

## Divorce (Financial Provision) Bill [HL] HL Bill 26 of 2017–19

### Summary

The [Divorce \(Financial Provision\) Bill \[HL\]](#) is a private member's bill introduced by Baroness Deech (Crossbench). The Bill received its first reading in the House of Lords on 3 July 2017 and is scheduled to receive its second reading on 11 May 2018.

The Bill proposes to replace section 25(2) of the Matrimonial Causes Act 1973, which deals with orders for financial provision after divorce. Section 25(2) lists the elements a court must consider when making orders for the division of finances when a couple divorces, including the financial resources and obligations each party has or is likely to have in the future, the standard of living enjoyed by the family, and the contribution of each of the parties to the welfare of the family.

The law in this area has been developed by the statute's application in the courts. Baroness Deech has argued that judicial discretion in the application of the law has resulted in a lack of clarity and consistency, and therefore that reform is necessary.<sup>1</sup>

### Provisions in the Bill

The Divorce (Financial Provision) Bill [HL] would replace section 25(2) of the Matrimonial Causes Act 1973 with "provisions about the principles to be applied in determining applications for such orders, including provision about the effect of pre-nuptial and post-nuptial agreements".<sup>2</sup> Setting out the purpose of the Bill, Baroness Deech has explained:

The purpose of this Bill is to reform the law relating to the splitting of assets on divorce. The current law is the Matrimonial Causes Act 1973, section 25, which has not been thoroughly debated by Parliament for 40 years despite radical changes in society and families, and which has been the subject of calls for reform from the Law Commission, Resolution and the Centre for Social Justice. Reform is urgent because the law is uncertain, to such an extent that it is failing to conform to the rule of law. It is largely judge-made law, which bears little resemblance to the statute. Judicial discretion has led to unpredictability and conflicting decisions, which make it hard for parties to negotiate and lead to disproportionate costs. Legal aid has been removed and parties of modest means are left unrepresented with little guidance as to the right outcome. The Bill would implement provisions very similar to those of Scottish law, and the laws of most European and North American states. It would introduce as a fair starting point the equal division of all the property and pensions acquired by the couple after marriage; provision for short-term maintenance; flexibility to allow the home to be retained for the carer and children; and binding pre-nuptial agreements. This is intended to facilitate mediation, reduce litigation and costs, and recognise equal partnership in marriage.<sup>3</sup>

Clause 1 states that section 25(2) of the Matrimonial Clauses Act 1973 would cease to have effect. Clause 2 would restrict financial orders to property acquired during the marriage, except in cases of pre-nuptial and post-nuptial agreements. Clause 3 would make written pre-nuptial and post-nuptial agreements binding, subject to a number of exceptions. Clause 4 proposes that the net value of matrimonial property is to be shared fairly between the parties, and clause 4(2) states that a fair sharing of assets would usually be an equal splitting of assets, except in specific circumstances. Clause 5 lists factors that would be taken into account when awarding periodical payments and lump sums, and limits the former to five years except in certain circumstances. Clause 6 states that when determining an application to which sections 4 or 5 applies, the conduct of either party would not be taken into account, except if the conduct has adversely affected the financial resources of a party or it would be unfair not to take it into account. Lastly, clause 7 provides for the Bill's extent, commencement and short title.

### **Law Commission Report and Subsequent Government Action**

In February 2014, the Law Commission published a report, *Matrimonial Property, Needs and Agreements*, which made a number of recommendations regarding financial needs and marital property agreements. These included the suggestion that the meaning of 'financial needs' be clarified in guidance published by the Family Justice Council, to ensure consistent application by the courts and assist those without legal representation who need a clear statement of their responsibilities and the objective of their financial settlement.<sup>4</sup> This guidance, entitled *Sorting out Finances on Divorce*, was published in April 2016.<sup>5</sup>

The Law Commission report also recommended that work be undertaken to assess whether a formula to produce a financial range, indicating minimum and maximum levels of support within which parties can negotiate, could be developed.<sup>6</sup> In January 2017, the Government stated that it was in the process of designing an online tool which could be used to help couples divide assets and income.<sup>7</sup>

Regarding pre- and post-nuptial agreements, the Law Commission recommended legislation to provide clarity about the legal status of these contracts, which it recommended should be upheld as long as they were not "unfair".<sup>8</sup> The Law Commission also recommended that legislation be enacted to introduce "qualifying nuptial agreements".<sup>9</sup> As long as such an agreement met certain requirements, such as that both sides received legal advice and there was full financial disclosure, they would be enforceable; however, they could not be used to enable one party to contract out of meeting the other's financial needs. In January 2017, the Government said that it was considering provisions on nuptial agreements in line with the Law Commission's proposals, and that the Government would be announcing its response to the Law Commission's report and was developing plans for wider private family law reform.<sup>10</sup> At the time of writing neither a response nor plans had been published. In a debate in the House of Commons in November 2017 Dr Philip Lee, Under Secretary of State for Justice, stated that the Government would consider the Law Commission's proposals and would "make their position known in due course".<sup>11</sup>

### **Previous Debate**

Baroness Deech has introduced similar bills in previous sessions, including in the 2016–17 session. A second reading debate on this Bill took place in the House of Lords on 27 January 2017.

In her introduction to the Bill, Baroness Deech stressed that the aim of the Bill was to provide certainty in an area where judges currently, she argued, have a significant amount of discretion.<sup>12</sup> A number of other Members echoed this point; for example Lord St John of Blesto (Crossbench) said that "clearly,

there is a need to provide clearly defined guidelines for divorcing couples and move away from the precedent of largely judge-made law".<sup>13</sup> Baroness Meacher (Crossbench), argued that increased certainty, as provided for in the Bill, would reduce the number of contested cases and therefore also reduce stress and instability.<sup>14</sup>

Responding for the Government, Baroness Buscombe said that while the Government accepted the potential for greater clarity and certainty in this area of law, this should be balanced against a need for flexibility in order to achieve fairness.<sup>15</sup> Lord Kirkhope of Harrogate (Conservative) argued that judicial discretion can lead to fairer outcomes and should be preserved, stating "I believe it is important that we maintain that flexibility. I therefore fear the rigidity of these proposals".<sup>16</sup>

A number of Members highlighted the fact that in most cases legal aid was no longer available for divorce cases, arguing that this increased the need for predictability. Baroness Watkins of Tavistock (Crossbench) said that "many parties, particularly those of lower means, are often left unrepresented, with no straightforward set of principles to assist them in dividing assets and income".<sup>17</sup> Baroness Meacher argued that because a growing number of people were representing themselves in court, clarity in the law was more important, saying "this [self-representation], in the context of a lack of clarity in the law, leads to endless adjournments and delays as the litigants and judges struggle to find a way towards a solution".<sup>18</sup>

The Shadow Spokesperson for Home Affairs, Lord Kennedy of Southwark, said that "the Bill seeks to deal with important issues and to find solutions to situations that are far from satisfactory at present [...] As an Opposition, we are happy to support it".<sup>19</sup> Responding for the Government, Baroness Buscombe emphasised action the Government had taken in this area, and said that, while the Government would not oppose the Bill receiving a second reading, it had "concerns about [the Bill's] approach".<sup>20</sup>

## Comment

### **Resolution Proposals**

In February 2015, Resolution (an organisation of family lawyers and other professionals) launched its *Manifesto for Family Law*, which called for changes to the law surrounding divorce and separation.<sup>21</sup> The 'Manifesto' urged the next Government to take action to improve the "unmodern law" on divorce, including a recommendation to help people understand how divorce will affect their future finances. Outlining the issue, Resolution argued:

Divorce law relating to finances is complex and difficult to understand. Outcomes can be difficult to predict, even for legal professionals. Section 25 of the Matrimonial Causes Act 1973, which determines how money is divided up on divorce, has fundamentally remained unchanged for the last 40 years.<sup>22</sup>

The *Manifesto* also argued that people separate with little or no understanding of the financial consequences of their break up, thereby making it more difficult for them to reach agreement and placing a burden upon the court system. It also contended that the courts have seen an increase in unrepresented litigants due to the removal of legal aid for divorce, with 50,000 people representing themselves in 2013. Offering a solution to the issues raised, the *Manifesto* recommended the reform of section 25 of the Matrimonial Property Act 1973, with changes including the addition of enforceable agreements, clear guidelines on the division of capital resources and pensions, and a distinction between

matrimonial property and non-matrimonial property in cases where resources exceed the needs of the separating couple.

### ***Limited Maintenance: Legal Practitioners' Comments***

The Divorce (Financial Provision) Bill 2017–19 would limit periodical or ‘maintenance’ payments to five years except in exceptional circumstances.<sup>23</sup> When the Divorce (Financial Provision) Bill 2014–15 was introduced, in June 2014, it provided that these payments would be limited to three years.<sup>24</sup>

The time limit on maintenance payments has been questioned by some legal practitioners. Commenting on the 2014–15 Bill (as introduced), an article by the Cambridge Family Law Practice contended that a limited maintenance provision “has the potential to cause real hardship”.<sup>25</sup> The Cambridge Family Law Practice argued:

It remains the case that women’s careers are often adversely affected by having a family, and by decisions taken jointly when children are born. When mothers return to work, many do so part-time, which obviously affects their income and earning potential in the short-to-medium term at least, and also the ability to make pension provision for the long term. It is still less common for men to take time out in the same way, but it is possible that men who do reduce their hours in order to spend time raising their children are also disadvantaged in career progression subsequently. Should a woman, or indeed a man, with a young family be automatically restricted to just three years of maintenance from someone whose career has been less affected by family decisions? We aren’t convinced.<sup>26</sup>

During the 2014–15 Bill’s second reading, the then Minister of State for Justice, Lord Faulks, said that the Government was concerned that that a three-year limit could cause hardship and “having to adjust to a new financial reality may take longer than three years”.<sup>27</sup> During committee stage, Baroness Deech introduced amendments extending this period from three years to five and making provision for periodical payments to continue “where there is evidence of serious financial hardship”.<sup>28</sup>

In February 2017, during the passage of the 2016–17 Bill, the law firm Vardags wrote that critics of the Bill had argued against limiting the maintenance period:

A maintenance cap would put women, still so often the family’s primary caregiver, at a significant disadvantage. Women who take a career break to shoulder the responsibilities of childcare may find their earning capacity stymied while their husband’s continues to grow unencumbered. Longer-term maintenance payments, appropriately awarded, help mitigate this unfairness.<sup>29</sup>

In an interview in February 2017, Baroness Deech argued that long-term maintenance payments were out of date and hindered gender equality:

Our judges are being very old fashioned I’m afraid. They are over-chivalrous and the way they were in the 19th century. People wonder why, 15 years after a marriage has ended, one person has to keep paying money to another. If there is one thing that stops women getting back on their feet and being treated seriously and equally at work, it is the assumption throughout the legal system that once a woman is married she is somehow disabled and incapable ever of managing on her own for the rest of her life. It is a very serious impediment to equality.<sup>30</sup>

### **Scottish Law Study**

In her contribution to the debate on the Bill in the 2016–17 session, Baroness Deech said that the proposed legislation was “very closely modelled” on the equivalent law in Scotland. In April 2016, researchers from the University of Glasgow School of Law published a review of Scottish law concerning financial provision on divorce. This study found that “the legislation has been successful in achieving one of its aims, which was to encourage parties to reach their own agreements about the financial and property consequences of divorce”.<sup>31</sup> Legal practitioners interviewed for the research were overall in favour of the law, felt it worked well and should not be changed.<sup>32</sup> The researchers concluded:

This is a well-designed statutory framework with no fundamental need for reform. It is regarded as combining certainty with flexibility in a way which facilitates the work of each group of legal actors who put the legislation into practice.<sup>33</sup>

### **Times Newspaper Campaign**

In November 2017, the *Times* newspaper launched a campaign to reform the law governing divorce. As well as calling for it to be made easier for couples to divorce without alleging fault or blame, the *Times* campaign advocates “ending the outdated and patronising ‘meal ticket for life’ that can result from laws on splitting assets and awarding maintenance after divorce, except where hardship would be caused; and giving pre-nuptial contracts the back and force of statute”.<sup>34</sup>

This campaign is supported by Baroness Deech, Lord Mackay of Clashfern (Conservative), Baroness Butler-Sloss (Crossbench) and Baroness Shackleton of Belgravia (Conservative).<sup>35</sup> Sir Paul Coleridge, chair of the Marriage Foundation, also backs the campaign.

In response to this campaign, the Secretary of State for Justice, David Gauke, said “I acknowledge the strength of feeling on this issue and will study the evidence for change”.<sup>36</sup>

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- <sup>1</sup> [HL Hansard, 27 January 2017, cols 945–6.](#)
- <sup>2</sup> [Divorce \(Financial Provision\) Bill 2017–19](#), clause 1(2).
- <sup>3</sup> Text provided by Baroness Deech on request from the Library.
- <sup>4</sup> Law Commission, [Matrimonial Property, Needs and Agreements](#), 27 February 2014, p 6.
- <sup>5</sup> Family Justice Council, [Sorting Out Finances on Divorce](#), April 2016.
- <sup>6</sup> Law Commission, [Matrimonial Property, Needs and Agreements](#), 27 February 2014, p 7.
- <sup>7</sup> [HL Hansard, 27 January 2017, cols 960–1.](#)
- <sup>8</sup> Law Commission, [Matrimonial Property, Needs and Agreements](#), 27 February 2014, p 7.
- <sup>9</sup> *ibid*, p 8.
- <sup>10</sup> [HL Hansard, 27 January 2017, cols 961–2.](#)
- <sup>11</sup> [HC Hansard, 15 November 2015, col 184WH.](#)
- <sup>12</sup> [HL Hansard, 27 January 2017, cols 946–7.](#)
- <sup>13</sup> *ibid*, col 954.
- <sup>14</sup> *ibid*, col 956.
- <sup>15</sup> *ibid*, col 959.
- <sup>16</sup> *ibid*, col 949.
- <sup>17</sup> *ibid*, col 955.
- <sup>18</sup> *ibid*, col 957.
- <sup>19</sup> *ibid*, col 959.
- <sup>20</sup> *ibid*, col 964.
- <sup>21</sup> Resolution, [Manifesto for Family Law](#), February 2015.
- <sup>22</sup> *ibid*, p 24.
- <sup>23</sup> [Divorce \(Financial Provision\) Bill 2017–19](#), clause 5(1)(c).
- <sup>24</sup> [Divorce \(Financial Provisions\) Bill 2014–15](#), clause 5(1).
- <sup>25</sup> Cambridge Family Law Practice, [‘Tough Love: Should We Limit Maintenance after Divorce?’](#), 7 January 2015.
- <sup>26</sup> *ibid*.
- <sup>27</sup> [HL Hansard, 27 June 2014, col 1513.](#)
- <sup>28</sup> [HL Hansard, 21 November 2014, col 640.](#)
- <sup>29</sup> Maire Connor, [‘Baroness Deech: Current Law on Spousal Maintenance “an Impediment to Equality”](#)’, *Vardags*, 14 February 2017.
- <sup>30</sup> Patrick Sawyer, [‘Divorces are Skewed by Judges’ Outdated Chivalry, Says Female Peer Pushing for Cap on Payments’](#), *Telegraph* (£), 12 February 2017.
- <sup>31</sup> Jane Muir et al, [Built to Last: The Family Law \(Scotland\) Act 1985](#), 8 April 2016, p 170.
- <sup>32</sup> *ibid*, p 156.
- <sup>33</sup> *ibid*, p 179.
- <sup>34</sup> The Brief, [‘Leading Legal Figures Demand End to “Unjust” Divorce Laws’](#), *Times* (£), 17 November 2017.
- <sup>35</sup> *ibid*.
- <sup>36</sup> Frances Gibb, [‘Justice Secretary to Review Divorce Laws after Times Campaign’](#), *Times* (£), 5 February 2018.

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