sarah's financial position would have been but for her childcare role, and how soon she would be able to achieve that position. This requires some assumptions and forecasting; on this basis we can explain to Sarah and Ian what the law is trying to achieve, but it is difficult to translate that into figures and time periods.

Case two:

Michael does not appear to have lost out financially from the marriage, as we set up the example initially. He is still working, and has been living at a far higher rate than he would have been able to achieve alone. On a compensatory basis he should receive only what he needs to transition back to a single lifestyle that he can support. Note that this has no effect on his entitlement to capital under the sharing principle; if there is an owned house acquired during the marriage, Michael should receive a half share in its value on these facts.

If Michael did give up work for Sophia's sake, then again a compensatory basis would entitle him to what he needs in order to set up home alone resume a single lifestyle funded by his own earnings. Note that the compensatory basis for payment, where losses are met if they arise as a result of the marriage, can be regarded as a basis of joint responsibility; it would not be appropriate to say that if Michael's half share in any capital enables him to relocate and start out on his own he should have no other entitlement. Arguably, compensatory spousal support is a joint responsibility, and Michael should receive what he needs out of the couple's joint assets before the rest of the matrimonial property is shared.

Case three:

On a compensatory basis, it is hard to see that Chris has any responsibility for Pat's needs arising from the disability, since they are not generated by the civil partnership.

The impact of a move to relationship-generated need

4.44 Ellman's article was extremely influential, and a number of US states endeavoured to adopt his theory. But difficulties arose from the need to quantify loss, by working out what a claimant would have been earning had he or she not given up work, say, 25 years ago. Equally, it is not usually possible to assess future loss precisely by working out when a claimant will get "back to normal" or "back up to speed"; the approach taken by Mr Justice Charles in *G v G*[43] was made possible only because, very unusually, the claimant was starting up her own business and was able to provide detailed forecasts of anticipated profit. An approach to spousal support based strictly on relationship-generated need runs

[43] [2012] EWHC 167 (Fam), [2012] All ER (D) 33 (Mar); and see para 4.32, fn 30 above.

into the evidential difficulty surrounding proof of what would have happened, and of what is going to happen.[44]

4.45 And it was that difficulty that led to the idea of adopting a formulaic approach. Different American states have adopted different schemes, but the major reference point here is the American Law Institute's Principles of the Law of Family Dissolution, of which Ira Ellman was the principal reporter.[45] However, the American Law Institute's Principles also incorporate a different idea developed by other scholars, namely "merger over time".

4.46 Before we discuss that, we note that a move to a formula is not the inevitable result of the adoption of a compensatory approach. In New Zealand new legislative powers were introduced in 2002. As amended,[46] section 15 of the Property (Relationships) Act 1976 allows the court to order a one-off compensatory lump sum payment to "redress [future] economic disparities".[47] These payments are solely compensatory in aim; the court first deals with capital division between the spouses by way of equal sharing of a defined "relationship property" pool[48] and also deals separately with meeting need by way of maintenance orders.[49]

4.47 To make a compensatory payment the courts must consider relevant circumstances, including the spouses' earning capacities and historical childcare contributions, and be satisfied that:

> The income and living standards of one spouse … are likely to be significantly higher than the other spouse … because of the effects of the division of functions within the marriage … while the parties were living together.[50]

[44] A difficulty compounded in a difficult employment market where there may be no jobs to be had, and where women may have more difficulty in finding jobs than men: in the three months to January 2012, women constituted 22,000 of the 28,000 newly unemployed (with a total of 1.13 million unemployed women): Office for National Statistics, *Labour Market Statistics: March 2012* (14 March 2012), available at http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/march-2012/statistical-bulletin.html (last visited 27 July 2012).

[45] See also G Blumberg, "The Financial Incidents of Family Dissolution" in S Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (2000) pp 387 to 404.

[46] By section 17 of the Property (Relationships) Amendment Act 2001.

[47] See J Miles, "Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976" [2003] *New Zealand Law Review* 535, at 537 where she notes that the purpose of the award is clear from s 15(3) and the heading preceding s 15, extracted in *de Malmanche v de Malmanche* [2002] 2 NZLR 838 at [150]. Note also that compensation can be awarded by the courts additionally under s 15A (for contributions to non-matrimonial property) and s 17 (for reliance on non-matrimonial property).

[48] Property (Relationships) Act 1976, ss 8 to 10.

[49] Family Proceedings Act 1980, s 70 as amended in 2001. The legislation does not specify the order in which a court should consider making a s 15 payment and/or maintenance payments.

[50] Property (Relationships) Act 1976, s 15(1).

4.48 The Act does not specify what level of compensation is payable, if the necessary conditions exist to merit any payment at all.[51] Although the New Zealand courts are not constrained by formulae, they do face numerous constraints which guide their discretion, including that:

(1) the compensation payment can only be made as a one-off lump sum or property transfer;[52]

(2) the compensation payment can only be met from property deriving from the relationship;[53]

(3) a spouse is only eligible for compensation if the disparity in living standards is attributable to the division of roles within the marriage in the past;[54] and

(4) the court can only compensate financial disparity caused by divisions of functions within the marriage, not disparity which arises from "illness, idleness, or the vagaries of the job market … special skill or qualifications, separate property or luck".[55]

4.49 Those constraints have attracted criticism. Joanna Miles has argued that the economic disparity between the spouses is much more complicated than merely the disparity between what the financially weaker party currently earns and what he or she might have earned save for the marital responsibilities.[56] Trying to quantify future economic losses by reference only to retrospective roles adopted in the relationship also seems arbitrarily limited; as Miles notes, what of the pregnant spouse who is yet to assume the role of mother on separation and so seemingly cannot demonstrate the effects of division of labour within the marriage and invoke section 15 provisions?[57]

4.50 Crucially, section 15 restricts the availability of compensation by stipulating that it can only be met by a transfer of property and not from future income. This may

[51] See J Miles, "Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976" [2003] *New Zealand Law Review* 535, for further discussion about the various approaches taken to assessing compensation.

[52] Property (Relationships) Act 1976, s 15(3)(a) and (b).

[53] Above, s 15(3)(a) and (b).

[54] Although once over that threshold, prospective childcare responsibilities are pertinent to the court's discretion to make an order: s 15(2)(b).

[55] J Miles, "Financial Provision and Property Division on Relationship Breakdown: A theoretical analysis of the New Zealand legislation" [2004] *New Zealand Universities Law Review* 268, 295.

[56] See J Miles, "Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976" [2003] *New Zealand Law Review* 535, 552.

[57] J Miles, "Principle and Pragmatism in Ancillary Relief: The virtues of flirting with academic theories and other jurisdictions" (2005) 19(2) *International Journal of Law, Policy and the Family* 242.

mean that compensation, albeit in theory owed, cannot be paid, as the available assets may be insufficient.[58]

4.51 So the New Zealand scheme, while taking compensation seriously as a basis of payment, can be criticised for inflexibility and for some arbitrary limitations. Time, perhaps, will tell whether it yields results that are generally regarded as acceptable.

(2) Unravelling the "merger over time"

4.52 A compensatory theory, based on the idea of reversing losses generated by the marriage or civil partnership, has some very hard edges; as well as generating evidential difficulties it can be said to be individualistic and unduly financial in its focus. A very different approach is to be found in a group of theories which build on the idea of "merger over time" and make proposals that focus on the unravelling of that merger without an assessment of individual economic contributions to the marriage. These theories are also known as "income-sharing theories" because that is the mechanism they advocate for the calculation of spousal support.[59]

4.53 "Merger over time" is a description of what happens within a marriage:

> [An approach to spousal support] is to see the spouses as merging into each other over time. In this model, the longer they are married, the more their human capital should be seen as intertwined rather than affixed to the individual spouse in whose body it resides. This idea is consistent with the notion that human capital needs constant renewal – a regular tune-up, repair, and parts replacement model, if you like. After a while, one can less and less distinguish between what was brought into the marriage and what was produced by the marriage. Moreover, the longer the marriage, the longer the spouse in a dependent role has likely submerged her or his independent identity and earning capacity into the marital collective.
>
> One way to implement such a concept would be to give each spouse a percentage interest in the other's human capital/future earnings based upon the duration of the marriage.[60]

4.54 Thus although the term "merger over time" describes what happens, or can happen, during a relationship,[61] it is also used as a shorthand for the basis of

[58] See J Miles, "Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976" [2003] *New Zealand Law Review* 535, 551.

[59] C Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December 2002) p 23, available at http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/ss-pae (last visited 27 July 2012).

[60] S Sugarman, "Dividing Financial Interests on Divorce" in S Sugarman and H Kay (eds), *Divorce Reform at the Crossroads* (1990) pp 159 to 160. And see J W Ellis, "Surveying the Terrain: A Review Essay of Divorce Reform at the Crossroads" (1992) 44 *Stanford Law Review* 471, 495 to 496.

[61] And can therefore be prayed in aid to justify a variety of bases for relief: compensation-based, contribution-based and so on.

relief proposed by Stephen Sugarman and others.[62] These are surveyed by Carol Rogerson in her background work prior to the development of the Canadian Spousal Support Advisory Guidelines;[63] and while the merger idea can be used to argue for the provision of spousal support for life,[64] most versions[65] of the merger over time theory propose income sharing over a period proportionate to the length of the marriage, in order to provide transitional support and, therefore, to facilitate a de-merger.

4.55 It is important to note that none of the American writers who developed the merger over time theory has proposed it as a basis for discretionary provision; by itself, neither "merger over time" nor "transition" is a sufficiently precise idea to tell us what measure of relief is expected. Instead, their proponents use them as powerful arguments for spousal support that does not seek to measure loss or to calculate what might have been, but seeks to equalise the spouses' position (thus reflecting merger) for a period proportionate to the length of the marriage. The longer the marriage, the greater the merger and the greater the support (whether seen as transitional or permanent).

4.56 It is interesting in this context to compare the French *prestation compensatoire*, or compensatory award.[66] To summarise, French law provides for a spouse to claim a compensatory award on divorce, alongside the sharing of the marital acquest.[67] The award aims to compensate the disparity created by the divorce in the respective standard of living of each party. It should be paid as a lump sum, although there is provision for instalments to be made over a period not exceeding eight years.[68] The fact that one spouse was very wealthy before the marriage compared to the other will not result in a disparity for the purposes of this provision.[69] Unlike the New Zealand scheme, this compensatory payment does not co-exist with a separate liability for "maintenance" or needs-based liability.

[62] Jane Ellis describes Sugarman's proposal as "a measure supported by a metaphor": J W Ellis, "Surveying the Terrain: A Review Essay of Divorce Reform at the Crossroads" (1992) 44 *Stanford Law Review* 471, 495.

[63] C Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December 2002) pp 23 to 27, available at http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/ss-pae (last visited 27 July 2012), referring to the work of J Singer, C Starnes, R K Collins, J Ellis, S Sugarman and M C Regan.

[64] One of the models proposed by Sugarman in the work referred to above: S Sugarman, "Dividing Financial Interests on Divorce" in S Sugarman and H Kay (eds), *Divorce Reform at the Crossroads* (1990) pp 159 to 160 and 162.

[65] Including Sugarman's work based on the idea of "fair notice": S Sugarman, "Dividing Financial Interests on Divorce" in S Sugarman and H Kay (eds), *Divorce Reform at the Crossroads* (1990) pp 160 to 163.

[66] We are grateful to Dr Thérèse Callus of the University of Reading for the information and references she has provided on this.

[67] Code Civil, arts 270 to 281 (as amended by the law of 26 May 2004, and in relation to pensions by the law of 9 November 2010).

[68] Code Civil, arts 274 to 275.

[69] Cass Civ 1ère 9 Septembre 2009, no 08-16180.

4.57 A recent sample of compensatory awards[70] reveals little consistency between the awards made by different regional courts. The awards varied according to the incomes of the parties, the length of marriage and the number of children. So, for a spouse with an income of 1,000 to 1,999 euros per month, with an average marriage length of 19 years and 1.8 children, the *prestation compensatoire* awarded was 14,000 euros. At the other end of the spectrum, a spouse earning in excess of 10,000 euros per month, over an average 12-year marriage with 2.3 children, was ordered to pay 216,667 euros. The *prestation compensatoire* is awarded in addition to the share in the community acquests[71] and there will also be provision for child support on top of this.

4.58 The award is to be assessed by the court on the basis of a number of factors set out in the Civil Code, which may not seem unfamiliar to us:

(1) the length of the marriage;

(2) the age and health of the parties;

(3) their respective qualifications and professions;

(4) the consequences of the professional choices made by the spouses, notably with regard to the upbringing of the children and any ongoing childcare;

(5) the property, assets and income available or foreseeable after the dissolution of the matrimonial property regime;

(6) existing or likely benefits such as investment dividends; and

(7) the parties' respective positions with regard to pensions and especially the effects flowing from the professional decisions made within the family (under (4) above).

4.59 Although the Civil Code does not prescribe a formulaic assessment, a number of formulaic bases for calculation have been proposed;[72] they generally look to income disparity or spending capacity. On that basis, the *prestation compensatoire* is thus not an endeavour to measure actual loss but disparity in living standards. It is therefore close to the idea of the merger over time theory that allows for a payment to ease the transition, which may be set at a low or high level on the basis of policy choices. It does not generate lifelong obligation. We are not aware that French law has been directly influenced by the "merger over time" theorists; rather, the similarity between that theory and the practical impact of the *prestation compensatoire* demonstrates the strength of the idea of

[70] See Divorcé(e)s de France, available at http://www.divorcefrance.fr/content/view/18/34/ (last visited 8 August 2012). The sample of 25 cases involved awards ranging from around 46,000 euros to around 250,000 euros.

[71] Most low to middle income couples are likely to be subject to the default regime of community of acquests.

[72] (2010) 9 *Actualité Juridique de la Famille*, Special Issue on "Calcul de la prestation compensatoire": S David, "Calcul de la prestation compensatoire: propositions d'un expert", 350; D M Saint Leon, "Méthodes de calcul: point de vue d'un magistrat", 360; A Depondt, "La méthode de calcul d'un notaire-expert", 365.

compensation for disparity in lifestyles at the point of divorce – which seems to be the ultimate outcome of the merger over time theories.

4.60 We may be seeing the same outcome in other areas of Europe too, notably in Germany, which recently overhauled its system of spousal maintenance. The reformed German system has a fresh emphasis on the attainment of independence which does not seem to have been borne out in practice.[73] What we can say is that spousal support seems, as in the French system, to be based on an assessment of current disparity rather than of relationship-generated loss. Anatol Dutta notes:

> In practice, the maintenance to be granted is calculated on the basis of maintenance tables and formulas that have been developed by some regional courts of appeal and which estimate the living conditions of the spouses and their needs based on the income of the maintenance debtor.[74]

Our case studies: unravelling the merger over time

The impact of a merger over time basis for support in our three scenarios would depend upon the manner in which it was implemented. Implementation would be most likely to be on a formulaic basis, and the devising of the formula would be influenced by choices about the duration of support; we discuss this further below. Using the "merger over time" as a basis for discretion is problematic because by itself the "merger over time" does not provide answers. It invites provision that will vary with the level of the merger; the length of the marriage, the presence of children and the marital standard of living can be regarded as indicators of the depth of that merger, but policy choices have to be made in order to translate that into levels and duration of support.

An important choice to be made would be for how long a parent with whom children are living is to be regarded as in need of transitional assistance; and how does that transitional support combine with the obvious need to provide a home for the children?

The transitional period for adjustment would surely be shorter in scenario two, where there are no children to care for. Michael will have relocation costs, of course; and the financial impact of the ending of the marriage on him is far greater than on his wife, and the disparity in lifestyle without adjustment will be considerable.

In scenario three, clearly no adjustment is possible; it may be that any formulaic basis has to leave room for adjustment in this sort of exceptional circumstances, but in any event a choice has to be made as to the extent of Chris' liability to continue supporting Pat.

4.61 The merger over time theories have been influential in both the American Law Institute's Principles of The Law of Family Dissolution and the Canadian Spousal Support Advisory Guidelines.

[73] A Dutta, "Marital Agreements and Private Autonomy in Germany" in J M Scherpe (ed), *Marital Agreements and Private Autonomy in Comparative Perspective* (2012) pp 158 to 199.

[74] Above, p 165.

(3) A formulaic calculation: the American Law Institute's Principles of the Law of Family Dissolution

4.62 The American Law Institute's Principles of The Law of Family Dissolution ("the ALI Principles") – drafted by a team headed by Ira Ellman – sought to create model principles for adoption in varying forms by the US states. They are a law reform proposal, but they reflect and aim to some extent to standardise existing practice.[75] The ALI Principles discuss the basis of support at length; although their starting point is the compensation of loss generated by the relationship, they have moved away from the strict parameters of that position by including an element of compensation for loss in standard of living, thus drawing upon the merger over time theories. The harsh outcome described at paragraph 4.39 above does not occur. Another way of describing the principles, and the formula generated in response to them, is to say that they address the different impact upon the parties of the ending of the relationship.

4.63 Appendix A to this paper sets out the formulaic scheme suggested by the ALI. It is based on disparity of earnings post-dissolution; it assumes that sharing of capital has already been effected, and that an effective and realistic system for child support payments is in place. The most important elements in the calculation[76] are:

(1) loss in standard of living experienced at dissolution by the less well-off spouse (paragraph 5.04); and

(2) loss of earning capacity incurred during marriage and continuing afterwards as a result of taking on a disproportionate share of childcare (paragraph 5.05).

4.64 These are calculated[77] as follows.

(1) 0.01 x the "earnings gap" between the parties, multiplied by the number of years of the marriage, to last for a period equal to 60% of the length of the relationship.

(2) 0.015 x that gap, per year of childcare, as a proxy for lost earnings as a result of childcare, payable for a period, again to last for a period equal to 60% of the length of the relationship.

4.65 The calculations are subject to an overall maximum that ensures that payment cannot exceed 40% of income; and duration is subject to provisos so that where the age of the payee and/or length of the marriage exceed certain limits there is no maximum duration.

[75] See C Rogerson's description of the existing formulaic approaches in some US states in *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December 2002) pp 34 to 56, available at http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/ss-pae (last visited 27 July 2012).

[76] See Appendix A for a full list of the components of the formula.

[77] These are the suggestions; the ALI Principles recommend that states choose their own figures.

4.66 The formula itself is not based upon any calculation of actual loss or of the actual cost of re-adjustment. It is based upon a view of the extent to which it is fair or practicable to equalise lifestyles (the payment never exceeds 40% of the payer's income); and it is also based upon a view taken about duration. The formula is therefore based upon policy choices about the extent of financial adjustment that ought – in some sense – to be made; that choice might be made after a study of what the courts in fact do under the pre-formula law, and will inevitably embody something of a moral judgement. More generous support is obtained by upping the relevant multipliers. Crucially important in this formula is the fact that levels of payment depend upon duration, both of marriage and of years of childcare undertaken during the marriage.[78] Duration therefore becomes a proxy measure for actual cost, whether in terms of loss, or of what is needed in order to adjust to the change of lifestyle.

4.67 The scheme is formulaic but allows for departures in cases where there is substantial injustice.[79] So whilst the result in our scenario one,[80] and indeed in scenario two, will be predictable on the basis of the formula, there is potential for an individualised solution to scenario three. A formula, in scenario one, will yield a payment (whether capitalised or not) that bears no necessary relationship to the amount of the mortgage; the fairness of uniformity and predictability is substituted for an individualised solution.[81]

4.68 It is particularly useful to consider Ellman's own analysis of two English cases in "Do Americans Play Football?",[82] an important analysis of *McFarlane v McFarlane, Parlour v Parlour*.[83] He applies the ALI Principles to Mrs McFarlane and to Mrs Parlour, and concludes that the former, as a mother with ongoing childcare responsibilities, would have done significantly better under the ALI Principles than under the Court of Appeal's time-limited award, whereas Mrs Parlour, after a short marriage with no children, would have done much worse.[84]

(4) Formulaic guidelines: the Canadian Spousal Support Advisory Guidelines

4.69 The Canadian system was overhauled by the production of Spousal Support Advisory Guidelines ("SSAG"), the final version of which was released in 2008. The architects of these guidelines were Professor Carol Rogerson and Professor Rollie Thompson; Professor Carol Rogerson explains in her 2002 discussion

[78] Where childcare has been undertaken jointly, with both parties sacrificing earnings in order to do so, then a more complex calculation is required.

[79] See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) at § 5.04(4) on p 805 and § 5.05(6) on p 834, and commentary.

[80] See para 4.27 and following.

[81] Assuming here a solution where one element of needs provision is the husband's undertaking to make the mortgage payments. See para 2.4 above.

[82] I Ellman, "Do Americans Play Football?" (2005) 19(2) *International Journal of Law, Policy and the Family* 257.

[83] [2004] EWCA Civ 872, [2005] Fam 171.

[84] Mrs McFarlane did far better in the end because the House of Lords got rid of the time-limit on her maintenance and substituted a joint lives order: *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618.

paper why change was needed.[85] The problem was similar to what occurred in the US and is familiar here: the rationale for spousal support vanishes with no-fault divorce, no rationale is substituted and the law becomes uncertain and difficult either to explain or to predict. The Canadian Supreme Court moved from:

(1) a very strict purely re-adjustment basis for support, which was too little for not very long (*Pelech v Pelech*[86]); to

(2) a compensatory basis (*Moge v Moge*[87]) which proved difficult because of the problems of proof and the unduly restrictive basis for entitlement; to

(3) the *Bracklow v Bracklow*[88] decision in 1999, which gave generous support using vague and contradictory principles (a mix of compensation, need, reliance and expectation) and seems to have brought the courts back to a trend for lifelong support at the level of the marital standard of living without real justification.

4.70 As Rogerson puts it in her 2004 article:

> Some now believe that life-long support (and at the most extreme – at the marital standard of living) can be claimed after the breakdown of any marriage, whatever its length or nature, if breakdown will leave the parties in significantly different financial positions. Such a model of spousal support is theoretically unjustifiable, absent fault, and will only serve in the long run to de-legitimize the spousal support obligation.[89]

4.71 Hence the SSAG project, which built on the ALI Principles but also upon extensive work researching local practice in the Canadian courts. Thus it embraces both compensatory and non-compensatory payments – the latter being understood as a sharing of the expectation loss on termination of the marriage.[90] It is similar to the ALI Principles, but consciously more generous. The guidelines are intended to reflect existing practice (hence the need for research before their formulation).[91] They are *guidelines* – their use is voluntary. There are numerous annual reports available on their effect and use by the courts, so despite their voluntary nature they have become thoroughly embedded in the system. Interestingly they do not say who is entitled to maintenance – that is for the courts, and is often based in practice on a significant disparity in post-divorce income. And unlike the formulae in the ALI Principles, the SSAG give a range,

[85] C Rogerson, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (December 2002), available at http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/ss-pae (last visited 27 July 2012).

[86] [1987] 1 SCR 801.

[87] [1992] 3 SCR 813.

[88] [1999] 1 SCR 420.

[89] C Rogerson, "The Canadian Law of Spousal Support" (2004) 38(1) *Family Law Quarterly* 69, 95.

[90] Compare § 5.04 of the ALI Principles: para 4.63 above.

[91] See C Rogerson, "Child and Spousal Support in Canada: The Guidelines Approach Part 2" (2012) 2 *Irish Journal of Family Law* 18 where Rogerson notes that regional courts had begun to adopt formulae of their own before the SSAG was drafted.

not a final figure, within which the courts can decide and/or the parties can negotiate. A summary of the formulae is set out in Appendix B.

4.72 The SSAG project provides for two different bases of payment – "with child support" and "without child support". It also sets out a wide range of exceptions which justify departure from the formula.

4.73 The "without child support" basis, available to all, works on the basis of income disparity and length of marriage in the same way (as do the ALI Principles) on the basis of the idea that:

> The amount and the duration of support increase incrementally with the length of the marriage … . The idea that explains this formula is merger over time: as a marriage lengthens, spouses more deeply merge their economic and non-economic lives, with each spouse making countless decisions to mould his or her skills, behaviours and finances around those of the other spouse. The gross income difference measures their differential loss of the marital standard of living at the end of the marriage. The formulas for both amount and duration reflect the idea that the longer the marriage, the more the lower income spouse should be protected against such a differential loss. Merger over time captures both the compensatory and non-compensatory spousal support objectives that have been recognized by our law since *Moge* and *Bracklow*.[92]

[92] C Rogerson and R Thompson, *Spousal Support Advisory Guidelines* (July 2008) p viii, available at http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html (last visited 27 July 2012).

Our case studies: a formulaic basis

The assessment of outcomes in our three case studies changes dramatically if a formulaic basis is used. For one thing, outcomes are more predictable – either absolutely if the formula is inflexible, or within a range, if the formula generates guideline ranges as does the SSAG. There is no element of speculation; we do not need to know what would have happened absent the marriage or civil partnership, nor to consider what may happen in some years' time. Another important difference is that the cause of the need for support does not have to be assessed; we do not have to consider whether Michael has lost anything as a result of the marriage; and the fact that Pat's disability – and consequent lack of earning capacity – is not the result of the civil partnership is irrelevant. However, a formula should factor in the continuing need generated by Sarah's childcare responsibilities.

We have not tried to apply either the ALI or the SSAG formulae to the case studies, because more detailed financial information would be needed and the examples would inevitably be misleading: a formula that works well in the different financial context of another jurisdiction might well not generate acceptable results in ours.

We think that a formulaic basis for spousal support, to be workable in England and Wales, would have to be integrated with the issues of child support and the occupation of the family home where that was relevant, and would have to work alongside the sharing principle. It would be likely to be based upon income disparity. Sophia and Michael supply a relatively simple example; there is no child support to consider, any capital (the value of the matrimonial home, in particular) would be shared equally, and a formula would be likely to be based upon the disparity in the couple's income and the length of the marriage, evening out the difference in earning power for a limited period.

4.74 Putting the ALI Principles and the SSAG together we can see that what they have in common is a formula that gives two general bases for support, with rules about duration; in all cases the economically weaker party has an entitlement to spousal support because the loss of interdependence is recognised as compensable even though that is really an expectation loss. Both formulae have elements in common, in particular the crucial factor of length of marriage; both recognise the ongoing nature of loss where there is ongoing child support. When we look at our three scenarios, similar comments arise to those we made when looking at the ALI formula; but here there is a range, rather than a single figure, and therefore rather more room to negotiate. That flexibility might be useful when financial support is combined with the need for housing; perhaps a lower level of support would be bargained for in exchange for being able to stay in the family home.

(5) A focus on independence

4.75 Under this head we group a number of approaches to this area of the law which impose a limit on either the level or the duration of spousal support in the interests of encouraging independence post-divorce and, in particular, to discourage a tendency to regard women as dependants.

4.76 This approach can be traced back some decades. In the 1970s and 1980s Ruth Deech[93] and Pamela Symes[94] questioned why "maintenance" was paid at all,[95]

[93] R Deech, "The Principles of Maintenance" (1977) 7 *Family Law* 229.

[94] P Symes, "Indissolubility and the Clean Break" (1985) 48(1) *Modern Law Review* 44.

save to the very old or to those who were looking after very small children. Their arguments were made from a feminist point of view and in opposition to a system that made women dependent upon men. Their argument was not simply that divorced wives should not be maintained; they also wanted women to be, and to expect and be expected to be, self-sufficient by remaining in employment and providing for themselves. So they did not see withdrawal of the expectation of maintenance as a stand-alone idea; Baroness Deech, for example, supported the Law Commission's proposals for automatic shared ownership of the family home.[96]

4.77 Baroness Deech has argued that the availability of spousal support jeopardises the development of equality in the workplace,[97] and maintains her view that "no maintenance should be payable unless the claimant spouse is unable to work or has the care of young children."[98]

4.78 There is some force in these arguments. To some extent, any system that provides support also enables, and perhaps encourages, dependence. And any imposition of a cut-off point, in either the level of support or its duration, can be said conversely to encourage independence and to discourage career sacrifice made in the interests of family life. That might be particularly important in our scenarios one and two, whereas it would be ineffective in scenario three.

4.79 The other side of the coin is that an arbitrary limit on the level[99] or duration of spousal support available has some damaging side-effects,[100] by limiting choice[101] and – indirectly but inevitably – prejudicing women. In stable partnerships, decisions about the family's welfare and lifestyle are not made with a view to the possibility of divorce. Inevitably there is give and take, and there is compromise – increasingly, today, compromises and sacrifices are made by men, although women are far more likely to give up work to look after children. Given that these decisions are inevitably made, there is a concern that any limit on levels of spousal support imposed in the interests of promoting independence will lead to unfairness, and in particular to a situation where the burden of joint responsibilities falls more heavily on women.

[95] This was of course in the era when there was no entitlement to share the family property.

[96] R Deech, "The Principles of Maintenance" (1977) 7 *Family Law* 229, 233. Compare A Diduck and H Orton, "Equality and Support for Spouses" (1994) 57(5) *Modern Law Review* 681: "While the ultimate goal for many feminists may be to abolish maintenance altogether, such a move must occur only when there is no need for support and not be made merely as a concession to the rhetoric of formal sex equality. In order to abolish need, however, we must restructure fundamentally the relationship between state, family and work."

[97] See para 4.8 above, fn 8.

[98] R Deech, *What's a Woman Worth? The Maintenance Law* (Gresham College Lecture, London, 13 October 2009), available at http://www.gresham.ac.uk/lectures-and-events/what%E2%80%99s-a-woman-worth-the-maintenance-law (last visited 27 July 2012).

[99] One practitioner suggested to us that spousal support should be measured by average incomes and by average house prices (with regional adjustment).

[100] See K O'Donovan, "The Principles of Maintenance: An Alternative View" (1978) 8 *Family Law* 180.

[101] Women should not be expected to stay at home when they have children; but should the law put them at a disadvantage if they do?

4.80 The Scottish system makes for an interesting comparison here. The Family Law (Scotland) Act 1985 makes financial orders available for the following purposes:

(1) fair sharing of matrimonial or partnership property;

(2) to take account of economic advantages and disadvantages;

(3) the fair sharing of the economic burden of looking after children;

(4) enabling a dependent partner to adjust to loss of support; and

(5) relieving serious financial hardship.

4.81 Section 9(1)(d) of the 1985 Act (enabling a dependent partner to adjust to loss of support) provides that spousal maintenance is payable for a maximum of three years; the Scots regard the clean break as a priority and have a strong preference for financial settlements that do not involve ongoing maintenance at all. The result is that where a spouse who has sacrificed earning capacity can be compensated from capital, that will be done; but that where there is no available capital, that spouse will remain uncompensated save where it is possible to make an order for the payment of capital by instalments. The system is reputed to be harsh to women;[102] certainly any system that imposes an arbitrary time limit upon spousal support will disadvantage the less well-off whose needs cannot be met out of capital. Looking at our case studies, Sarah in case study one is very vulnerable to any arbitrary limitation in her entitlement to support; the benefits (to her, as well as to Ian) of encouraging her to get back into work have to be balanced against the stress and hardship that may be generated if she is actually forced to do so.

POLICY CHOICES AND THEIR CONSEQUENCES

4.82 Our current law is unsatisfactory because, whilst it provides us with a number of explanations as to *why* spousal support is payable, it does not tell us what is payable. In order to do that a policy choice has to be made about the basis of liability. Here we discuss and compare the options of discretion and of a formulaic calculation, and consider some of the consequences of the available policy choices, before asking consultees for their views.

The options discussed: discretion v formula

4.83 An examination of other jurisdictions reveals that a compensatory basis for spousal support – in other words, a decision that the needs to be met are those generated by the relationship – may be viable, and is certainly intellectually justifiable. But a decision to adopt that basis entails some difficult evidential requirements. The court must take a view on what would have been the case absent the marriage or civil partnership, and indeed on what is going to be the case in the future. This has not been found to be a straightforward exercise in New Zealand.[103] It is perhaps small wonder that in this jurisdiction a decision

[102] See P Cunniff, "Notable Differences" (2011) 110(Oct) *Family Law Journal* 14.

[103] See para 4.46 and following.

explicitly based on the assessment of relationship-generated needs, although a legitimate approach to the section 25 exercise, is a rarity.[104]

4.84 Small wonder, too, that a number of jurisdictions have turned to a different sort of compensation: meeting the loss caused by the divorce or dissolution, rather than that caused by the relationship itself and the choices made within it. On this basis spousal support aims to compensate the difference in outcomes for the two parties, where the ending of the relationship leaves one better off than the other. We have suggested that the French *prestation compensatoire* is an example of this exercise; we have also seen it embodied in the formulaic approaches of the ALI Principles and the Canadian SSAG.

4.85 The idea of a formula for the assessment of needs has its advocates in this jurisdiction;[105] but in the main we have found practitioners to be wholly opposed to the use of a formula. We have to ask whether that opposition is well-founded, based as it is in part upon the experience of the earlier, rather than the later, years of the child support legislation.[106] A formula, however counterintuitive it is to English family lawyers, offers two significant advantages:

(1) certainty; and

(2) the ability to combine more than one rationale for relief.

4.86 Thus the ALI calculation is able to incorporate the merger over time principle alongside the compensation of relationship-generated need, so avoiding the harsh results that the latter may generate by itself while incorporating the important idea of joint responsibility for losses caused by the relationship.

4.87 Another way of putting this is to say that the complexity of an assessment of relationship-generated needs leads naturally to a change of focus, from compensation of reliance loss (what would have been the financial position of this person but for the marriage) to the compensation of expectation loss (what would have been this person's financial position but for the divorce). The latter is considerably easier to assess, because the only information needed is the parties' present financial position; but it also requires a policy decision as to the length of time required to adjust. And from there it is not difficult to see a road that leads to a formula based in some measure upon disparity in lifestyle and calculated so as to yield a figure that it is proportionate to the length of the marriage, together with other factors such as the duration of past and future childcare responsibilities.

[104] *G v G* [2012] EWHC 167 (Fam), [2012] All ER (D) 33 (Mar).

[105] See D Hodson, "Financial Provision: A Formula Will Do Nicely, Sir" (2007) 37(Jan) *Family Law* 57; and D Hodson, "Maintenance after *Miller and McFarlane*: Sharing the Income Resources" (21 July 2006) *Family Law Week*, available at http://www.familylawweek.co.uk/site.aspx?i=ed2083 (last visited 27 July 2012).

[106] It will be recalled that the original child support formula required nearly one hundred separate items of information. The formula is now considerably simpler (see Child Support Act 1991, sch 1, part 1). One academic writer (Hilary Woodward, University of Cardiff) wrote to us on this point: "For all the criticisms of the Child Support Act, the formula has stuck and my impression from my own practice is that people have found it helpful to use the Agency formula as a guideline."

4.88 A formula is therefore to some extent arbitrary; it requires a policy choice both about how far the disparity in post-divorce lifestyles should be moved towards equality, and for how long. And in asking "how long", of course we do not refer to method of payment. The issue is how long it is supposed to take the recipient spouse to adjust to independence; typically the answer is a number of years, but the actual payment may be in income or in capital form. In making an assessment of the duration of support, policy-makers must take into account external factors such as the employment market, and the extent to which independence should be encouraged or even enforced, as we have discussed.[107]

4.89 One of the growing features of the law relating to financial orders is the likelihood that litigants will not have legal representation.[108]

4.90 Any solution to the problems in this area of the law must take into account that the vast majority of couples will not have access to judicial discretion. We take the view that it is implausible to suggest that the current law, with its mixture of mutually inconsistent rationales,[109] is correct and sustainable for the future; but it may also be impracticable for the law to continue on a discretionary basis at all. It is not simply that the virtues of predictability may well outweigh the advantages of individualised "fairness"; in the light of the withdrawal of legal aid for the future and the unlikelihood that the vast majority of couples going through divorce or dissolution will benefit from adjudication, individualised fairness is in any event largely unavailable.

4.91 There is, of course, no reason why the actual formulae used elsewhere should be appropriate in this jurisdiction. The ALI and Canadian formulae have evolved in their own contexts and against different legal and economic backgrounds. Those formulae may well be inappropriate here not only in the figures used but also in the basis of calculation, because of the differences between US and Canadian society and ours in terms of state benefits, the labour market, house prices, earning capacity and so on. It may well be that the approach to owner-occupation here means that an income sharing model by itself could not work in our society where the ability to obtain satisfactory housing depends not so much on ability to pay as on ability to borrow. Income sharing might leave the parties with comparable incomes but very different lifestyles if one party has mortgage capacity and the other does not.

[107] See paras 4.75 to 4.81 above.

[108] See para 3.34 above. However, we note that litigation insurance is a growing industry. We note also the availability of litigation loans: clients in divorce cases can now take out loans as low as £3,000, which are secured against the matrimonial home and used to fund legal costs. Another potential option is litigation funding, where a funded litigant is not required to pay back the funder unless the case is successful. However, it seems that companies offering this service have little enthusiasm for funding divorce cases. See R Rothwell, "Is it Wrong to Profit from Divorce Litigation", *Law Society Gazette*, 28 May 2012, available at http://lawgazette.co.uk/blogs/blogs/news-blogs/is-it-wrong-profit-divorce-litigation (last visited 27 July 2012). For a discussion of the potential risks associated with litigation loans in family cases, see D Capper and L Glennon, "Litigation Funding for 'Big Money' Divorces: An Assessment of Legal Risk" (2007) 26(Oct) *Civil Justice Quarterly* 447.

[109] See paras 3.30 to 3.32 above.

The implications of policy choices

4.92 Needs is not an isolated matter. At the moment it is part of a package, considered by the courts – in those very few cases where the matter is in fact considered by a court – alongside the sharing of capital, in the context of the payment of child support, and with an eye to the need of all parties for housing and especially the children. It is therefore important to consider the effect on the whole package of any reform of the principled basis for meeting needs.

Needs and the family home

4.93 Accordingly principled reform of spousal support, whether a re-shaping of discretion or the introduction of a formula, would have to take into account the dual role of the family home in this context: as a capital asset and as a place to live. Put another way, "needs" at present involves in many cases an element of capital provision, in the form of the equity in the family home, and also an element of substitute income in the form of the right to stay in the family home, often for some years. It may be very difficult to incorporate those ingredients in the current law within, or alongside, any calculation, but they are so important that a way of doing so would have to be devised.

4.94 A move to a formulaic basis could be considered alongside a re-arrangement of the other factors involved in financial orders. One possibility would be to invoke a simpler version of the German system of "pillars" or topics; we already regard as conceptually separate the payment of child support and the sharing of matrimonial property.[110] It is possible to imagine a system where the financial arrangements made on divorce or dissolution might involve as separate ingredients child support, sharing of property, consideration of the right to stay in the family home, and an additional payment of spousal support where indicated by a formula. That approach involves the separation of the use value of the family home from the capital value, and may be much easier for spouses to understand and, perhaps, to accept than is the mingling of the two aspects of the home under the current law. But a formula would therefore have to be carefully devised so as to enable the economically weaker party to be properly housed, not only while the children are with him or her but also in the long term.[111]

Needs and compensation

4.95 We touched on this point earlier. If spousal support were to be calculated solely by reference to relationship-generated needs, then any separate consideration of compensation would be redundant.[112] But an adoption of a merger over time basis would also seem to dictate that outcome, unless there were to be very careful specification of the special circumstances that should give rise to

[110] Although in practice, particularly in the context of housing, they are mingled. Support for a spouse is also support for the children by giving them a carer.

[111] This is one of the reasons why the devising of a formula would have to be the subject of a considerable amount of research and careful piloting.

[112] Indeed, we suggested in the 2011 Consultation that "compensation", as one of the three strands described in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, is not really an addition to the law but rather highlights an element that has always been present: see Marital Property Agreements (2011) Law Commission Consultation Paper No 198, para 2.56.

compensation in addition to the transitional support that merger over time is used to justify.

The relationship between needs and sharing

4.96 This is a further ambiguity within the current law, and one which has given rise to some concern. In redistributing the family assets, should the court meet the parties' needs first and then share the balance, or should they share the property equally and then adjust the shares if needs are not thereby met?

4.97 In *Miller v Miller, McFarlane v McFarlane*,[113] Lord Nicholls pointed out that in many everyday cases the process will never go beyond an assessment of needs. He said that "in some cases provision for the financial needs may be more fairly assessed first along with compensation and the sharing entitlement applied only to the residue of the assets".[114] But both Lord Nicholls and Lady Hale emphasised the importance of preserving a flexible approach to this question:

> In big money cases, the capital assets are more than sufficient to meet the parties' financial needs … . In these cases, should the parties' financial needs and the requirements of compensation be met first, and the residue of the assets shared? Or should financial needs and compensation simply be subsumed into the equal division of all the assets? There can be no invariable rule on this. Much will depend upon the amounts involved. … Needless to say, it all depends upon the circumstances.[115]
>
> … there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared as well as current assets.[116]

4.98 There was a move in *Charman v Charman*[117] to introduce greater clarity by setting out in more certain terms that needs prevail if greater than the result based on sharing, but sharing should come first in cases where the sharing result exceeds needs.[118] In the latter case in fact there may be no practical difference between the two methods since where only needs are in issue, half of the matrimonial property is likely to be wholly inadequate to meet the needs of the economically weaker party and there should be significant adjustment of the sharing result. It may be that all the assets are devoted to housing one party with the children.

[113] [2006] UKHL 24, [2006] 2 AC 618.

[114] Above, at [29].

[115] Above, at [28] to [29] by Lord Nicholls.

[116] Above, at [144] by Lady Hale. The judiciary have continued to assert the need for a flexible approach: *B v B* [2008] EWCA Civ 284, [2008] 1 FCR 613 at [24] by Hughes LJ, and at [50] and [57] by Wall LJ.

[117] [2007] EWCA Civ 503, [2007] 1 FLR 1246.

[118] Above, at [73] by Sir Mark Potter P. And see *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [139], [142] and [144] by Lady Hale, and at [28] to [29] by Lord Nicholls.

4.99 In cases where assets exceed needs, outcomes may differ dramatically depending upon which basis is chosen. Consider a couple with assets of £700,000 (including the equity in a house). Suppose that the husband will be able to maintain a lifestyle near to the level the family has enjoyed during the marriage (in terms of standard of housing, provision for pension, holidays, and so on) if he receives £350,000 while the wife, with a far greater earning capacity,[119] can maintain that standard of living without any capital receipt and so will be able either to enjoy a higher standard of living or to invest the £350,000.[120]

4.100 Whether that example is troubling depends upon one's view of the purpose of equal sharing. The purpose is not to equalise living standards. It has been variously explained as a response to partnership, and as a response to contributions which are regarded as equal no matter what their monetary value.[121] Insofar as equal sharing is a response to contribution, and therefore to the effect upon the individual of the investment he or she has made in the relationship, it may be that equal sharing is regarded as a way of meeting needs; if needs are met once sharing has taken place, it is not appropriate for there to be any adjustment.[122]

4.101 The difficulty with that approach is twofold. One is that it excludes the possibility of compensation as a separate exercise. Even if the two parties are each well provided for by an equal share of resources, that arrangement may leave one party having made a significant financial sacrifice for which the other has not taken any joint responsibility. The other difficulty is that there is a troubling potential for one party to be left barely managing with an equal share, while the other is left comfortably off.

4.102 We now have some indication of what happens in practice. In March 2012 Resolution polled its solicitor members and asked whether, in a case where the available assets exceed the needs of the parties so that the sharing principle applies, the courts were more likely to meet needs first and then share, or share and assess whether needs were met afterwards. The results indicated that both approaches are applied across the country and across cases of different values, with 56% of practitioners who responded to the relevant question saying that they would mostly expect the court to share first in a case where assets exceed needs. Anecdotally individual solicitors told us that there was not always consistency, either with different District Judges favouring different approaches or with a county court favouring a particular method.

4.103 Reform of the basis on which needs are met would lead to greater clarity about the relationship between needs and sharing. A decision to regard "need" as a

[119] For whatever reason, whether because she is better qualified or because of joint decisions taken during the marriage. It might be, for example, that the husband gave up a lucrative job in order to further the wife's career.

[120] See J Miles, "*Charman v Charman (No 4)*: Making Sense of Need, Compensation and Equal Sharing after *Miller/McFarlane*" (2008) 20(3) *Child and Family Law Quarterly* 378, 389. And see the subsequent discussion in R George, *Ideas and Debates in Family Law* (2012) pp 98 to 99.

[121] [2000] UKHL 54 at [24], [2001] 1 AC 596, 605 by Lord Nicholls.

[122] See J Miles, "*Charman v Charman (No 4)*: Making Sense of Need, Compensation and Equal Sharing after *Miller/McFarlane*" (2008) 20(3) *Child and Family Law Quarterly* 378, 389.

matter of redressing losses generated by the relationship might point to an imperative to meet the needs of both parties first – on the basis that each must share the responsibility for each other's losses, and then to share any surplus. A decision to regard "need" as that which is required to transition from the merger of lives to independence (whether that takes months or years) might point in the direction of simply sharing, and then assessing the need for further support. And a move to a formulaic basis, with a calculation based upon disparity in income, would avoid the need to assess the priority between the two issues – particularly if separate consideration were given to the place of the family home, as suggested above.

4.104 As matters stand, without a decision in principle upon the basis on which needs are met, it is impossible to give a clear answer to "which comes first", and we cannot propose any change to the current discretionary position with all its uncertainties.

Consultation questions

4.105 Despite the fact that the available levels of spousal support are infinite, the policy choices may well boil down to two or perhaps three. The obvious two are as follows.

(1) Should the law seek to compensate relationship-generated need or should it seek to unravel the "merger over time" by redressing the disparity in lifestyle caused by the divorce or dissolution?

(2) Should a formulaic calculation be adopted?

4.106 The third issue would be to decide to what extent either a reformed discretionary basis or a formula would embody incentives towards independence by placing limits on the extent of support that might be given.

4.107 We take the view that the current law, based as it is upon a mix of mutually inconsistent principles, is not a sustainable policy choice for the future. Beyond that, we express no view about the choices above at this stage, but ask consultees to consider them, in the light of their own experience but also in terms of their impact upon the scenarios we have suggested, upon the lives of separating couples and their children, and upon society as a whole.

4.108 We would also ask consultees to consider the way in which change should be put into effect. Reform of the basis of discretion, re-shaping section 25 by adding an objective in terms of compensation, or of transitional support, could be achieved by statutory amendment. What would be the effect of that in practice on the practical issues: how much has to be paid, and for how long? And if a formula is favoured – potentially giving clear answers to both those questions – how would it then be devised?

4.109 The introduction of a formula is a complex matter and this project is not the context in which a formula could be devised. Experience in other jurisdictions indicates that considerable empirical work and piloting would be needed to devise a formula that yielded acceptable results, and in particular results that did not divert dramatically from the outcomes achieved under the current law, nor cause

unexpected hardship to the parties or their children. Spousal support is part of a bigger picture and cannot be reformed without considering matters in the round.

4.110 Any recommendation to the effect that a formula might be introduced would have to be accompanied by a recommendation as to how it might be researched and introduced. Our objective here is to ask consultees to consider in principle the virtues and disadvantages of a formulaic approach. Those who favour that approach are also asked to consider how the further work required would be conducted, who should do that work, what methodology should be adopted, and what sort of timescale and investment would be required.

4.111 We have set out these issues in a number of consultation questions below, so as to tease out consultees' views on the related issues within them – for example, the length of the marriage, the significance on ongoing responsibilities and so on.

4.112 We have presented our questions in two alternative formats – the one looking at principle, the other referring back to the case studies; consultees are welcome to answer either or both sets of questions.

4.113 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?

4.114 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?

4.115 In answering the question at paragraph 4.114 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.

4.116 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?

4.117 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?

4.118 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?

Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or "unravelling the merger over time", as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:

- to live at the same standard as he would have lived during the marriage, and if so for how long?
- to as much as he needs to relocate and to start again as a single person?
- to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple's home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat's care after the ending of the civil partnership?

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah's claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

PART 5
IMPROVING THE CURRENT LAW RELATING TO NEEDS

INTRODUCTION

5.1 We indicated above at paragraphs 1.3 and 3.45 that our consultation pursues two objectives in relation to needs. One is to generate discussion about the fundamental basis for the assessment of needs and the question of whether, and how, that might be reformed. We explored that topic in Part 4, and explained that we did not anticipate that any such reform would be practicable in the immediate future, both because of the difficulty of building consensus on this issue and because of the extent of the empirical research and piloting work that would be needed in order to ensure that any change would generate fair and workable results.

5.2 In this Part we address our other objective, which is to improve matters in the short term by clarifying the current law relating to needs.[1] For the most part we look at this in the general context of divorce and the dissolution of civil partnership; at the end of the Part we add a brief discussion of the management of the concept of needs in the context of qualifying nuptial agreements.

5.3 "Clarify" is an ambiguous word and we use it here to mean both change in the substance of the law and the provision of information about the law. In view of the fact that fundamental reform is not an immediate prospect, we wish to explore options for the improvement of the law as it stands, insofar as is possible without a fundamental and principled reform. The options that we identify could involve small-scale statutory reform, or non-statutory guidance (which cannot change the law), or both. If we recommend any statutory reform as a result of this Part, that will be embodied in the draft Bill that will accompany our final Report.

5.4 The problems with the law relating to needs that we identified in Part 3 were as follows:[2]

(1) a lack of principle;

(2) the law is inaccessible;

(3) uncertainty within the current law; and

(4) dissatisfaction with the level of awards.

5.5 Clearly, the first of those issues can be addressed only by principled reform of the sort addressed in Part 4; and none of these problems can be wholly solved without that fundamental change to the basis of the law relating to needs. But so far as points (2), (3) and (4) above are concerned we think that steps can be taken to improve matters. Some, although by no means all, uncertainty might be remedied by small-scale statutory amendment; and in addition it may be that

[1] See para 3.45(2) above.

[2] See paras 3.29 to 3.41 above.

information can be provided about the sort of needs that must be met and the way in which they may be met. We have found it useful to concentrate on three issues in this Part:

(1) the balance between support and independence;

(2) the provision of information; and

(3) the need for consistency between courts.

5.6 As will be seen from the discussion that follows, these issues are not unrelated to each other. We discuss them under two headings, namely the balance between support and independence and the provision of information, because the problem of inconsistency is seen in the courts' response to those two issues.

THE BALANCE BETWEEN SUPPORT AND INDEPENDENCE

Tensions within the law

5.7 One of the difficulties that we identified in Part 3 was the uncertainty within the current law about the duration of spousal support. An award based on needs involves a detailed examination of the parties' means; it will often involve issues such as the effect of employment disadvantage caused by looking after children for years ahead, and where possible consideration should be given to long-term issues such as pension provision. It therefore involves a difficult judgement: at what point can the former spouses be financially independent of each other?

5.8 That judgement must then be reflected in the amount awarded. It will not necessarily be reflected in the duration of payment; as discussed in Part 1, orders for periodical payments are increasingly unusual, and provision is more likely to be made on a capitalised basis, or reflected in the proportion of the proceeds of the eventual sale of the matrimonial home.[3] Whether or not periodical payments are awarded, dissatisfaction may be caused for two opposing reasons: the economically weaker party may feel – and may find in reality[4] – that inadequate provision has been made, and the other party may feel that support is being ordered for far too long. The latter view may be stronger in cases where periodical payments are in fact awarded, because the requirement to keep making regular payments to a former spouse, perhaps over many years, may keep dissatisfaction alive.

5.9 We find within the current law evidence of the desire to encourage independence and equally the recognition that independence is impracticable in circumstances where the financial commitment of the marriage has effects that reach a long way into the future. That may arise because of a continued responsibility for children

[3] So, for example, a finding that the wife will have far less mortgage capacity than the husband during the years when the children live with her, and will not be able to earn as much as he will even when the children leave home, is likely to lead to an award of a greater than 50% share of the proceeds of sale of the family home once the children have finished their education. See para 2.4 above.

[4] See para 3.41 above.

or because one or both spouses are now too old to regain a position in the job market.[5]

The advantages of independence

5.10 Lady Hale has said that the "ultimate objective [in making an award for ancillary relief] is to give each party an equal start on the road to independent living"[6] with the aim of achieving "independent finances and self sufficiency".[7] Mr Justice Charles in *G v G* made a similar point:

> The objective of achieving a fair result … i) is not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households), but ii) is met by an approach that recognises that the aim is independence and self sufficiency based on all the financial resources that are available to the parties.[8]

5.11 The reasons for this are clear. The reality of divorce means that former spouses should not be tied to each other for life; the law gives them freedom to re-marry and to take on new responsibilities, and this is hampered if the financial commitment of a former relationship is unnecessarily prolonged. From the point of view of the economically weaker party, dependence means vulnerability. Reliance upon another's employment, health and – in a context where enforcement is not easy – willingness to pay is not a comfortable or safe position.[9]

5.12 Social policy has in recent years sought to make it easier for parents to combine paid employment with their childcare responsibilities. For example, in the context of welfare benefits, the Government has stated that it is reasonable to expect lone parents to take up work once their children are in full-time education.[10]

5.13 Most importantly, the economic position and expectations of women have changed; they do not want or expect dependence, and certainly there is no longer a social expectation that they should be dependent:

[5] Empirical evidence suggests that in a recession women may have more difficulty in finding jobs than men: in the three months to January 2012, women constituted 22,000 of the 28,000 newly unemployed (with a total of 1.13 million unemployed women): Office for National Statistics, *Labour Market Statistics: March 2012* (14 March 2012).

[6] *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [144] by Lady Hale.

[7] Above, at [133].

[8] [2012] EWHC 167 (Fam), [2012] All ER (D) 33 (Mar) at [136].

[9] The Law Commission will be reviewing the various means by which family financial orders made under the Matrimonial Causes Act 1973, the Civil Partnership Act 2004 and the Children Act 1989 are enforced as part of our Family Financial Orders – Enforcement project. We will commence work on this project after completing our work on Matrimonial Property, Needs and Agreements.

[10] Department for Work and Pensions, *Policy: Lone Parents* (4 July 2012), available at http://www.dwp.gov.uk/policy/welfare-reform/lone-parents/ (last visited 27 July 2012).

> We … expect to find women occupying half of the top jobs, getting equal pay, retiring at the same age as men with similar pensions.[11]

5.14 If the Law Commission in 1980 could say that lifelong support was inconsistent with the economic position of women,[12] that must be even more true today.

The need for support

5.15 On the other hand, there have been clear statements from the higher courts that it is not appropriate for the possibility of support to be cut off[13] where the payee is looking after school-age children.[14] Even where no substantive periodical payments have been ordered, a nominal order should be made so that it can be varied in future.[15]

5.16 Moreover, a parent with whom the children are living may well require, and receive, a greater than 50% share of the marital assets on divorce in order to meet his or her own and the children's needs. One of the "folk myths" surrounding divorce is that the courts operate on the presumption of a 50:50 split.[16] In fact the court's first consideration is always the welfare of any minor children,[17] and that factor together with the needs of the parent with whom they are living often dictates a more uneven split of assets between former spouses, typically somewhere from 65:35 to 55:45. Housing the children, caring for the children and meeting their everyday needs often comes at the expense of a career and at some considerable financial cost in terms of lost earning capacity for the future. Awarding that parent a greater share of the capital assets, or ongoing maintenance to recognise his or her role as primary carer, reflects the reality that the parental partnership and responsibilities towards the children continue after divorce, even though the marital partnership does not.

5.17 Accordingly, despite the importance of independence, the courts inevitably recognise that it may not be possible. The statute itself does not provide any assistance to the courts in weighing the desirability of independence against the need for support.

The legal background and the courts' dilemma

5.18 The current law finds its roots in the 1980 Law Commission Discussion Paper on the financial consequences of divorce.[18] At that time the statute still embodied the

[11] R Deech, *Divorce Law – A Disaster?* (Gresham College Lecture, London, 15 September 2009), available at http://www.gresham.ac.uk/lectures-and-events/divorce-law-a-disaster (last visited 27 July 2012).

[12] See para 3.15 above.

[13] Whether by an immediate clean break – even if it embodies provision for the future – or by a term order without the possibility of extension. See paras 2.8 to 2.11 above.

[14] See for example *Waterman v Waterman* [1989] 1 FLR 380, CA.

[15] By contrast, in the "big money" cases, if an award representing lifelong spousal support is made, and capitalised (that is, paid in a lump sum), then there is no place for an award of nominal periodical payments.

[16] G Davis, S Cretney and J Collins, *Simple Quarrels* (1994) pp 49 to 50.

[17] Matrimonial Causes Act 1973, s 25(1).

[18] The Financial Consequences of Divorce (1980) Law Com No 103.

"minimal loss principle"[19] which inevitably encouraged awards of lifelong support. The courts could not impose a clean break if either one of the spouses opposed it. The Law Commission analysed the arguments against the policy of lifelong support, and we set them out in Part 3.[20]

5.19 The Law Commission's subsequent Report recommended that:

> Weight should be given to the view that, in appropriate cases, periodical financial provision should be primarily concerned to secure a smooth transition from the status of marriage to the status of independence.[21]

5.20 However, the Commission noted that the number of appropriate cases for a "final, once for all settlement" would be "comparatively few, and almost non-existent where there are young children".[22] This concern was echoed by the then President of the Family Division who gave evidence to Parliament that the termination of financial support or its limitation for a defined period would be "entirely inappropriate" in a number of circumstances, including where "the wife has a continuing charge of young children".[23]

5.21 As a consequence of the Commission's recommendations, section 25A of the Matrimonial Causes Act 1973 was enacted, requiring the court to consider whether or not it is appropriate to terminate all financial obligations between the parties as soon as the court considers it is just and reasonable to do so. The court is further invited to make any periodical payments order only for sufficient duration to allow the financially weaker party to adjust from their financial dependence on the other party without undue hardship.[24] We looked at this in Part 2;[25] but it is difficult to do, because it requires an element of forecasting. If the road to independence cannot be seen clearly ahead, the courts are reluctant to cut off financial support; who knows what hardships, traceable to the joint responsibilities of marriage, lie ahead? One judge who discussed this with us indicated that if it is not clear that independence is possible within the three years following divorce, he makes a joint lives order.[26]

5.22 So the courts are endeavouring to do two things: to encourage independence, but also to protect spouses from future need. They have a genuine dilemma. For the ex-spouses themselves, that dilemma may not be understood, and the outcome may be perceived as unfair by one or both.

[19] See paras 3.10 to 3.12 above.

[20] See para 3.15 above.

[21] Family Law: The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper, and Recommendations on the Policy of the Law (1981) Law Com No 112, para 46(5)(ii)(b).

[22] Above, para 28.

[23] HC Official Report, col 78, 22 March 1984.

[24] Matrimonial Causes Act 1973, s 25A(2).

[25] See paras 2.8 to 2.11 above.

[26] Whether for substantial or nominal periodical payments. See also the discussion in C Bradley and E Moore, "The Maintenance Conflict: Crystal Ball Gazing Versus a Meal Ticket for Life" (2011) 41(Jul) *Family Law* 733.

5.23 Moreover, this is a context in which evidence suggests that there are significant regional variations in the practice of the courts.[27] The distinctive features of the Principal Registry of the Family Division in London have been discussed elsewhere;[28] we have also been told by a number of practitioners that, outside London, in some areas of the country District Judges are far more likely than in others to make term awards, without the possibility of extension, in cases where one parent is taking on the day-to-day care of the children and will be economically vulnerable for that reason for years to come.

5.24 Our survey data from Resolution would appear to bear this out, in that 57% of solicitors who responded to the relevant question said that they had issued proceedings in a certain court centre or area of the country because they believed the result would be more favourable for the client than issuing elsewhere. The majority of solicitors surveyed by Resolution claimed that they can "rarely" (6.4%) or only "sometimes" (80%) predict how the court will quantify their client's needs. Accordingly, the difficulty that litigants have in understanding the tensions within the law between independence and the need for support may be compounded by inconsistencies in practice and by the making of orders that run counter to what authority there is on the point.

What would help?

5.25 There is therefore a cluster of problems. Litigants do not necessarily understand the dilemma that the courts face in seeking both to promote independence and to make orders that provide proper support. The statute requires the court to consider bringing dependency to an end, but beyond that makes no statement about this dilemma. There is evidence, anecdotal but plentiful, that the courts are approaching that dilemma inconsistently, so that there may be something of a postcode lottery. Dissatisfaction with the law may be inevitable in the context of divorce and dissolution, but it may be made worse by a lack of understanding both of the extent of the long-term economic consequences of marriage and of the consequent breadth of the concept of "needs" within the law.

5.26 That cluster of problems takes on a different complexion in the context of the resolution of financial matters outside the legal system, by negotiation or mediation. A lack of understanding of the tension between the value of independence and the need for support, and a lack of information about the real extent of needs in the current law, may mean that negotiated or mediated solutions, even if they embody the real advantages of consensus, do not make adequate provision for former spouses or children.

5.27 Those problems are interrelated. Matters could be improved, we suggest, by the provision of better and more authoritative information for litigants, which we discuss in the next section of this Part. There may also be a case for guidance for the judiciary, beyond that which is given in the statute and the case law, particularly on the subject of support for those with care of children; authoritative guidance for the judiciary, made available to the public, could address both the

[27] E Hitchings, "Chaos or Consistency? Ancillary Relief in the 'Everyday Case'" in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (2009) pp 198 to 204. We have also heard anecdotal evidence on this point.

[28] "'Divorce Tourists' Attracted to London Courts", *LNB News* (20/04/2012) 86.

problems of regional inconsistency and the need for the parties themselves to have a better understanding of their responsibilities.

5.28 But guidance and information cannot change the law. Is there also scope, and is there any need, for amendment to the statute?

Statutory amendment

5.29 One possibility would be to upgrade the current statutory direction to the court to consider whether the financial obligations of each party towards the other can be brought to an end,[29] and instead direct the court to bring it to an end where possible. That could send an important message to the courts and, perhaps more importantly, to litigants and those who are negotiating their own financial settlement.

5.30 Such a direction would be incomplete without a statutory statement of the opposing issue, namely the need to ensure the possibility of ongoing provision for parents who are looking after children. The message that the law should convey is that lifelong dependence is not what is wanted, and that self-sufficiency is expected but only where that is possible. What we have in mind here is a message and a consideration, rather than a rule or presumption. A rule that term orders will never be made where the payee has care of minor children, or at least that the term should not expire before the ending of the dependency of the youngest child, would in some senses strengthen the position of parents with whom children live; but it could send the wrong message for those who can achieve independence. It could also weaken the bargaining power of some who would prefer to receive a greater share of the equity in the home in return for an ending of the possibility of ongoing support.

5.31 We are attracted to the possibility of a direction within section 25, requiring the courts both to endeavour to achieve independence where possible and to bear in mind that this is unlikely while the payee has care of school-age children. An alternative would be the addition of both points to the "section 25 factors". We ask for consultees' views on these possibilities below.[30]

Issues for statutory amendment or for guidance

5.32 Three further possibilities either for minor statutory amendment or as the subject matter of authoritative guidance (discussed below) are worth consideration.

5.33 One would be for the statute to direct the court to make a term order, capable of extension, in all but exceptional circumstances in preference to a joint lives order. That would place the onus on the payee to apply for an extension, rather than leaving payment for life as a default option. An important accompaniment to that direction would be to ensure that the grounds for variation of the original order were also amended,[31] since the payee would need to be able to apply for an extension if his or her circumstances had *not* changed, or not changed

[29] Matrimonial Causes Act 1973, s 25A(1).

[30] See para 5.62(1) below.

[31] Matrimonial Causes Act 1973, s 31.

sufficiently, since the order was made.[32] Clearly this has downsides, not least the cost to the payee and the risk of the deadline being missed.[33] We are alive to the disadvantages of this and all the possibilities we raise here; finding a way forward is very much a matter of weighing up risk against the need to clarify the law and the overall benefit that will bring.

5.34 Another possibility, which again we float tentatively, would be to create – by statutory amendment, or in non-statutory guidance without legal effect – an expectation of independence within a stated period. That might be an element of any fundamental reform, as we discussed in Part 4; but there may be a place for setting up some expectations or indications even without principled change; such indications would be for the assistance of the judiciary and of litigants and those trying to negotiate their own settlements.

5.35 As discussed above, it is clearly stated within the current law that independence is expected where possible; and legal practitioners have told us that there is a desire on the part of litigants to know how long their responsibilities last for. Clearly rules are not appropriate, however generous, within a discretionary system[34] and without the sort of large-scale research and piloting that we have suggested in Part 4. But might there be scope for the creation of starting points, by which we mean periods within which a former spouse might be expected to achieve independence, and which should therefore be embodied in an order in the absence of circumstances that make that inappropriate?

5.36 We are alive to the disadvantages of that suggestion, and indeed to the likely resistance to it. But we are also alive to the difficulties faced by those who are trying to reach a settlement and have no idea what is a realistic expectation. So we think it worth discussing whether or not indicative starting points might be created, certainly for short childless marriages, and potentially for longer ones. It might even be done for marriages and civil partnerships where there are children, but referring to the date at which the children leave home[35] rather than beginning from the date of divorce or dissolution. Any such starting points would also be able to embody an acceptance that beyond middle age a spouse may be unable to achieve independence at all, because of the likelihood that he or she will not be able to find employment due to the difficulties generally experienced by older people seeking jobs.

5.37 We should like to hear consultees' views about the provision of starting points, whether statutory or in the form of non-statutory guidelines. Non-statutory guidance cannot, of course, change the law or impose a starting point, but it could suggest and recommend, and could be a useful source of consistency

[32] Currently, the applicant bears quite a substantial burden in persuading the court that a term order should be extended: *Fleming v Fleming* [2003] EWCA Civ 1841, [2004] 1 FLR 667.

[33] Once the term has expired the payments cannot be revived: see *Rayden and Jackson on Divorce and Family Matters*, Issue 28 (March 2012) at T16.107.

[34] As we noted at 4.81, a rule limiting the duration of periodical payments simply penalises the less well-off who are less likely to be able to capitalise longer-term payments.

[35] This could be specified as the date on which the children leave full-time education, or perhaps later to allow a period of adjustment: see for example *A v A* [1994] 1 FLR 657.

particularly if shaped by consultation among the judiciary.[36] We ask this with an open mind and are keen to hear views both for and against this suggestion.

5.38 Finally, the Centre for Social Justice in its 2009 "Every Family Matters" report recommended that parties to a marriage of less than three years without children should share marital assets equally but otherwise be returned to their pre-marital financial positions on divorce, unless this would cause "significant injustice".[37] That may be seen as an arbitrary solution, but it would bring an element of certainty to a situation where long-term dependency is particularly inappropriate. It would not amount to a refusal of needs-based support, but it would enable that support to be ordered or negotiated with a clear objective, at a point when irreversible losses are unlikely to have occurred. That said, such losses may well have occurred if the marriage was – as is likely – preceded by cohabitation, and some consideration would have to be given to the effect of that. Again, we ask consultees to consider whether this possibility is desirable and whether it should be effected by statutory reform or merely indicated in non-statutory guidance.

5.39 We bring these possibilities together in our questions to consultees at the end of this Part, since they are closely related to our thinking on the other topic that we now discuss, namely the need for better and more authoritative information about the law in this area.

GUIDANCE AND INFORMATION

5.40 In the previous section our consideration of the real uncertainty within the law about the time within which independence can be expected led us to mention both statutory and non-statutory reform. There is scope for the amendment of section 25 of the Matrimonial Causes Act 1973, either by adding further items to the "section 25 factors" or by introducing fresh principles which, without imposing any overarching objective or fundamental change, can direct the courts' thinking, achieve greater consistency between courts, and also convey a message to litigants.

5.41 However, we take the view that the law might perhaps also be improved by non-statutory means. At the most basic level, greater information for litigants could help them to understand the extent of "needs" in the current law, and so could help the parties to bargain for more appropriate solutions.[38] Taking the matter a step further, such information could assist litigants to find solutions by explaining the relative importance of different types of need. Going one step further still, there may be scope for the provision of guidance that would also assist the judiciary, and therefore go some way towards eliminating inconsistencies.

[36] See paras 5.54 and 5.55 below.

[37] Centre for Social Justice, *Every Family Matters: An In-Depth Review of Family Law in Britain* (2009) p 223, available at http://www.centreforsocialjustice.org.uk/default.asp?pageRef=372 (last visited 27 July 2012).

[38] For example, a litigant with access to information that informs him or her that provision for income after retirement is a legitimate element of needs is perhaps less likely to accept an assertion that he or she has no entitlement to long-term support in a case where that is in fact needed.

5.42 In what follows we consider the content of guidance, the source and authority of guidance, and the vehicle for publishing or communicating guidance. We appreciate that what we are suggesting here is a tentative exploration of measures that might assist; none is claimed as a complete solution, none is without disadvantages, and none is a substitute for the principled reform that we have advocated in Part 4. We invite consultees' views generally as to whether guidance and information in any format would be of assistance; we set out our questions in more detail at the end of this Part.

The content of guidance

Factual information: the content of "needs"

5.43 If asked for a definition of "financial needs", a family lawyer is likely to respond not with a definition but instead with examples of tangible property types which may be involved in an order or agreement that meets needs. The examples are exclusively dictated by the financial resources available and the marital standard of living – a lawyer will rarely describe a party as "needing" something if it was not a financial choice already made by the couple during the marriage. As discussed in Part 4, in the usual county court case, whether settled or contested, parties will be principally concerned with the need for housing.

5.44 However, legal advice on financial needs will typically extend beyond the provision of housing. The lawyer will, where relevant, describe the financial need to ensure provision not only for basic living expenses like food and clothing, but also for employment purposes such as commuting, work clothes and tools and to meet the costs of retraining to secure employment. Importantly any advice will encourage consideration of future needs, not just immediate needs, such as the need for a share of any pension fund to finance provision after retirement.

5.45 As "financial needs" are not described anywhere in statute, there is a concern that their scope may be underestimated by those with no access to legal advice. Anecdotally we have heard that even clients who receive comprehensive legal advice can struggle to understand why they might "need" a pension to finance their retirement, preferring to focus instead on negotiating only on capital assets which have a realisable value.[39] Similarly having the means to pay back debt can often be an underestimated need. A party to a divorce may be resistant to providing for items which do not seem, to him or her, to be "needed", even where the other party's requirement or expectation stems from choices made within the marriage.

5.46 We think that some of these concerns could be addressed by the inclusion within the guidance of a checklist of financial needs. Such a list could set out possible types of financial needs and be accompanied by topics to consider. Housing, for example, is a major element of needs. The sort of questions that information and guidance might include, on the subject of housing by way of example, are set out in the text box below.[40]

[39] See also A Perry, G Douglas, M Murch, K Bader and M Borkowski, *How Parents Cope Financially on Marriage Breakdown* (2000) p 31.

[40] We stress that this is simply an example by way of a starting point to provoke discussion, for the purposes of this paper.

(1) What type of housing did you live in during the marriage – privately rented, privately owned, council housing? Can both you and you former spouse afford to live in a similar type of property after you divorce?

(2) Have you explored the option of either your spouse or you remaining in the former matrimonial home?

(3) Have you looked at new homes in your local area? Are they affordable? If relevant, would you still be able to commute to work and take your children to school if you moved?

(4) How many bedrooms do you need in your new home? If the children are not going to live with you then will you need spare bedrooms for them to come and stay?

(5) Have you thought about how you will meet the outgoings for your new property: rent; mortgage payments; council tax; property maintenance; and home insurance?

(6) Have you looked at any benefits which might be available to help with housing provision?

5.47 A checklist would also contain further information; for example, under "housing" there might be information on the implications of retaining the matrimonial home, the availability of legal orders designed to facilitate one spouse remaining in the home and practical considerations such as the need to contact the mortgage company and check the viability of any potential change to mortgage arrangements.

5.48 The checklist would not provide answers to any of these questions but it would ensure that parties were encouraged to think through the financial implications of their proposed settlements. We think that parties would also benefit from seeing all potential types of needs; having different categories to consider will make it harder to avoid talking about more difficult concepts such as pension provision, where relevant.

Beyond information: priorities and solutions

5.49 Providing a checklist should help aid discussion, but it will not help divorcing couples understand the ways in which the court might exercise its discretion, nor guide them towards a solution. Prioritising financial needs is much harder, particularly if there are insufficient assets available to meet all the couple's financial needs. Some parties will fail to prioritise important financial needs they wrongly deem less important; examples include the parent with whom children are living, who is prepared to sacrifice a share of the retirement pension in order to ensure that he or she has a home, and indeed the parent with whom children are not living, when there are limited assets and the needs of the children and the other parent predominate.

5.50 Accordingly, as well as encouraging comprehensive thought about all aspects of needs, guidance (and we stress that this would be guidance, not law) should indicate the priority to be accorded, normally, to different types of need. That

priority should reflect the priority currently given by the courts to housing for both parties,[41] to a particular standard of housing (where possible) for children, and beyond that the importance of income levels (including, importantly, the place of mortgage capacity among a person's resources), provision for the costs of working and (where relevant) of retraining, of childcare, and of retirement provision. Expectations can be built into this list to demonstrate the importance that the courts attach to the parties' working towards and achieving independence.

5.51 A further way to communicate information might be the provision of case studies. They could deal with commonly arising factual circumstances and explore how needs could be prioritised. They could go beyond the checklist approach by including actual figures for salaries, house prices, rents and so on. They might be linked to a searchable database; parties could search for case studies relevant to their personal circumstances, using keywords such as "debt", "children" or "private rental property". Solicitors and mediators could be encouraged to submit their own anonymised case studies for the database so that over time the database would provide a wide and representative range of examples. We appreciate that this might be an optimistic suggestion; it would depend upon the willingness of practitioners to participate in building up a bank of examples.

5.52 These are all candidates for inclusion in a non-statutory source of information. We do not think that a priority order for financial needs should be enshrined in statute. Within a discretionary system that seems to us to be too prescriptive. However, whilst the law is built around individualised solutions, an indicative priority order – albeit one that could be departed from – would be helpful.

The source and authority of guidance

5.53 Clearly a great deal of information is available already, not only to the judiciary through conventional legal sources but also to the public. Increasingly, traditional providers of legal services are making information available on the internet; legal information provided by retail brands and insurance companies is becoming increasingly prevalent and is often hosted on a branded website. Some legal practitioners are now offering their services on websites which allow internet users to assemble their own court documents and submit them online to be checked.

5.54 What we have in mind, however, is a source of non-statutory guidance that will assist the courts and also benefit members of the public. A single source could, we think, play both roles, and thus would not only help to address regional inconsistencies in court orders but would also inform the public of the content of the law and of the matters that a court would take into consideration – which in turn would assist both in the negotiation of settlements and in the understanding of orders made in the small proportion of cases where there is a judicial determination.

5.55 But if guidance is to be of use both to the judiciary and to the public, it cannot be produced by a firm or commercial organisation, nor by a Government department

[41] "Homes are of fundamental importance and there is nothing more awful than homelessness": Thorpe J in *Cordle v Cordle* [2001] EWCA Civ 1791, [2002] 1 WLR 1441 at [33].

in view of the independence of the judiciary. The creation of an independent body to provide guidance might be costly; more importantly it may be unnecessary in view of the structures already in place. One possibility is that the Family Justice Council might prepare Practice Guidance, after consultation.[42] The level of information and guidance we have envisaged above is detailed and would need be carefully nuanced. The Family Justice Council is ideally positioned to carry out this work. We would expect that practitioners and members of the judiciary would be willing to assist the Council in the preparation of the guidance, which we appreciate would not be a simple task.

5.56 Authoritative guidance produced in this way could also embody some of the possible solutions discussed above in response to the tension between the need for independence and the need for support. We considered three possibilities:

(1) an expectation that term orders would be the norm rather than joint lives orders;

(2) the production of starting points for periods within which independence should be expected to be achieved; and

(3) an expectation that the parties to a short childless marriage or civil partnership (three years was the figure suggested by the Centre for Social Justice)[43] should receive – alongside their share of marital assets – only what they needed to return them to the economic position they held prior to the marriage.

5.57 Each of those suggestions amounts to an expectation or starting point rather than a rule; and each is quite specific and therefore vulnerable to external factors – such as, for example, a dramatic shortage of jobs caused by economic downturn. They might better be embodied in authoritative guidance rather than in statute. They would thus be more easily amended; and they would be more accessible to the public (depending upon the vehicle chosen for their publication – see paragraphs 5.58 to 5.60 below). They might also be able to be more flexible and incorporate other expectations in the event that the judiciary or practitioners wanted at any stage to encourage the use of particular legal tools.[44]

The vehicle for guidance

5.58 The internet may as yet be an underexploited resource for couples who separate. Research indicates that people looking for formal legal advice are most likely to turn first to a solicitor (24%), local councils (16%), Citizens Advice Bureaux (16%)

[42] The Family Justice Council is an independent body, sponsored by the Judicial Office, whose members include experts from the legal, medical and social care fields. The Council is specifically charged with "providing guidance and direction to achieve consistency of practice throughout the family justice system and submitting proposals for new practice directions where appropriate". See http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/fjc (last visited 27 July 2012).

[43] Centre for Social Justice, *Every Family Matters: An In-Depth Review of Family Law in Britain* (2009) pp 211 and 225, available at http://www.centreforsocialjustice.org.uk/default.asp?pageRef=372 (last visited 27 July 2012).

[44] Compare the comments made by the Centre for Social Justice: above, p 208.

or Trade Unions (10%).[45] These people are likely to make initial contact with their advisor over the telephone (46.5%) or in person (43.1%); only 4.9% do so using email or the internet.[46] However, 18.6% use the internet in some way to help sort out their problem.[47] But trends over the last few years in many different contexts indicate that the internet will become an increasingly important means of accessing legal advice and information.[48]

5.59 In November 2011 the Family Justice Review Final Report recommended the creation of an online information hub, providing a centralised source of information for family justice.[49] The Government has adopted that recommendation and is working to provide such a service.[50] It seems to us that it would be the right internet resource to provide access to the checklist and accompanying information. It might be thought unusual for Practice Guidance to be made available in this way, but that would seem to be a sensible way to ensure that the guidance to be followed by the judiciary was also available to the public.

5.60 Alternatives could of course be devised. But the virtues of a one-stop shop, or at least a one-stop "hub", are obvious; parents seeking advice on post-divorce parenting issues, for example, will benefit from a unified source of information on topics within the context of divorce.

QUESTIONS FOR CONSULTEES

5.61 This Part has been exploratory, and we close with questions rather than provisional proposals, based on the possibilities that seem to us to be the most viable among many possible options.

5.62 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

[45] P Pleasence, N Balmer, A Patel, A Cleary, T Huskinson and T Cotton, *Civil Justice in England and Wales: Report of Wave 1 of the English and Welsh Civil and Social Justice Panel Survey* (2011) p 43 and Table 30 on p 44, available at http://www.justice.gov.uk/publications/research-and-analysis/lsrc/research-publications (last visited 27 July 2012).

[46] Above, p 45 and Table 32.

[47] Above, p 45.

[48] We note the increasing prevalence of legal advice videos on video-sharing websites such as YouTube.

[49] Family Justice Review Panel, *Family Justice Review: Final Report* (November 2011) pp 22 and 150 to 154, available at http://www.justice.gov.uk/publications/policy/moj/2011/family-justice-review-final (last visited 27 July 2012).

[50] The Government Response to the Family Justice Review: A System with Children and Families at its Heart (2012) Cm 8273, pp 71 (recommendation 111), 81 (recommendation 130) and 82 (recommendation 131), available at http://www.justice.gov.uk/publications/policy/moj/family-justice-review-response (last visited 27 July 2012).

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;[51]

(b) the priority to be afforded to different elements of need.[52]

(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;[53]

(b) the normal form of orders for periodical payments (term orders or joint lives);[54] and

(c) the financial arrangements to be made after short childless marriages.[55]

(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.

5.63 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.

NEEDS IN THE CONTEXT OF QUALIFYING NUPTIAL AGREEMENTS

5.64 We noted in Part 1 some points about our emerging policy on the proposed new qualifying nuptial agreement. We have taken the view that it will not be appropriate to enable couples to use such agreements to contract out of making provision for needs. We have to ask, therefore, what level of provision has to be made in order for a qualifying nuptial agreement not to be open to challenge on this ground. Should that level be set at a generous level corresponding to the meaning of "needs" in the current law, or at a lower level?

5.65 The 2011 Consultation asked consultees whether needs for this purpose should be set at the same level as needs in the general law, or at a lower level.[56] There

[51] See paras 5.43 to 5.48 above.

[52] See paras 5.49 to 5.50 above.

[53] See paras 5.33 to 5.39 above.

[54] See para 5.33 above.

[55] See paras 5.38 to 5.39 above.

[56] Compare the comments in *Radmacher v Granatino* about "real need": [2010] UKSC 42, [2011] 1 AC 534 at [81] by Lord Phillips (giving the judgment of the majority).

was very little enthusiasm for a lower level of needs and we are not pursuing that possibility any further.[57] We intend to recommend that qualifying nuptial agreements will be open to challenge if they leave one of the parties without provision for needs, as understood in the general law.

5.66 As we outlined in Part 1, one of the main motivations for extending the scope of our project was to investigate whether it was possible to clarify the meaning of "needs" in the current law, to benefit both those intending to cater for needs in a qualifying nuptial agreement and those attempting to reach financial settlement on divorce or dissolution without a settlement. We have explained why it is not possible to find a simple definition of needs as it applies in the current law, and have outlined in Part 4 options for future developments that could offer a clearer understanding of spousal support.

5.67 It would in theory be possible to provide a separate definition to clarify the meaning of needs for the purposes of qualifying nuptial agreements only which would approximate to the meaning of needs in the general law. For example, statute could specify that the qualifying nuptial agreement must not leave a party without housing and spending power for him or herself and any children of the marriage at a level commensurate with that enjoyed during the marriage, with guidance on duration and other issues such as pension provision. That could be more generous than needs provision under the current law, but might have the advantage of being slightly clearer for those contemplating the terms of a qualifying nuptial agreement.

5.68 We are not convinced, however, that this would be beneficial. We remain of the view that needs, as it has developed in the current law, cannot be captured by a statutory description, let alone by a definition, because it embodies inconsistent principles and a number of uncertainties. Moreover, we do not think that those preparing qualifying nuptial agreements would advise their clients to attempt to set out specific future payments on what they thought would equate to the level thought to equate to needs. To do so would risk underestimating the future circumstances and needs of the parties. It would also risk exposure to changes in the general law of needs, and in particular to fundamental developments along the lines specified in Part 4. This would have the potential to generate satellite litigation on the question of whether the detailed financial terms of a particular qualifying nuptial agreement really did meet need.

5.69 We therefore envisage that, until more fundamental reform of spousal support, parties will draft qualifying nuptial agreements either by general reference to agreeing to meet the other party's needs, or by specifying a level of provision clearly in excess of needs. We do not see this as an onerous requirement. Many of those entering into qualifying nuptial agreements will not be motivated by a desire to squeeze need to a minimum. They will want, and be able, to make generous provision for their ex-partners.

5.70 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.

[57] We will report on this conclusion more fully in our final Report.

PART 6
NON-MATRIMONIAL PROPERTY

INTRODUCTION

6.1 So far, this paper has discussed one of the two additional elements to our project: the extent and basis of provision for needs on divorce and dissolution. In this Part we turn to the other additional focus, namely non-matrimonial property. This paper sketches the current law, and then considers a number of issues for consultation. The focus of this Part is rather different from that of the earlier Parts in that whilst the law relating to needs is important in every divorce and dissolution, the significance of non-matrimonial property is limited. Not everyone has any. And where there is non-matrimonial property, it can only be treated differently from matrimonial property insofar as it is not required to meet the other party's needs. The importance of meeting needs on divorce or dissolution[1] means that we are not advocating rules which will allow the parties to prioritise protection of their non-matrimonial property over meeting their former spouse's needs.

6.2 So it is fair to say that the issues discussed in this Part will be of limited relevance in the majority of cases. Nevertheless, we regard them as important, for two reasons. The first is that the development of the concept of non-matrimonial property in the case law has opened up issues which will, in due course, have to be resolved; those issues may be better considered together rather than in isolation, in response to consultation and with a view to consistency. The alternative is to continue to have the courts resolve issues with difficulty,[2] one by one, in response to the case that happens to raise a particular issue, and without the ability to consult or to consider the issues in the round.

6.3 The second reason why these issues are important is that they are also relevant to qualifying nuptial agreements. If it becomes possible to contract out of sharing named items of property, agreements should specify what is to happen if the property is sold and replaced, or if the other spouse invests in it, and so on; but default rules are needed in case the parties do not make provision for this.[3]

THE CURRENT LAW

The development of the idea of non-matrimonial property post-*White*

6.4 The current law has developed over the last 12 years since the House of Lords' decision in *White v White*.[4] Until then, the concept of non-matrimonial property

1 See para 1.22 above.

2 In *X v X* [2012] EWHC 538 (Fam), [2012] Fam Law 804 at [30] Charles J pointed out that our law of financial provision is not designed to meet the issues that arise when there are questions of whether or not property is to be shared; some of those issues are described at [31].

3 Jurisdictions that have community of property regimes and operate – by default, or as an option to be adopted by agreement – a community of acquests (so that pre-acquired property is not part of the community) likewise have rules to deal with property that changes.

4 [2000] UKHL 54, [2001] 1 AC 596.

had no place in ancillary relief because capital was not shared beyond what was needed to meet "reasonable requirements", even in the very wealthy cases.[5]

6.5 In *White v White*, the fact that the husband's parents had made a contribution to the original acquisition of the couple's home was used by the House of Lords as a justification for upholding the Court of Appeal's award to Mrs White, amounting to around 38% of the family's assets. There was no arithmetical calculation of the value of that contribution in current terms, and thus no attempt to match it exactly. The point was discussed by Lord Nicholls:

> Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.
>
> Plainly, when present this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.[6]

6.6 One of the consequences of the dramatic introduction of a sharing principle[7] in *White v White* was that litigants, and the courts, felt the need to explore its boundaries. To what property does the principle of equal sharing apply and when is such sharing not appropriate? One outcome was the development of the idea of a "stellar contribution", where one party's business efforts were so exceptional as to justify receiving more than half the parties' wealth.[8] The courts retreated from this idea in *Lambert v Lambert*[9] and it has been considerably marginalised by comments in *Miller v Miller, McFarlane v McFarlane*[10] and seems to be rarely argued now, although it has not entirely disappeared.[11] Review of the "stellar contribution" thinking is not part of our extended project.

6.7 The other way in which the boundaries of equal sharing have been tested is in the development of the idea of non-matrimonial property. The seed sown in *White*

5 See paras 2.14 to 2.17 above.

6 [2000] UKHL 54 at [42] to [43], [2001] 1 AC 596, 610.

7 Although their Lordships did not call it that; see para 2.17 above.

8 *Cowan v Cowan* [2001] EWCA Civ 679, [2002] Fam 97.

9 [2002] EWCA Civ 1685, [2003] Fam 103.

10 [2006] UKHL 24, [2006] 2 AC 618 at [68] by Lord Nicholls, and at [146] by Lady Hale.

11 *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [90] to [91] by Sir Mark Potter P, setting out guidelines: the stellar contributor may be awarded between 55% and 66.6% of the assets.

v White has borne fruit; Lord Nicholls in *Miller v Miller, McFarlane v McFarlane* discussed non-matrimonial property explicitly, referring to "property … the parties bring with them into the marriage or acquire by inheritance or gift during the marriage",[12] and in a number of cases property acquired or generated before the marriage,[13] or inherited by either party,[14] has not been shared. As ever, this is trumped by needs;[15] but as Mr Justice Mostyn noted in *S v AG (Financial Orders: Lottery Prize)*[16] "we await the first decision where the sharing principle has led to an award from non-matrimonial property in excess of needs."[17] There is considerable uncertainty surrounding property such as post-separation bonuses,[18] where there is a conspicuous addition to one party's wealth after separation and before the divorce.

6.8 A further suggestion is that the presence of business property that is owned by one party and entirely that party's concern, and has not been used to support the family, may justify a departure from equal division (subject to the length of the marriage).[19] It does not appear that this suggestion has been followed in the subsequent case law.

A community of acquests?

6.9 In view of this development it is unsurprising that it has been suggested that England and Wales now has a regime of community of acquests,[20] by analogy with the regimes found in some jurisdictions in continental Europe and elsewhere. Under those regimes, marriage creates a community of jointly-owned property that must (unless the couple agree otherwise by marital property agreement) be shared equally in the event of the bankruptcy or death of either spouse, or on divorce. In a regime of community of acquests, such as France, the community property does not include anything owned by either spouse alone before

[12] [2006] UKHL 24, [2006] 2 AC 618 at [23].

[13] See for example *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508.

[14] See for example *B v B (Ancillary Relief)* [2008] EWCA Civ 284, [2008] 1 WLR 2362; *L v L* [2008] EWHC 3328 (Fam), [2008] 1 FLR 142; *K v L* [2010] EWHC 1234 (Fam), [2010] 2 FLR 1467.

[15] *M-D v D* [2008] EWHC 1929 (Fam), [2009] 1 FLR 810; *Robson v Robson* [2010] EWCA Civ 1171, [2011] 1 FLR 751. Note the suggestion in *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] EWHC 586 (Fam), [2011] 2 FLR 533 at [16] to [19] by Mostyn J, that the level of needs to be met may be reduced by the presence of pre-acquired wealth, just as it may be reduced by the presence of a pre-nuptial agreement. See also *AR v AR (Treatment of Inherited Wealth)* [2011] EWHC 2717 (Fam), [2012] WTLR 373, giving priority to needs (reflecting the marital standard of living).

[16] [2011] EWHC 2637 (Fam), [2012] 1 FLR 651 at [7].

[17] Also pointed out by Wilson LJ in *K v L (Non-Matrimonial Property: Special Contribution)* [2011] EWCA Civ 550, [2011] 2 FLR 980 at [12], discussed in M Welstead, "The Sharing of Pre-matrimonial Property on Divorce: *K v L*" (2012) 42(Feb) *Family Law* 185.

[18] See *H v H* [2007] EWHC 459 (Fam), [2007] 2 FLR 548.

[19] See Lady Hale's discussion of "non-business-partnership, non-family asset cases" in *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [150], and generally at [149] to [153]; compare Lord Mance at [170]: "where both parties are and remain financially active, and independently so".

[20] S Cretney, "Community of Property Imposed by Judicial Decision" (2003) 119(Jul) *Law Quarterly Review* 349.

marriage, nor anything acquired by either by gift or inheritance at any time. By contrast, the regimes of total community found in, for example, the Netherlands and the Scandinavian countries require the sharing of all the couple's property.

6.10 But England and Wales does not have a regime of community of property.[21] The difference is that a regime is a system of rules.[22] Our "sharing principle" (as the courts have called it) is not a rule but a principle for the exercise of discretion. Moreover, so far as non-matrimonial property is concerned:

(1) the range of property within the term "non-matrimonial property" is unclear;

(2) the law is *not* that non-matrimonial property is exempt from sharing. All property is subject to the sharing principle[23] but in short marriages the non-matrimonial property is less likely to be shared.[24] It is not known how long it takes for non-matrimonial property to become matrimonial;

(3) there has been some discussion as to whether the existence of non-matrimonial property can lead the court to adjust (if it sees fit) the proportions in which property is shared, or the non-matrimonial property should simply be excluded from the sharing exercise and the rest shared equally. In *Jones v Jones*[25] the Court of Appeal favoured the latter approach, in *Robson v Robson*[26] the former;[27] and

(4) we have no rules as to what happens when property changes over time. It is not clear what happens when non-matrimonial property is sold and replacement property bought with the proceeds, nor when the owner or the other spouse invests in the property during marriage.

6.11 In a community of property regime, by contrast: there would be a statutory definition of non-matrimonial property; non-matrimonial property would not be able to become matrimonial over time; the rule would simply be that it is not shared; and statute would provide rules about the development of property during the marriage. The continental European regimes are the obvious examples; New Zealand, whose legislation is linguistically more accessible, has also introduced

[21] *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [151] by Lady Hale: "We do not yet have a system of community of property, whether full or deferred".

[22] Defined as "the sets of legal rules relating to the spouses' financial relationships resulting from their marriage" in European Commission, *Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition* COM (2006) 400, 2.

[23] *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [66] by Sir Mark Potter P.

[24] See *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [24] to [25] by Lord Nicholls, and at [147] and [152] by Lady Hale: "The source of the assets may be taken into account but its importance will diminish over time".

[25] [2011] EWCA Civ 41, [2012] Fam 1.

[26] [2010] EWCA Civ 1171, [2011] 1 FLR 751.

[27] See A Chandler, "'The Law is Now Reasonably Clear': The Courts' Approach to Non-matrimonial Assets" (2012) 42(Feb) *Family Law* 163; and see S Harris-Short and J Miles, *Family Law: Text, Cases and Materials* (2nd ed 2011) pp 463 to 467.

statutory definitions of "relationship property" and "separate property",[28] and we have reproduced the relevant provisions at Appendix C.

6.12 It is not part of our project to introduce a community of property regime. The sharing principle rooted in *White v White*[29] will remain and it is not within our terms of reference to alter the discretionary basis of the sharing of matrimonial property. But in considering whether the law's treatment of non-matrimonial property could be made clearer and more predictable – and perhaps more acceptable – it is useful to look sideways at the community of property regimes.

THE ISSUES FOR CONSULTATION

6.13 The importance of non-matrimonial property is now well-established in the case law but the detail is unclear. The issues appear to be as follows.

(1) Is the source of property relevant at all?

(2) If it is, should there be a rule that non-matrimonial property should not be shared?[30] Or should that question remain in the court's discretion?

(3) If there is to be a rule that non-matrimonial property is not shared, should that rule be subject to the proviso that it can be accessed to meet needs?

(4) What property is non-matrimonial?

(5) Can non-matrimonial property become matrimonial?

Discussion

6.14 In looking at these questions we aim to move the law in the direction of clarity and predictability; we have to consider, therefore, whether it is possible and desirable to move towards statutory rules, rather than maintaining an open-ended discretion. This is an area where the law has firmed up in recent years and it may be that the time has come to complete that process.

(1) Is the source of property relevant at all?

6.15 For the sake of completeness we should consider whether the concept of non-matrimonial property should disappear from the law, so that the courts would not distinguish between matrimonial or non-matrimonial property. Why would we not make such a proposal? The reasons why not are important in revealing why it might be desirable to reinforce the protection of non-matrimonial property from sharing.

6.16 The reasoning that leads to the separate treatment of non-matrimonial property is persuasive. It recognises effort, emotional attachment, and family ties; the arguments are particularly strong in the case of second marriages (where each party may be concerned to keep the fruits of his or her own life's work, and may

[28] Property (Relationships) Act 1976, ss 8 and 9.

[29] [2000] UKHL 54, [2001] 1 AC 596.

[30] Unless it later becomes matrimonial: we discuss that issue separately under question 5: see paras 6.60 to 6.100 below.

well also regard it as important to be able to bequeath property acquired during the first marriage to the children of that marriage). But for some people these arguments are equally strong even when they are relatively young. So the protection of non-matrimonial property feels important to the party who owns it not only in the obvious case of wealth, in whatever form, already gained through the owner's own efforts,[31] or through inheritance, but also property that has financial and also emotional significance due to its age and its family associations. The problems presented by the family house or farm have been discussed in a number of cases.[32]

6.17 Non-matrimonial property encompasses not only significant wealth but also more modest assets such as:

(1) the small holiday cottage inherited by one party from his or her parents;

(2) jewellery, such as a wedding or engagement ring, passed on to one of the parties from a mother or grandmother;

(3) a musical instrument, books, or any collection of something special, personal, perhaps valuable, acquired or collected or given to one of the parties during their teens or early adulthood;

(4) a house owned before marriage (for example, the not uncommon situation where each party owns a house before marriage and they choose to live in one and rent out the other, whether the marriage takes place early or late in life); and

(5) a gift received during marriage – large or small, an investment or something tangible.[33]

6.18 What these things have in common is that their *source* is unrelated to the marriage; in addition, in some cases although not all, the source gives the property an emotional importance in addition to its financial value.

6.19 There are jurisdictions that do not recognise non-matrimonial property. The Netherlands, Sweden and South Africa, amongst others, operate total community of property. Everything is shared in the default regime. All the countries that have that default regime allow couples to contract into an acquests regime, or indeed into separation of property; and in those jurisdictions there is little or no issue over the enforceability of such contracts. Although we are not considering the possibility of a community of property regime, we are going to recommend the introduction of qualifying nuptial agreements. It would therefore be possible for us to propose that the source of assets be irrelevant, so far as sharing is concerned, unless the couple has arranged otherwise by contract.

[31] *M-D v D* [2008] EWHC 1929 (Fam), [2009] 1 FLR 810, in which the husband was a Circuit Judge who had established himself financially before the marriage.

[32] For example *P v P (Inherited Property)* [2004] EWHC 1364 (Fam), (2006) 2 FCR 579.

[33] E Cooke, A Barlow and T Callus, in *Community of Property: A Regime for England and Wales?* (2006) p 19 record the comment of a Dutch notary who mentioned a client whose mother gave her money to buy an extremely expensive violin; the client was dismayed to find that, because the donor had not specified that the violin was not to fall within the community, it became community property and was subject to the "share everything" rule.

6.20 By contrast, many jurisdictions that have marital property regimes operate a community of acquests, where what is shared is only what has been acquired during the marriage, and other than by gift or inheritance. The prevalence of those regimes has attracted attention in this jurisdiction as we noted above.[34]

6.21 Aside from that, the arguments for sharing property acquired during the marriage are considerably stronger than the arguments for sharing absolutely everything. If what is being honoured by the sharing principle is the marriage partnership and the joint efforts of the couple concerned it is difficult to bring pre-acquired property into that reasoning.

6.22 In fact, we have so far heard no arguments from stakeholders in favour of getting rid of the distinction between matrimonial and non-matrimonial property altogether. And to make such a proposal would be to bring pressure to bear upon persons with pre-acquired or inherited property to enter into a marital property agreement, which we do not think would be desirable or practicable.[35]

6.23 Accordingly, we do not propose that the source of property should cease to be relevant to whether or not it is shared. Moving on, then, we suggest that issues 2, 3 and 4 should be considered together.

(2) Should the treatment of non-matrimonial property be a matter for rules or for discretion?

6.24 This question is pivotal: it requires some balancing of couple-specific fairness (an individual assessment is supposed, ideally, to produce what is right for the parties) and more general fairness (with rules, everyone knows where they are and can make their own arrangements if they do not like that; but will they know, and will they make arrangements?).

6.25 There is no clear answer to this; it is an example of the pervasive debate within the law about the virtues of rules and of discretion, in very close focus, concentrated upon a legal detail which may, nevertheless, be of critical importance to the individuals involved. Rules will generate answers that are unfair, but so may discretion. Discretion is expensive; but the application of the rules may be disastrous to an individual (as may discretion). Once there is a rule, there is scope for assertion and argument; if the ownership of an item of property makes a difference to the way it is treated on divorce, that may make it more worthwhile to argue or bargain about it. So there may be a downside to certainty.[36] Arguably, however, the law has moved so far in the direction of differential treatment for non-matrimonial property that there is already considerable scope for argument about it, and we take the view that clarity would be an improvement.

[34] See para 2.16 above.

[35] Consider the inheritance received during marriage; it is probably not realistic to expect that to trigger negotiations about a post-nuptial agreement.

[36] See also P G Harris, "The *Miller* Paradoxes" (2008) 38(Nov) *Family Law* 1096, 1100.

6.26 Rules may, however, have explicit exceptions; the protection of non-matrimonial property can be made subject to needs, as it is in the current case law. Discretion may be guided by principles, guidelines or presumptions of greater or lesser rigidity, as indeed we discussed in Part 4 above in connection with the assessment of need.

6.27 Accordingly, there is a choice between:

(1) an absolute rule that non-matrimonial property is not to be shared, and therefore is simply subtracted from the total family assets before the latter are shared;

(2) a rule subject to exceptions (in particular for needs);

(3) a discretion as in the current law, with added statutory guidelines, thus perhaps giving the greater security of a statutory presumption that non-matrimonial property will be shared only when required to meet needs;[37] or

(4) no change – discretion as now.

6.28 However, it is difficult to answer this question without also having an answer to questions 3 and 4;[38] it may be that a rule about non-matrimonial property would be unacceptable unless it could be overridden to meet needs, and conversely that a very broad definition of non-matrimonial property would have to be subject to some discretion.[39]

6.29 It is worth bearing in mind, however, that although the current law is discretionary, the courts have moved to a position where non-matrimonial property is generally not shared unless it is required to meet needs. There are two approaches to "not sharing": the Court of Appeal's approach in *Charman v Charman*[40] and in *Robson v Robson*[41] whereby despite the presence of non-matrimonial property the whole of the property is still available for sharing but this may be in proportions other than 50/50, and its approach in *Jones v Jones*[42] whereby the non-matrimonial property is initially taken out of the pool and the rest shared equally.[43] The latter approach has the merit of clarity and has been

[37] Perhaps also guidance on when, if ever, non-matrimonial property can become matrimonial, which is uncertain in the current law: see paras 6.60 to 6.100 below.

[38] See para 6.13 above.

[39] Some may also feel that they cannot answer questions 2, 3 and 4 unless the answer to 5 is also known: their views on these questions might be influenced by the ease with which non-matrimonial assets could become matrimonial. But questions 2, 3 and 4 seem to us to be particularly closely linked.

[40] [2007] EWCA Civ 503, [2007] 1 FLR 1246.

[41] [2010] EWCA Civ 1171, [2011] 1 FLR 751.

[42] [2011] EWCA Civ 41, [2012] Fam 1.

[43] In both methods the overall result is said to be "subject to" or "tested against" the "overall fairness" of the award: *Jones v Jones* [2011] EWCA Civ 41, [2011] 1 FLR 1723 at [34], [43] and [52] by Wilson LJ.

followed in recent High Court decisions,[44] although not consistently.[45] When we refer here to a rule that non-matrimonial property is not to be shared, we refer to the *Jones v Jones*[46] approach, which leaves the treatment of non-matrimonial property as a matter of arithmetic: simply subtract it before sharing. The alternative, whereby the whole property is shared but in proportions other than 50/50, generates unpredictable results; it cannot be known why a particular percentage is used in a given instance.[47]

(3) If non-matrimonial property is not to be shared, should it nonetheless be able to be accessed to meet need?

6.30 It is clear in the current law that the court will readily order that non-matrimonial property be shared if it is required to meet need; under option (4) at paragraph 6.27 above, this issue is answered already. And statutory guidance on this point – under option (3) above – would not therefore change the law. In evaluating option (2) above we have to ask: should the rule be modified by an exception so that non-matrimonial property can be accessed to meet needs?

6.31 Whilst it might be easier to answer this question if we had a definition of needs, we should nevertheless seek to do so on the basis of the current law, which measures needs generously with reference to the marital standard of living but is uncertain as to both how much should be paid and for how long. The courts seem clear that non-matrimonial property can be accessed to meet need.

6.32 The issue does not arise in the same terms in the continental community of acquests regimes; if (as a matter quite separate from the division of the community property) a maintenance order is made,[48] the payer can choose what to pay it out of (with that choice constrained to some extent if there is a capital order). He or she may choose to use non-matrimonial property to pay, and of course has to access non-matrimonial property in the absence of other options.

6.33 We are committed to a policy of giving priority to needs; in particular, qualifying nuptial agreements will be subject to challenge if their effect is that needs are not

[44] Decisions of Mostyn J in *FZ v SZ (Ancillary Relief: Conduct: Valuations)* [2010] EWHC 1630 (Fam), [2011] 1 FLR 64; and *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] EWHC 586 (Fam), [2011] 2 FLR 533; *R v R (Financial Remedies: Needs and Practicalities)* [2011] EWHC 3093 (Fam), [2012] Fam Law 653 at [45] by Coleridge J.

[45] See *AR v AR (Treatment of Inherited Wealth)* [2011] EWHC 2717 (Fam), [2012] WTLR 373.

[46] [2011] EWCA Civ 41, [2012] Fam 1.

[47] A further possibility is for the calculation to be done as if all the property were to be shared, but the award capped so as to exclude non-matrimonial assets. So where the matrimonial property amounted to, say £4 million, and the husband's non-matrimonial property was £6 million, the wife would receive 50% of the whole, but capped so as to exclude the non-matrimonial assets; she would therefore receive £4 million. This approach, although arithmetically possible, excludes the husband entirely from the marital acquest in this example, and would typically mean that the party holding non-matrimonial property would receive less than half of the marital acquest.

[48] Here "maintenance" is used in the European sense which is generally narrower than "needs" in English law: see for example Case C-220/95 *Van Den Boogaard v Laumen* [1997] QB 759 (ECJ).

met. So our preliminary view is that non-matrimonial property, while generally not shared, should be accessible to meet needs.[49]

(4) What property is non-matrimonial?

6.34 If the law is to change at all with respect to non-matrimonial property there must first be a definition of that property. The matters to be considered in connection with definition seem to be as follows.

(1) It seems clear that inherited, gifted and pre-acquired[50] property are currently regarded as non-matrimonial property.

(2) What should be the status of property derived from non-matrimonial property, such as bonus shares issued during the marriage or civil partnership?

(3) Should the definition include the separate business property referred to at paragraph 6.8 above?

(4) Should it include post-separation bonuses?

(5) There are strong arguments for and against regarding the family home as matrimonial property even if inherited, gifted or pre-acquired; we discuss this separately below.

(6) What should be the status of property acquired by one party during cohabitation? Again we consider this separately below.

Issues 2, 3 and 4 together

6.35 Clearly these three issues are closely linked. Our views, and consultees' views, as to whether there should be a rule that non-matrimonial property is not to be shared, must depend in part upon whether that rule is subject to provision for needs, and upon the breadth of the definition of non-matrimonial property. And whilst a number of permutations would be possible, it seems to us that broadly the choice comes down to two options. Either the statute provides that non-matrimonial property, defined as pre-acquired, gifted and inherited property, should not be shared, subject to provision for needs; or it is amended to allow for the continuation of the current discretionary approach alongside the introduction of a broader definition of non-matrimonial property, again subject to provision for needs.

6.36 Arguably a continued discretionary basis, even if hedged around with some extra guidance, will not provide any increased certainty. There is anecdotal evidence of

[49] We note that Mostyn J in *N v F (Financial Orders: Pre-Acquired Wealth)* [2011] EWHC 586 (Fam), [2011] 2 FLR 533 at [19] asked (rhetorically, we suggest) "If an agreement to preserve non-matrimonial property can have the effect of assessing need more conservatively (indeed in *Granatino* far more conservatively) than would have been the case absent that factor, why cannot the presence of pre-marital property simpliciter not have an equivalent or similar effect?". We are not minded to recommend a more conservative level of needs for financial provision cases involving non-matrimonial property and are not aware of any case where a court has adopted this approach.

[50] Acquired, that is, outright; property whose purchase was ongoing during the marriage, with the mortgage instalments still being paid, should perhaps be excluded from the definition.

dissatisfaction with the uncertainty about non-matrimonial property within the current law, and that it may amount to a disincentive to marriage. Particularly troubling are the indications we have had from some solicitors that they have to advise clients that the only way to protect pre-acquired property is not to marry.[51]

6.37 But with that view goes a relatively uncontentious definition of non-matrimonial property, comprising property owned by one party, acquired by gift or inheritance at any time, and property acquired before the marriage or civil partnership. Such a definition would exclude a business started up during the marriage, even if the spouses had retained their economic independence. It would also exclude post-separation bonuses, which are acquired during the marriage – they are generally shared, subject to the courts' discretion. We take the view that it would not be right both to introduce a rule that non-matrimonial property cannot be shared (save to meet needs) and at the same time to adopt a definition that goes wider than the core idea of non-matrimonial property currently found in the case law.[52] There would then remain other types of property that might arguably not be shared, for example personal injury damages awarded to provide future financial security for an injured party or a financial prize won by one spouse, and they could be dealt with in the court's discretion as at present.[53]

6.38 In order to formulate a definition, a decision is also required about the status of property derived from non-matrimonial property; one example is a bonus issue of shares, or savings derived from the income from non-matrimonial property. The status of such property in the current law is unknown.[54] As we are aiming for a narrow definition, a preliminary view might be that such property should not be included.[55]

6.39 A further inference from the preference for an uncontentious definition – implicit in what we have said so far in referring to "property owned by one party" – is that where the legal title to property is vested in joint names, neither party's entitlement to the property should be regarded as non-matrimonial. The decision to acquire the property as joint legal owners, or to transfer it from sole ownership

[51] We recognise that if qualifying nuptial agreements were introduced, then there would be an alternative method of protecting non-matrimonial property.

[52] It follows from our policy on marital property agreements that those who have, and want to protect, property that currently might or might not be regarded as non-matrimonial – in particular, business property that has been the sole concern of one party where the two spouses are financially independent – can, if both parties are willing, protect that property using a qualifying nuptial agreement.

[53] See for example *S v AG (Financial Remedy: Lottery Prize)* [2011] EWHC 2637 (Fam), [2102] 1 FLR 651; *Wagstaff v Wagstaff* [1992] 1 WLR 320 and *M v M* [2011] EWCA Civ 1056, [2012] 1 FLR 117.

[54] It is worth pausing to consider income from non-matrimonial property arising during the marriage. Because marriage has no effect upon the ownership of property, such income belongs as it arises to the owner of the property that produced the income, although he or she may choose to share it during the relationship. That has no bearing on the issues we have to address, which relate only to property held at the point of divorce or dissolution – the shares vested in one party's sole name, for example, or money in the bank. A definition of non-matrimonial property must address whether or not such property, albeit belonging to one party and derived from his or her non-matrimonial property, should be part of the matrimonial property and therefore within the sharing principle.

[55] We consider below at paras 6.90 to 6.99 the issues that arise when income or profits from non-matrimonial property are invested in that property, so that its value grows.

to joint, manifests a decision which is inconsistent with either party's share being non-matrimonial. Where legal title is held jointly, the individuals may or may not be entitled to it in equal shares, and there may or may not be a right of survivorship;[56] but each party's share should form part of the matrimonial property.

6.40 We need to look separately at two issues arising from what has been said so far, namely the status of the family home and the status of property acquired by one party during cohabitation. But first we make a provisional proposal on the major issues of principle.

6.41 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?

THE FAMILY HOME

6.42 The definition proposed above would mean that if the matrimonial home was solely owned by one spouse[57] and had been acquired by gift or inheritance, or before the marriage or civil partnership, it would not be shared on divorce or dissolution. That could be regarded as a change from the current law, where there is authority to the effect that the matrimonial home is *generally* considered matrimonial property however it was acquired. As Lord Nicholls said in *Miller v Miller, McFarlane v McFarlane*:

> The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose.[58]

6.43 The family home has a special position. As their marital home, it is a place to which both parties are, normally, emotionally attached. It "belongs", during the marriage or civil partnership, to both – each can say it is "my home". Importantly

[56] Where the property is held in such a way that one party's share automatically passes to the other on his or her death, there is said to be a right of survivorship; property held in equal shares with a right of survivorship is said to be held by "beneficial joint tenants". Decisions as to the form of joint ownership should be taken at the point when the property is acquired.

[57] This in itself sets a limit upon the relevance of the discussion in most cases; the majority of couples acquire their home as joint legal owners, and it follows from the definition proposed above that there is no question of it then being non-matrimonial – whether or not it was owned as beneficial joint tenants.

[58] [2006] UKHL 24, [2006] 2 AC 618 at [22]. Of course this does not mean that a sale will invariably be ordered or that any sale proceeds will always be shared equally.

for the parties, and for the children of the marriage, neither can say "it is not your home". The word "belong" is in inverted commas there because it is not in fact the property of both, since marriage and civil partnership have no effect in themselves upon property rights; but even when it is owned outright by one spouse, the other can apply for recognition of their matrimonial property rights and seek exclusive occupation.[59]

6.44 Does the emotional attachment to the family home inevitably lead to the conclusion that its value must be shared, since the home itself cannot, as a home, be shared any longer? The point can be seen in sharp focus if we take a case where both parties' needs are amply met by the matrimonial assets, leaving only the matrimonial home, and no other assets to offset it. The wife either inherited it from her family or bought it outright with her earnings pre-marriage. Does its status as the family home mean that it must now be sold in order for its value to be shared?

6.45 Consider also the case where, for example, the wife had a house before the marriage, and the husband had a house, and while they are married they live in his house and she rents out the other. The rent may have gone into her bank account (and has been spent); or it may have gone into a joint account. Does it make sense in this case to say that the value of his house has to be shared because they have lived in it, while hers remains non-matrimonial property?[60]

6.46 To argue that the family home, because it has been the couple's home, must be sold and its value shared seems to run counter to all the arguments for treating it as matrimonial property. They are all reasons why both parties want it; but they are not arguments for destroying it by sharing its value.

6.47 The arguments for treating a solely-owned, pre-acquired family home as non-matrimonial are at their strongest when that home is inherited, and particularly in those very unusual cases where it has been in the family for generations. In such cases the individual who owns the house may feel that, whatever the legal position,[61] the property is not really his or her own, but rather something that belongs, in all but the legal sense, to a blood family far more than to the couple. It is in such cases that there may also be particular difficulty in defining the family home: how is it to be separated out from the rest of a farm or a country estate?[62]

[59] For example in cases of domestic violence: Family Law Act 1996, s 33.

[60] This situation is addressed specifically by the New Zealand legislation. Section 8 of the Property (Relationships) Act 1976 includes the family home and family chattels within the definition of relationship property, but s 16 provides that "the court may adjust the shares of the spouses or partners in any of the relationship property (including the family home and the family chattels) according to what it considers just to compensate for the inclusion of the home of only one spouse or partner in the relationship property".

[61] Assuming that he or she owns it outright and that it is not in fact held by trustees, with the party to the marriage holding only a limited interest as one of a number of beneficiaries. In that event other issues arise as to whether the property in fact belongs to the party to the marriage in any sense at all. See for example *Thomas v Thomas* [1995] 2 FLR 668.

[62] There does not yet appear to have been a case where an inherited family home of significant value had to be disposed of in order to meet needs; in many cases, of course, such a property would be held on trust rather than owned outright by one of the parties to the marriage or civil partnership.

6.48 However, leaving aside those unusual cases, it may be that for the vast majority of families the central position of the matrimonial home in the parties' lives means that it is inappropriate to treat the family home as non-matrimonial property. It may also be impractical because of the inevitability that both parties will have contributed to it in some measure during the marriage. Whether through payment of bills, carrying out practical maintenance, or changing décor both spouses tend to contribute in a variety of ways, some of them difficult to quantify and some clearly substantial, to their matrimonial home. We consider the effects of mingling non-matrimonial property with matrimonial property (below at paragraphs 6.60 to 6.100) but it is worth noting that the problems outlined there are likely to be at their most marked in relation to the family home.

6.49 It may be that the court's discretion would ensure – for those who can afford to access discretion – that inappropriate results can be avoided in the examples given at paragraphs 6.45 to 6.47 above. It would be possible to provide, for example, that the value of the family home must always be shared, unless that makes it impossible for its owner to keep it. So where there is no property to offset the value of the family home, the value of the property would not be shared; and in the second example a fair result would be obtained by each party retaining his or her own house. And if sharing on this basis was not acceptable to either party, it would be open to them to provide otherwise by qualifying nuptial agreement. In the unusual case where an inherited family home is of great antiquity or value, it is likely that the parties would have ready access to legal advice and would be alert to the need to do this.

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

PROPERTY ACQUIRED BY ONE PARTY DURING COHABITATION

6.51 Property acquired during cohabitation would, on the basis of the definition proposed above, be non-matrimonial. We have to consider if that is right.

6.52 It has long been the case that the courts will take account of periods of pre-marital cohabitation when making orders for financial provision on divorce; *Kokosinski v Kokosinski*[63] is perhaps the best known case for its dramatic facts.[64] But in other cases of that era, the courts were unimpressed by periods of premarital cohabitation;[65] and of course cases before *White v White*[66] in 2000 were not concerned with division of property beyond that which was required to meet needs and so can give us no direct assistance on this point.

6.53 Turning to post-*White* cases, in *GW v RW*[67] Nicholas Mostyn QC (then sitting as a Deputy High Court Judge) regarded the 18 months of pre-marital cohabitation as part of the duration of the marriage for the purposes of section 25(2)(d):

[63] [1980] Fam 72.

[64] The parties had lived together for 24 years before marrying; they separated six months later.

[65] *Campbell v Campbell* [1976] Fam 347; *S v S* [1994] 2 FLR 228.

[66] [2000] UKHL 54, [2001] 1 AC 596.

[67] [2003] EWHC 611 (Fam), [2003] 2 FLR 108.

> Where a relationship moves seamlessly from cohabitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently.[68]

6.54 However, he treated both the property brought into the marriage and the husband's "fledged" experience as reasons to depart from equality;[69] the case has been overruled on the "fledged" experience point.[70]

6.55 This approach has been criticised as an unacceptable gloss on the meaning "duration of the marriage" in the statute.[71] It is also arguably unnecessary, since other factors within section 25 can be found to give significant weight to pre-marital cohabitation. The Court of Appeal in *K v L*[72] appeared to endorse a more flexible approach to determining the relevant duration of the marriage:

> Thus, inclusive of the year of cohabitation and of the years of invalid marriage, the "marriage" in the relevant, loose sense endured for 21 years.[73]

6.56 In *Miller v Miller, McFarlane v McFarlane*, Lady Hale suggested that the acquisition of matrimonial property "should probably include periods of pre-marital cohabitation and engagement".[74] This approach appears to have been applied in at least one High Court judgment handed down this year.[75] So although there is no clear authority that property acquired by one party during cohabitation, in his or her sole name, is therefore matrimonial, there are cases that indicate that the law may be moving in that direction.[76]

6.57 The treatment of periods of cohabitation is particularly significant for civil partners whose relationship began before the commencement of the Civil Partnership Act 2004. Such couples were previously unable to formalise their relationship in such

[68] Above, at [33].

[69] Above, at [50] and [51].

[70] *Jones v Jones* [2011] EWCA Civ 41, [2011] 1 FLR 1723 at [26] by Wilson LJ.

[71] S Gilmore, "Duration of Marriage and Seamless Preceding Cohabitation?" (2004) 34(Mar) *Family Law* 205, 207.

[72] [2011] EWCA Civ 550, [2012] 1 WLR 306.

[73] Above, at [3] by Wilson LJ.

[74] *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [149].

[75] *B v B* [2012] EWHC 314 (Fam), [2012] Fam Law 516. The parties began cohabiting in 1993, married in 1997 and separated in 2008. Mr David Salter (sitting as a Deputy High Court Judge) treated the duration of the marriage as 15 years (at [3]) and calculated the husband's pre-marital wealth (principally shares in a private company) by reference to their value in 1993. See also *CC v RC* [2007] EWHC 2033 (Fam), [2009] 1 FLR 8, where Moylan J justified a departure from equal sharing on the basis that the husband owned significant assets before the marriage and the pre-marital cohabitation.

[76] Contrast the earlier decision in *CO v CO (Ancillary Relief: Pre Marriage Cohabitation)* [2004] EWHC 287 (Fam), [2004] 1 FLR 1095, where Coleridge J took account of eight years' cohabitation prior to a four-year marriage but made an award which gave the claimant only one third of the available assets. As in *GW v RW* ([2003] EWHC 611 (Fam), [2003] 2 FLR 108) it is hard to see how the wife benefited from the cohabitation being taken into account, save that the length of the relationship may have countered the argument that the short marriage should mean that there was no sharing beyond what was required to meet the wife's needs.

a way as to be entitled to financial orders at the end of the relationship. It may be seen as particularly invidious to disregard any earlier period of cohabitation when making an order for financial provision on dissolution of their civil partnership, since there can be no suggestion in cases of pre-2004 cohabitation that it was the parties' choice not to formalise their relationship.

6.58 It may be suggested that to regard property acquired during cohabitation as matrimonial detracts from the status of marriage and civil partnership; but it is the *subsequent marriage or civil partnership* that gives rise to the obligation to share; so the formal relationship or status is still the key.

6.59 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.

(5) Can non-matrimonial property ever become matrimonial?

6.60 We turn now to a much more difficult issue. Property is not static; it is used, it grows, it depreciates, and can be sold or exchanged; it can be changed by the financial contribution or by the efforts of another person. Once we start out upon the road to the evolution of rules for these situations it rapidly becomes apparent that difficult decisions have to be made. One option is to decline to make them as part of a law reform project, on the basis that where there is non-matrimonial property, the spouses can make their own arrangements for what happens over the long term, by marital property agreement.[77] In any event the courts can resolve difficult points as they arise. But as we said at the beginning of this Part, we think it worth considering the issues in the round. The introduction of the concept of non-matrimonial property in the case law means that these issues will arise; we have to consider how far it is worth anticipating them. We note that the New Zealand statute makes provision in some detail, in section 9A of the Property (Relationships) Act 1976 for those circumstances when separate property can become relationship property.[78] We also take the view that default rules will be needed in the context of qualifying nuptial agreements, in case the parties make contractual arrangements by reference to specific items of property but fail to set out what is to happen if that property changes over time.

6.61 With those issues in mind, we turn to the question whether non-matrimonial property can ever become matrimonial. It can certainly do so under the current law. Lord Nicholls put it this way in *Miller v Miller, McFarlane v McFarlane*:

> After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom retained in specie.[79]

[77] Although this may be easier to achieve before marriage or civil partnership than in cases where the non-matrimonial property is acquired afterwards.

[78] See Appendix C; s 9A was added to the statute in 2002, by the Property (Relationships) Amendment Act 2001.

[79] [2006] UKHL 24, [2006] 2 AC 618 at [25].

6.62 As Lady Hale put it in the same case: "the importance of the source of the [pre-matrimonial] assets will diminish over time".[80] The point is not that the status of the assets changes by virtue of time alone, but that as time goes on the lives of the two people become more intermingled, and it may cease to matter to them (at least while the relationship continues) who first owned (say) the shares or the piano.

6.63 However, under the current law it is not possible to say how long the transformation takes. That uncertainty is compounded by the less arithmetical approach to sharing found in *Robson v Robson*[81] and the cases that follow that approach. If we were to recommend a rule that non-matrimonial property is simply taken out of account before the rest is shared, it would be important to know precisely whether and when it becomes matrimonial, in whole or in part, and if the latter to what extent.

6.64 We also find a more narrow approach in the current law. As Lord Justice Wilson said in *K v L*:

> I believe that the true proposition is that the importance of the source of the assets *may* [not will] diminish over time. Three situations come to mind:
>
> > (a) Over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property.
> >
> > (b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult.
> >
> > (c) The contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property.
>
> The situations described in (a) and (b) above were both present in *White*. By contrast, there is nothing in the facts of the present case which logically justifies a conclusion that, as the long marriage proceeded, there was a diminution in the importance of the source of the parties' entire wealth, at all times ring-fenced by share certificates in the wife's sole name which to a large extent were just kept safely and left to reproduce themselves and to grow in value.[82]

[80] Above, at [148].

[81] [2010] EWCA Civ 1171, [2011] 1 FLR 751; and see paras 6.10 and 6.29 above.

[82] [2011] EWCA Civ 550, [2012] 1 WLR 306 at [18].

6.65 Thus in *K v L* the wife's capital, primarily in shares she had inherited long before she met her husband and which were largely untouched during the marriage, was not shared. Time alone made no difference; nor did the fact that the income from the shares had been used to support the family and that parts of the shareholding had from time to time been sold for that purpose. Lord Justice Wilson's comments seem to describe three processes: (a) dilution of the non-matrimonial property because it has become a very small part of the parties' wealth; (b) deliberate mixing of the property in a way that makes it clear that its owner regards it as matrimonial; and (c) the use of the non-matrimonial property to invest in the family home. These are useful ideas and starting points when we come to consider how the law might be clarified.

6.66 In fact we can tease out a range of different questions. We can ask if non-matrimonial property becomes matrimonial if it is sold and replaced during marriage; if it is sold and the proceeds spent; if it remains unsold and is used by the family during marriage (as a holiday property naturally would be); if it is sold and the proceeds used to buy the family home during marriage.[83]

6.67 More difficult are the situations where the property changes, particularly if it grows due to investment by either the owner or the non-owning spouse. "Investment" can mean money, for example funds introduced from another source, or indeed from the non-matrimonial property itself as where the income from the family farm is used to buy another barn. But investment may also be time, where one or both parties have worked in the family business.

6.68 These are difficult issues and there is no "right" answer. It is useful in considering them to reflect upon our objectives of certainty as well as of fairness, and on the purpose, discussed above,[84] of recognising that the source of property makes a difference. The non-sharing of non-matrimonial property recognises effort, as well as emotional investment and family heritage. It may in some cases remove a disincentive to marriage. In recognising the source of property as important, and thereby providing for non-matrimonial property not to be shared, we are setting out a default position: a couple should be able to make provision for assets to be shared that would otherwise not be shared, or indeed for matrimonial property not to be shared (subject to needs), by a qualifying nuptial agreement. So whatever we propose will not be absolute rules.

6.69 It may be helpful to break down the various questions into groups:

(1) non-matrimonial property that has been spent and not replaced;

(2) non-matrimonial property that has remained unsold but has been used for the family;

(3) non-matrimonial property has been sold and substitute property bought; and

[83] We asked above at paras 6.42 to 6.50 whether the family home, even if otherwise non-matrimonial, should always be matrimonial property. It would be possible to reject that view, but to take the view that the sale of non-matrimonial property and its investment in the family home transforms those sale proceeds so that the family home is *not* non-matrimonial.

[84] See paras 6.15 to 6.23 above.

(4) the consequences of investment in non-matrimonial property.

(1) NON-MATRIMONIAL PROPERTY THAT HAS BEEN SPENT AND NOT REPLACED

6.70 Where the non-matrimonial property has been spent on something other than replacement property, for example on holidays or school fees, there is no property left to retain the non-matrimonial status. That is the case whether the expenditure was on the family or otherwise.

(2) NON-MATRIMONIAL PROPERTY THAT HAS REMAINED UNSOLD BUT HAS BEEN USED FOR THE FAMILY

6.71 This scenario exposes something further about the purpose of distinguishing property by its source. What we have in mind here is, for example, a holiday property inherited by one party, but used for the family's holidays. Equally, an investment might remain unsold and its income be used to support the family.

6.72 In recognising that the source of the property makes a difference, should we take the view that the source alone makes that difference? Or should we in effect restrict the meaning of non-matrimonial property further by providing that it retains that status only if it has nothing to do with the marriage or civil partnership, remaining something uninvolved with the family members and never used for their benefit?

6.73 The latter would seem to be a very restrictive view; it does not represent the current law, nor the law in other jurisdictions. That view would mean that any involvement in the property by the family makes it family property not only in the sense that it is shared and enjoyed together during the marriage but also that its value has to be shared on dissolution.

6.74 But it is difficult to draw the line. What counts as involvement – a single visit? Regular use? Hanging a picture? And do we distinguish between the physical use made of a cottage or a car, and the use of income from an investment?

6.75 These are difficult distinctions to draw, and it may be impossible to do so without arbitrariness or indeed without undue evidential complexity. It may be that the logical conclusion to this line of thought is to accept that the mingling of lives within normal married or civil partnered life means that non-matrimonial property inevitably loses its status over time, and to avoid evidentially difficult inquiries by providing simply that all non-matrimonial property becomes matrimonial on a gradual basis, perhaps by a percentage every five years.[85]

[85] One of the recommendations of the Centre for Social Justice was that for each year of the marriage, 5% of pre-marital assets of either spouse would be added to the "marital pot" until the parties had been married for 20 years, when all pre-marital assets would pass into the marital assets category (thus being subject to automatic equal division if needs had been met). A further recommendation adopted the New Zealand model where "pre-marital assets are brought into account as marital assets if they are in marital common use or common benefit, or if they are used to purchase other assets which, in turn are for marital common use or common benefit". It was suggested that "perhaps the solution is a variation and widening of the New Zealand model alongside the mathematical provision". See Centre for Social Justice, *Every Family Matters: An In-depth Review of Family Law in Britain* (2009) pp 213 and 250 to 251, available at http://www.centreforsocialjustice.org.uk/default.asp?pageRef=372 (last visited 27 July 2012).

6.76 The opposing view is that this approach negatives the protection that was to be given to the source of the property; that it penalises generosity and practical sharing during the currency of the marriage or civil partnership;[86] that involvement in, or enjoyment of, a non-matrimonial asset does not in itself give a right to share its value; and that it is unnecessary, provided that there is a rule that non-matrimonial property must be accessible to meet needs. On balance we are not persuaded that a rule that non-matrimonial property automatically becomes matrimonial, on a sliding scale over time, is appropriate. The advantages of certainty are outweighed by the damage done to the underlying reasons for recognising non-matrimonial property. Nor do we feel that it is appropriate that mere use of the non-matrimonial property by the family makes it matrimonial;[87] we think it unrealistic to say that non-matrimonial property cannot be put to use at all during the marriage or must in some way be insulated from family contact. That would be to disadvantage the family, rather pointlessly, since the effect of such a rule would be to provide an incentive for a party to the marriage not to share, in a practical sense, his or her property with the spouse and children.

6.77 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?

6.78 We noted above[88] the relevance of these issues to the rules to be devised for qualifying nuptial agreements. Such an agreement might provide for specific property not to be shared in the event of divorce or dissolution; we would expect that the use of such property for the family would not change its contractual status.

(3) NON-MATRIMONIAL PROPERTY HAS BEEN SOLD AND SUBSTITUTE PROPERTY BOUGHT

6.79 Consider here an inherited holiday property. It might be sold and replaced with another; it might be sold and the proceeds used to buy the family car and a caravan for family use; it might be sold and the proceeds either used to buy a family home in whole or in part, or to pay off the mortgage on the jointly-owned family home. If the marriage or civil partnership is dissolved, what is the status of the new property? And if sale proceeds have been invested in matrimonial property, does that property become partly non-matrimonial?

6.80 These are again difficult issues but we suggest that the fact of sale and the exercise of the owner's choice in reinvesting the proceeds in something different gives us something extra to take into consideration. It may be that the key to these instances is whether or not the owner in spending the proceeds has chosen to the treat them as matrimonial property.

[86] Not so if the transformation of non-matrimonial into matrimonial property is achieved arithmetically and automatically rather than on the basis of evidence.

[87] There is a connection here with the question we have asked about the family home at para 6.50 above. If it is to be possible for the family home to be non-matrimonial, then in that case at least, for consistency, there would have to be a rule that use by the family did not make the property matrimonial.

[88] See para 6.3 above.

6.81 In order to explore this view we can begin with an example involving non-matrimonial property that is not being used for the family, such as a picture, kept in the bank. If it is sold and replaced with another picture, to use an example suggested in a case,[89] that should not mean that the latter is matrimonial property. To prevent the owner of non-matrimonial property from managing it as an investment (including, for example, keeping a portfolio of shares which are sold and replaced from time to time) negates one of the primary purposes of recognising non-matrimonial property and treating it differently, namely to recognise and reward effort.

6.82 On the other hand, where property is sold and the proceeds used for something different – the picture in the bank is sold to buy a holiday property, for example – then there is a deliberate choice to purchase a different kind of property, to invest in the family, and non-matrimonial status should be lost.

6.83 That is not a watertight distinction, but it may nevertheless be a useful basis for a rule by recognising the owner's choice. It would be natural to do this if the replacement property is bought in the joint names of the spouses (and indeed that can be addressed in the definition of matrimonial property, which would naturally include any property held in the joint names of the spouses[90]): if that is done then the owner's choice is clear. But we can extrapolate from that and say that if the new, different property is bought for the family's use then, again, a choice is evident.[91]

6.84 However, we have also said that use by the family does not in itself mean that non-matrimonial property becomes matrimonial. The word "different" in the preceding paragraph reflects the fact that where non-matrimonial property is used for the family, and then sold and replaced with something of the same kind (a holiday cottage in Wales is sold and a cottage in Cornwall purchased with the proceeds), it does not seem appropriate for that transaction to cause the property to change status. The transaction does not seem to involve a choice in the sense of a changed attitude to the property.

6.85 But that choice can be said to be evident when non-matrimonial property is sold and the proceeds mingled with matrimonial property, perhaps by paying off some of the mortgage debt on the family home, or being pooled with jointly-held funds in order to buy something new.[92] Here the non-matrimonial status of the funds should be lost. A difficult tracing-like exercise is thereby avoided. This reflects the view expressed by Lord Justice Wilson in *K v L*,[93] above.

[89] *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496 at [34] by Burton J.

[90] See the definition proposed at para 6.41 above; compare the New Zealand provision, s 8(1)(c) of the Property (Relationships) Act 1976.

[91] And where that is not the owner's intention, if the law is clear the contrary intention can also be made clear by qualifying nuptial agreement. Compare the purchase of a flat as a gift to the wife in *B v S (Financial Remedy: Marital Property Regime)* [2012] EWHC 265 (Fam), [2012] All ER (D) 189 (Mar) accompanied by a contractual agreement (at [29]), under a legal system where that contract was clearly valid.

[92] Compare the New Zealand provision, s 9A(3)(b) of the Property (Relationships) Act 1976.

[93] [2010] EWHC 1234 (Fam), [2010] 2 FLR 1467; see paras 6.64 to 6.65 above.

6.86 So we take the view that a useful principle can be derived here. We acknowledge that there are some fine distinctions being drawn; it may follow from consultees' responses to the discussion here that a holiday property owned prior to marriage and used by the family remains non-matrimonial property, but that when sold and replaced with another property for family use that property becomes matrimonial. That distinction is a fine one but not an arbitrary one. It can be overridden by a marital property agreement in a case where the couple agrees that the property is to remain non-matrimonial.

6.87 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?

6.88 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?

6.89 Again, we have to consider the relevance of these provisional proposals to property specified in a qualifying nuptial agreement. Where an agreement provided, for example, that an inherited shareholding was not to be shared in the event of divorce or dissolution, we would expect that the owner of those shares would be free to sell them and replace them with other shares without changing their contractual status. But where the owner sold them and used the proceeds to pay off the mortgage on the family home, we think that the position changes and that it should not be possible to trace those shares into the home. A choice has been made to end the contractual non-matrimonial status of that property. If the parties want the owner of the shares to be able to trace their value in the family home – so that a proportion of it is not matrimonial – then they are free so to provide by express terms in the qualifying nuptial agreement.

(4) THE CONSEQUENCES OF INVESTMENT IN NON-MATRIMONIAL PROPERTY

6.90 So far, we have discussed situations where non-matrimonial property is sold and the proceeds dissipated or mingled, or sold and replaced, or where it remains unsold but is used by the family. We have to turn now to the even more difficult – but common – situation where non-matrimonial property changes in value over time because effort and/or money has been invested in it. This may be by the owner, or it may be by the couple together.

6.91 So at one end of the spectrum the owner manages his or her property, as the owner did before the marriage or civil partnership, albeit not as a full-time activity – for example, a portfolio of properties is managed, perhaps by the owner on a spare-time basis, perhaps by paying managing agents. At the other end, the non-matrimonial property represents the owner's career and full-time occupation, as would naturally happen in the case of the family business. A further variation occurs when the other spouse joins in, perhaps by investing money, or by working full-time or part-time in the business but not formally as a partner.

6.92 Clearly where the spouses become business partners in the formal sense it is easy to see a justification for regarding the property as matrimonial; and as a starting point we would suggest that that should be the rule. If that formal step of partnership has been taken one would expect the parties to have been advised of the possibility of making a qualifying nuptial agreement about the status of the property if the default position is not acceptable to them.

6.93 Beyond that, the current law is unclear and it is, again, difficult to know where to draw a line. In *S v S*,[94] the husband was a property developer. He argued that certain properties he had brought into the marriage remained non-matrimonial; and he succeeded because he had not done anything to enhance their value during the marriage. In other words, keeping property separate and untouched, growing passively if at all, will insulate it from the transition from non-matrimonial property status to matrimonial status discussed above.

6.94 And the thinking in *S v S*[95] seems directly to contradict the comments in *Miller v Miller, McFarlane v McFarlane* about "non-business-partnership, non-family assets".[96] In *Jones v Jones*[97] Lady Justice Arden expressed concern about this decision on the basis that it seems to discourage investment and productive activity. She said:

> If only passive growth is taken into account, the law rewards the spouse who buries her non-matrimonial assets in the ground rather than the spouse who actively manages them. The correct analysis in my judgment, in circumstances such as the present, is that, where a spouse has a non-matrimonial asset of the present kind, he is entitled to that element of the company at the end of the day which can fairly be taken to represent the fruits of the non-matrimonial assets that accrue during the marriage, even if the fruits are the product of activity by him or on his behalf.[98]

6.95 This is an area where general rules are very difficult to devise. There is, as discussed above, a temptation to leave it to the parties to manage these situations by contract and, in default of that, to leave it to the courts. But that carries a risk of decisions being made in isolation, and without consultation; there may be a correspondingly greater risk of unforeseen consequences. And it seems both harsh and discouraging of sensible economic activity to provide, at the other extreme, that any act of involvement in the property by its owner – any small management activity – during the marriage would give rise to the loss of non-matrimonial status. Such a provision would, again, seem to run counter to the purposes of affording a different treatment to non-matrimonial property. We note below the provisions of the New Zealand statute about the effect of the investment of relationship property in separate property; but there is no provision

[94] *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496. See also *Rossi v Ross*i [2006] EWHC 1482 (Fam), [2007] 1 FLR 790 and *S v S (Ancillary Relief after Lengthy Separation)* [2006] EWHC 2339 (Fam), [2007] 1 FLR 2120.

[95] [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496.

[96] [2006] UKHL 24, [2006] 2 AC 618.

[97] [2011] EWCA Civ 41, [2011] 1 FLR 1723.

[98] Above, at [60].

for the separate property to change status as a result of the owner's own efforts in managing the property, nor as a result of the investment of separate property in separate property. We are not aware of any provision in another jurisdiction providing that the owner spouse's own efforts or investment in the non-matrimonial property during marriage have an effect on its status.

6.96 If investment in the non-matrimonial property by its owner does not change its status, that means that the property may grow and be developed during marriage. If income generated by it is not spent on the family but reinvested, the non-matrimonial property grows – some would say that it is right that that actively grown value remains the property of one spouse only and not liable to sharing; others would disagree. Suppose that the husband has an inherited farm when he marries; during the marriage he erects expensive farm buildings paid for out of the farm profits earned during the marriage. Do those buildings form part of the non-matrimonial property? The same point arises if the profits of his inherited family company are ploughed back into the company rather than being taken out as dividends. If the answer is yes, how far does the principle extend? Suppose that the inherited asset is a partnership in the family firm of solicitors. Does the husband's share of the goodwill, which has increased dramatically during the marriage because of his endeavours, remain a non-matrimonial asset?[99]

6.97 Equally difficult is the situation when the non-owner has invested money, or time and effort, into the other's non-matrimonial property – as would naturally be the case with a family business. Does that in itself make the property, or more likely a proportion of it, liable to sharing? If not, what level of investment by the other spouse, if any, should change the status of the property?

6.98 Our understanding is that in a number of continental European jurisdictions, rules provide that investment in non-matrimonial property by the other spouse gives rise to a right of reimbursement, while the owner spouse's investment has no consequences for the status of the property.[100] The New Zealand statute takes a different line (as do some European countries): any increase in value of separate property, or income or gains derived from it, arising from the investment of relationship property or from the efforts of the other spouse, becomes relationship property.[101]

6.99 So other jurisdictions have chosen to make rules dealing with investment in non-matrimonial property by the other spouse. The devising of statutory rules requires difficult policy choices, but may well give rise to far greater consistency than can the accumulation of individual court decisions on particular points that happen to have arisen in litigation.

[99] A policy decision on these issues then needs very careful translation into a definition. What amounts to a separate item of property? Some work would be needed to distinguish the case of a business (with assets including goodwill) from the case where a collection of valuable antiques has been acquired before and during the marriage from one party's earnings as, say, a consultant surgeon. It may be that the antiques acquired before the marriage are non-matrimonial assets, whilst those acquired, albeit in precisely the same way, during the marriage are not. Much depends upon what one regards as "the same" item of property.

[100] K Boele-Woelki, B Braat and I Curry-Sumner (eds), *European Family Law in Action: Volume IV: Property Relations Between Spouses* (2009) pp 521 to 532.

[101] Property (Relationships) Act 1976, s 9A(1) and (2).

6.100 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?

6.101 We are aware that these are difficult questions. We have taken the view that the law should provide answers to them; the concept of non-matrimonial property is already a major aspect of the law relating to financial orders, albeit for a small proportion of litigants. Large sums are being expended in legal costs on the resolution, on a case-by-case basis, of the questions that we pose here. We take the view that statutory reform following consultation is preferable to an incremental approach which may be unduly influenced by individual cases.

PART 7
LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

INTRODUCTION

7.1 In this Part, we set out our provisional proposals and consultation questions on which we are inviting the views of consultees. We would be grateful for comments not only on the issues specifically listed below, but also on any other points raised in this Supplementary Consultation Paper. It would be helpful if, when responding, consultees could indicate either the paragraph of this list to which their response relates, or the paragraph of this Supplementary Consultation Paper in which the issue was raised.

PRINCIPLED REFORM

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?

[paragraph 4.113]

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 4.114]

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.

[paragraph 4.115]

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 4.116]

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?

[paragraph 4.117]

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?

[paragraph 4.118]

Our case studies: the basis of support

We are asking consultees to choose between two different models of support; one addresses the losses caused by the relationship, whereas the other is neutral about causation but offers support to enable the spouses – in practice, the economically weaker party – to adjust to independence.

Case study two highlights the contrast here. The current law appears to give Michael an entitlement to continue living at the marital standard of living, for an uncertain period. If spousal support is based strictly on compensation, Michael gets very little, because he does not appear to have lost out as a result of the marriage. A transition approach (or "unravelling the merger over time", as we put it earlier) is likely to give him a higher award, evening out the disparity in the two lifestyles for a period proportionate to the length of the marriage.

Put very practically:

A. Should Michael be entitled:

- to live at the same standard as he would have lived during the marriage, and if so for how long?
- to as much as he needs to relocate and to start again as a single person?
- to a more graduated transition to independence, with some income contributions from Sophia and, if so, for how long?

B. Should that entitlement be calculated before the capital value of the couple's home is shared, or subtracted from that value before sharing what is left?

Consultees are also invited to consider case study three (Pat and Chris), and to tell us:

C. To what extent does Chris have a responsibility to provide for Pat's care after the ending of the civil partnership?

Our case studies: a formula or discretion?

D. Consultees are asked to look again at our three case studies. We have highlighted the difficulties in calculating levels of support on any basis; even if you feel that Sarah should be compensated for her past and ongoing losses as a result of the marriage, you may also feel that it is very difficult to calculate them. Imagine that Sarah and Ian – who cannot afford legal advice – could look up a calculation which gave a figure, or a range of values, for Sarah's claim (as, of course, they can for child support). Would they find that helpful because it gave them an answer? Or frustrating because that answer cannot be flexible or responsive to their individual circumstances or preferences?

E. We have also asked about incentives for independence. Should there be rules that place a limit on the length of time for which Sarah can be supported by Ian and, if so, how strict should they be? Do you feel the same way about Michael, after a childless marriage?

Our case studies: the factors that affect levels of support

We ask consultees to focus here on factors that might make a difference to levels of support. In particular:

F. Whatever your view of the level of support to which Sarah, Michael and Pat are entitled, how does your view change – if at all – if in each case the length of the marriage is changed. In particular, suppose Sarah and Ian had been married for twelve years not six? Sophia and Michael for ten years not six? By contrast, how would your view change, if at all, if Pat and Chris had been in a civil partnership for two years rather than eight?

G. We ask about the marital standard of living: should Sarah, Michael or Pat be entitled to carry on living at that standard? If so, why?

H. How important are continuing responsibilities? Do you agree that this should make a difference to levels of support in case study one, where Sarah has ongoing care of the children?

I. Should Sarah be entitled to carry on living in the family home after divorce? Should Sophia? Or Ian? Or Michael? If so, in any case, why?

IMPROVING THE CURRENT LAW RELATING TO NEEDS

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;[1]

(b) the priority to be afforded to different elements of need.[2]

(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;[3]

(b) the normal form of orders for periodical payments (term orders or joint lives);[4] and

(c) the financial arrangements to be made after short childless marriages.[5]

(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.

[paragraph 5.62]

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.

[paragraph 5.63]

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.

[paragraph 5.70]

NON-MATRIMONIAL PROPERTY

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

[1] See paras 5.43 to 5.48 above.

[2] See paras 5.49 to 5.50 above.

[3] See paras 5.33 to 5.39 above.

[4] See para 5.33 above.

[5] See paras 5.38 to 5.39 above.

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?

[paragraph 6.41]

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

[paragraph 6.50]

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.

[paragraph 6.59]

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?

[paragraph 6.77]

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?

[paragraph 6.87]

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?

[paragraph 6.88]

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?

[paragraph 6.100]

APPENDIX A
THE ALI FORMULA

A.1 While the traditional term for spousal support in the US is “alimony”, or indeed “spousal support”, the ALI entitles its chapter 5 “Compensatory spousal payments”. It sets out the losses that can be compensated, as follows.

(1) Compensation for Loss of Marital Living Standard (section 5.04): this payment compensates the less well-off spouse for the loss in standard of living experienced at dissolution.

(2) Compensation for Primary Caretaker’s Residual Loss in Earning Capacity (section 5.05); this payment relates to the loss of earning capacity incurred during marriage and continuing afterwards as a result of taking on a disproportionate share of childcare.

(3) Compensation for the Residual Loss of Earning Capacity Arising from the Care of Third Parties (section 5.11); this payment relates to the loss of earning capacity incurred by caring for a sick or disabled third party in fulfilment of a joint moral obligation.

(4) Compensation for Contributions to Other Spouse’s Education or Training (section 5.12).

(5) Restoration of Premarital Living Standard After a Short Marriage (section 5.13).

A.2 The ALI insists that these are presumptions, and that they are to be implemented by individual states using a formula; the parties will not have to prove these losses by evidence. It is accepted that this will not generate individual fairness; a predictable outcome is reckoned to be far more important. The principles and formula assume a realistic child support system.

A.3 Turning to the formula: in most cases the relevant heads will be 5.04 and 5.05. These are calculated as follows.[1]

(1) 0.01 x the “earnings gap” between the parties, multiplied by the number of years of the marriage, to last for a period equal to 60% of the length of the relationship.

(2) 0.015 x that gap, per year of childcare, as a proxy for lost earnings as a result of childcare, payable for a period, again to last for a period equal to 60% of the length of the relationship.

A.4 That first calculation maps on to the principle at section 5.04. It is “compensating” every claimant, not by assuming an incurred loss but actually conferring an expectation loss. It is tightly linked to the length of the marriage; and it uses not the marital standard of living itself but, as a proxy (which in practice must nearly

[1] The figures are those suggested in the ALI’s Appendix.

always fall short of the marital standard of living), the earnings gap between the parties.

A.5 The duration of awards under sections 5.04 and 5.05 is indefinite when the age of the payee and the length of the marriage exceed a specified figure; this is left to individual states to determine, but the ALI Appendix suggests that awards should be unlimited in duration when the payee is over 45 and the duration of marriage exceeds 25 years. Otherwise the duration of the payments is determined by the formula and is dependant upon length of marriage, and, where there are children, the length of time that child-care has already been unequally shared. So the length of the marriage affects both amount and duration; after a longer marriage a claimant gets more for longer.

A.6 Importantly, although a claimant can get compensation under both sections 5.04 and 5.05, the total payment cannot exceed the maximum allowed under section 5.04; again that is for state legislatures to determine but the ALI Appendix suggests that the maximum should be set at 40% of the difference in incomes.

A.7 The principles go on to address adjustment and ending of payments, and form of orders (capitalisation and so on).

APPENDIX B
CALCULATIONS UNDER THE SSAG

B.1 The formula is set out as follows in the SSAG text, and the emphasis is in the original):

> **Amount** ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the **gross income difference**) for each year of marriage (or, more precisely, years of cohabitation), up to a maximum of 50 percent. The maximum range remains fixed for marriages 25 years or longer at 37.5 to 50 percent of income difference. (The upper end of this maximum range is capped at the amount that would result in equalization of the spouses' net incomes—the **net income cap**.)
>
> **Duration** ranges from .5 to 1 year for each year of marriage. However, support will be **indefinite (duration not specified)** if the marriage is **20 years or longer** in duration *or*, if the marriage has lasted 5 years or longer, when the years of marriage and age of the support recipient (at separation) added together total 65 or more (the **rule of 65**).

B.2 So imagine a couple married for 10 years with no children. One earns $90,000 per year, the other $30,000.[1] The amount of the support awarded will be between:

> (1.5 x 10 =) 15% x $60,000 = $9,000 and
>
> (2 x 10 =) 20% x $60,000 = $12,000
>
> which will be payable for between
>
> (0.5 x 10 =) 5 years and
>
> (1 x 10 =) 10 years post separation.

B.3 As the authors of the SSAG point out, the calculation is easy and does not require a computer.

B.4 The **with child support** formula is much more difficult and needs a computer. It is based directly on the Canadian child support system which is much more complex than ours. One of the reasons why the Canadians came to a position where formulaic spousal support was acceptable was that they had become accustomed to formulaic child support.[2] It generates a payment without a duration – contrast the ALI – but with an expectation of review at a point in the future that is itself generated by formula.

[1] The figures are taken from the first of the examples in chapter 7 of the SSAG.

[2] SSAG, p11.

B.5 The important points are:

(1) that the income disparity is adjusted, after child support, so that the payee is left with 40% to 46% of the income not allocated to child support. This effects something not far short of equal sharing (leaving the payer an incentive to continue to earn) in the “with children” cases; and

(2) that duration is determined by whichever of two formulae – based on length of marriage or age of children – yields the longer period. But there is no automatic termination so the payer has to apply to adjust or to stop paying at that future point.

APPENDIX C
SECTIONS 8 - 11 OF THE NEW ZEALAND PROPERTY (RELATIONSHIPS) ACT 1976

8 Relationship property defined

(1) Relationship property shall consist of—

(a) the family home whenever acquired; and

(b) the family chattels whenever acquired; and

(c) all property owned jointly or in common in equal shares by the husband and the wife or by the partners; and

(d) all property owned by either spouse or partner immediately before their marriage, civil union, or de facto relationship began, if—

(i) the property was acquired in contemplation of the marriage, civil union, or de facto relationship; and

(ii) the property was intended for the common use or common benefit of both spouses or partners; and

(e) subject to sections 9(2) to (6), 9A, and 10, all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and

(ee) subject to sections 9(3) to (6), 9A, and 10, all property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—

(i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or

(ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; and

…

(g) the proportion of the value of any life insurance policy (as defined in section 2), or of the proceeds of such a policy, that is attributable to the marriage, civil union, or de facto relationship; and

(h) any policy of insurance in respect of any property described in paragraphs (a) to (ee); and

(i) the proportion of the value of any superannuation scheme entitlements (as defined in section 2) that is attributable to the marriage, civil union, or de facto relationship; and

(j) all other property that is relationship property under an agreement made under Part 6; and

(k) any other property that is relationship property by virtue of any other provision of this Act or by virtue of any other Act; and

(l) any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).

…

9 Separate property defined

(1) All property of either spouse or partner that is not relationship property is separate property.

(2) Subject to sections 8(1)(ee), 9A(3), and 10, all property acquired out of separate property, and the proceeds of any disposition of separate property, are separate property.

(3) Subject to section 9A, any increase in the value of separate property, and any income or gains derived from separate property, are separate property.

(4) The following property is separate property, unless the court considers that it is just in the circumstances to treat the property or any part of the property as relationship property:

(a) all property acquired by either spouse or partner while they are not living together as husband and wife or as civil union partners or as de facto partners:

(b) all property acquired, after the death of one spouse or partner, by the surviving spouse or partner, as provided in section 84.

(5) Subject to subsection (6), all property acquired by either spouse or partner after an order of the court (other than an order made under section 25(3)) has been made defining the respective interests of the spouses or partners in the relationship property, or dividing or providing for the division of that property, is separate property.

(6) However, where relationship property has been divided on the bankruptcy of a spouse or partner,—

(a) the family home and any family chattels acquired after that division may be relationship property; and

(b) any other property acquired by either spouse or partner after the discharge of that spouse or partner from bankruptcy may be relationship property.

9A When separate property becomes relationship property

(1) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part) to the application of relationship property, then the increase in value or (as the case requires) the income or gains are relationship property.

(2) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part, and whether directly or indirectly) to actions of the other spouse or partner, then—

(a) the increase in value or (as the case requires) the income or gains are relationship property; but

(b) the share of each spouse or partner in that relationship property is to be determined in accordance with the contribution of each spouse or partner to the increase in value or (as the case requires) the income or gains.

(3) Any separate property, or any proceeds of the disposition of any separate property, or any increase in the value of, or any income or gains derived from, separate property, is relationship property if that separate property or (as the case requires) those proceeds or the increase in value or the income or gains are used—

(a) with the express or implied consent of the spouse or partner that owns, receives, or is entitled to them; and

(b) for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either spouse or partner in, any property referred to in section 8(1).

(4) Subsection (3) is subject to section 10.

10 Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift

(1) Subsection (2) applies to the following property:

(a) property that a spouse or partner acquires from a third person—

(i) by succession; or

(ii) by survivorship; or

(iii) by gift; or

(iv) because the spouse or partner is a beneficiary under a trust settled by a third person:

(b) the proceeds of a disposition of property to which paragraph (a) applies:

(c) property acquired out of property to which paragraph (a) applies.

(2) Property to which this subsection applies is not relationship property unless, with the express or implied consent of the spouse or partner who received it, the property or the proceeds of any disposition of it have been so intermingled with other relationship property that it is unreasonable or impracticable to regard that property or those proceeds as separate property.

(3) Property that one spouse or partner acquires by gift from the other spouse or partner is not relationship property unless the gift is used for the benefit of both spouses or partners.

(4) Regardless of subsections (2) and (3) and section 9(4), both the family home and the family chattels are relationship property, unless designated separate property by an agreement made in accordance with Part 6.

11 Division of relationship property

(1) On the division of relationship property under this Act, each of the spouses or partners is entitled to share equally in—

(a) the family home; and

(b) the family chattels; and

(c) any other relationship property.

(2) This section is subject to the other provisions of this Part.